The Legal 500 Country Comparative Guides

Turkey: Merger Control

This country-specific Q&A provides an overview of merger control laws and regulations applicable in Turkey.

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1. **Overview**

The governing legislation on merger control is Law No.4054 on Protection of Competition and Communique No.2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (as amended by Communique No.2017/2). In particular, Article 7 of the Law No.4054 governs mergers and acquisitions, and authorises the Turkish Competition Board (the "Competition Board" or the "Board") to regulate, through communiqués, which mergers and acquisitions require notification to the Turkish Competition Authority ("Competition Authority" or "Authority") to become legally valid.

The national competition authority for enforcing the Law on the Protection of Competition No. 4054 in Turkey is the Competition Authority, a legal entity with administrative and financial autonomy. The Authority consists of the Competition Board, the Presidency and service departments. As the competent decision making body of the Authority, the Competition Board is responsible for, inter alia, reviewing and resolving merger control filings.

Communiqué No.2010/4 defines the scope of the notifiable transactions as follows:

- a merger of two or more undertakings;
- the 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: (i) the purchase of assets or a part or all of its shares, (ii) an agreement, or (iii) other instruments.

As explained more fully below, Communique No.2010/4 provides turnover thresholds that a given merger or acquisition must exceed before becoming subject to notification. Within these turnover thresholds, there are also specific methods of turnover calculation for certain sectors.

Furthermore, Communique No.2010/4 does not seek the existence of an 'affected market' in assessing whether a transaction triggers a notification requirement; foreign-to-foreign transactions (cases where the relevant undertakings do not any physical presence in Turkey) are also caught if they exceed the turnover thresholds.

The notification process is mandatory. If the turnover thresholds are met and there is a change of control on a lasting basis, the transaction is subject to approval by the Competition Board.

For the sake of completeness, if the turnover thresholds are met, foreign-to-foreign transactions would trigger notification requirement so long as the joint venture is a full-function joint venture.

There is no specific deadline for making a notification in Turkey. There is however a mandatory waiting period: a notifiable transaction is invalid unless the Competition Authority approves it.

2. **Is notification compulsory or voluntary?**

Turkey is a jurisdiction with a pre-merger notification and approval requirement, much like the EU regime. Concentrations that result in a change of control are subject to the Competition Board's approval, provided they exceed the applicable turnover thresholds.

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 such agreements, have de facto power to exercise these rights. Once the thresholds are exceeded, there is no exception for filing a notification. 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.

3. **Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?**

Under Turkish merger control regime there is an explicit suspension requirement. A notifiable merger or acquisition, not notified to, or approved by, the Board, shall be deemed as legally invalid with all of its legal consequences. If a transaction is closed before clearance, the substantive nature of the concentration plays a significant role in determining the consequences.

As for the filing process for privatisation tenders, Communiqué No. 2013/2 provides that it is mandatory to file a pre-notification with the Competition Authority before the public announcement of tender specifications to receive the opinion of the Competition Board which will include a competitive assessment. In the case of a public bid, the merger control filing can be performed when the documentation adequately proves the irreversible intention to finalise the contemplated transaction. Filing can also be performed when the documentation at hand adequately proves the irreversible intent to finalise the contemplated transaction.

The notification process differs for privatisation tenders. According to 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), it is mandatory to file a pre-notification before the public announcement of tender and receive the opinion of the Competition Board in cases where the turnover of the undertaking or the asset or service production unit to be privatised exceeds TL 30 million (approximately €4.7 million or $5.2 million). Further to that, the Communique 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 Competition Board. The application should be filed by all winning bidders after the tender but before the Privatisation Administration's decision on the final acquisition.

There is no normative regulation allowing or disallowing carve-out arrangements. Carve-out arrangements have been rejected by the Board (eg, the *Total SA* Decision 06-92/1186-355, 20.12.2006, and the *CVR Inc Inco Limited* Decision 07-11/71-23, 07.02 2007) so far arguing that a closing is sufficient for the suspension violation fine to be imposed and that a further analysis of whether a change in control actually took effect in Turkey is unwarranted. The wording of the Board's reasoned decisions does not analyse the merits of the carve-out arrangements, and takes the position that the "carve-out" concept is found unconvincing. Therefore, methods like carve-out or hold separate would not eliminate the filing requirement and they cannot authoritatively be advised as safe for early closing mechanisms recognised by the Board.

Finally, Turkish merger control rules do not provide the possibility of derogations from suspension.

4. **What types of transaction are notifiable or reviewable and what is the test for control?**

Turkey is a jurisdiction with a suspensory pre-merger notification and approval requirement.

Much like the European Commission regime, concentrations that result in a change of control are subject to the Competition Board's approval, provided that they reach the applicable turnover thresholds. The turnover thresholds given in Communiqué No. 2010/4 are stated more fully in the upcoming sections.

Communiqué 2010/4 and the Guideline on Cases Considered as Mergers and Acquisitions and the Concept of Control provide a definition of 'control' which does not fall far from the definition included in Article 3 of Council Regulation 139/2004. According to Article 5(2) of Communiqué 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 have decisive influence – in particular, in terms of ownership or the right to use all or part of the assets of an undertaking, or rights or agreements which confer decisive influence on the composition or decisions of the organs of an undertaking.

Pursuant to Article 6 of Communiqué 2010/4, the following transactions do not fall within the scope of Article 7, and are therefore exempt from board approval:

- intra-group transactions and other transactions that do not lead to a change in control;
- temporary possession of securities for resale purposes by undertakings whose normal

activities involve conducting transactions with such securities for their own account or that of others, provided that the voting rights attached to such securities are not exercised in a way that a□□ects thecompetition 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 privatisation; and
- acquisition by inheritance, as provided by Article 5 of Communiqué 2010/4

5. **In which circumstances is an acquisition of a minority interest notifiable or reviewable**

Acquisition of a minority shareholding can amount to a notifiable transaction, if and to the extent it leads to a change in the control structure of the target entity. In other words, if minority interests acquired are granted certain veto rights that may influence management of the company (e.g. 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. As specified under the Guideline on the Concept of Control, such veto rights must be related to strategic decisions on the business policy and they must go beyond normal "minority rights", i.e. the veto rights normally accorded to minority shareholders to protect their financial interests.

The Competition Board's approach to voting and negative control rights is very similar to, if not the same as the European Commission's position. For there to be a change in the target's control structure, the voting and/or veto rights should be sufficient to enable the acquirer to exercise decisive influence on the strategic business behaviour of the target. Under Turkish

merger control regime, veto rights on the business plan, appointment of the senior management, budget, and strategic/major investments are typical examples of veto rights that confer joint control (Aksa Akrilik Kimya Sanayi 12-14/410-121, 29.03.2012; Medikal Park, 09- 57/1392-361, 25.11.2009; Tarshish, 06-59/780-229, 24.8.2006).

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.

6. **What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)? Are there different thresholds that apply to particular sectors?**

Under Article 7 of the Communiqué No.2010/4, the transaction would be notifiable in case

oneof the below turnover thresholds are triggered:

- the aggregate Turkish turnover of the transaction parties exceeding TL 100million (approximately €15.7 million or $17.6 million) and the Turkish turnover of at least two of the transaction parties each exceeding TL 30million (approximately €4.7 million or $5.2 million); or
- the Turkish turnover of the transferred assets or businesses in acquisitions

exceeding TL 30 million (approximately €4.7 million or $5.2 million) and the worldwide turnover of at least one of the other parties to the transactionexceeds TL 500 million (approximately €78.7 million or $88.1 million), or

(ii) the Turkish turnover of any of the parties in mergers exceeding TL 30million (approximately €4.7 million or $5.2million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 500 million (approximately €78.7 million or $88.1 million).

As seen above, the tests provided under Article 7(b) include 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.

The thresholds do not differ according to the sector. There is however certain other special merger control rules to be considered in respect of a number of specific sectors.

Furthermore, Communique No. 2017/2 on the Amendment of Communique No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board ("Communique No. 2017/2") which has been published on the Official Gazette on February 24, 2017 and entered into force on the same day abolished Article 7(2) of Communique No. 2010/4 which stated that "The thresholds set out in the first clause of this article are re-determined by the Board biannually". With the abolishment of the relevant clause, the Board is no longer rested with 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 relevant turnover thresholds set forth by Article 7(1) of Communiqué No. 2010/4.

In addition, it should be also noted that 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.

There is no market share threshold in Turkey. If the parties meet the turnover thresholds, the transaction would be notifiable, regardless of the parties' market shares. In addition, sellers' turnover is not relevant while determining the filing obligations however it is only

relevant in joint venture transactions i.e. where the buyer and the seller form a joint venture, both the seller and the buyer would be considered as buyers pursuant to Article 5 of Communiqué No. 2010/4.

Regardless of the parties' physical presence in Turkey, sales in Turkey may trigger the notification requirement to the extent that the turnover thresholds are met. Article 2 of Law 4054 sets out the effects criterion – that is, whether the undertakings concerned affect the goods and services markets in Turkey. Even if the undertakings concerned have no local subsidiaries, branches or sales outlets in Turkey, the transaction could still be subject to Turkish competition legislation if the goods or services of the participating undertakings are sold in Turkey and the transaction would thus affect the relevant Turkish market.

7. **How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?**

As explained above, the jurisdictional thresholds under Turkish merger control regime are solely based on the turnover figures of the Parties. In other words there are no assets and/or market share based jurisdictional threshold. To that end, turnover consists of "*the net sales realized at the end of the financial year preceding the date of the transaction according to the uniform chart of accounts, or if the calculation thereof is not possible, the net sales realized at the end of the closest financial year from the date of the transaction*". Captive/internal sales should be excluded.

Article 8 of Communiqué No. 2010/4 sets out detailed rules for turnover calculation. In short:

- The turnover of the entire economic group, including the undertakings controlling the undertaking concerned and all undertakings controlled by the undertaking concerned, will be taken into account.
- 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.
- Multiple transactions between the same undertakings realized over a period of two years are deemed as a single transaction for turnover calculation purposes. They warrant separate notifications if their cumulative effect exceeds the thresholds, regardless of whether the transactions are in the same market or sector or not and whether they were notified before or not.

Transactions that are closely connected in that they are linked by conditions or take the form of a series of transactions in securities taking place within a reasonably short period of time are treated as a single concentration (interrelated transactions theory).

On the matter of geographic allocation of turnover, unlike the EU legislation (i.e. para. 195-203 of the Consolidated Jurisdictional Notice), the Turkish merger control regime does

not include any specific provisions regarding the geographic allocation of turnover. Also, the Board does not have any specific precedent directly on point concerning the geographic allocation of turnover. One decision that discusses geographic allocation of turnover concerns *Air Berlin Plc./Intro* (4.7.2007, 07-56/661-230) which suggests that "the location of the customer at the time of the transaction" is taken into consideration in assessing whether the revenue is attributable to Turkey.

There are also specific methods of turnover calculation for certain sectors. These special methods apply to banks, special financial institutions, leasing companies, factoring companies, securities agents and insurance companies.

8. **Is there a particular exchange rate required to be used to convert turnover and asset values?**

For converting the annual turnover of an undertaking in foreign currency to TL, average buying rate of exchange of the Central Bank of Turkey for the financial year the turnover is generated is taken into consideration as the rate of exchange.

For 2019, applicable exchange rate to be used is 1 EUR= TL 6.35, 1 USD= TL 5.67.

9. **In which circumstances are joint ventures notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?**

The Turkish merger control rules applicable to joint ventures are akin to-if not the same as-the EU rules. Article 5 of the Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("Communiqué No. 2010/4") provides a definition of joint venture, which does not fall far from the definition used in the EU law.

To qualify as a concentration subject to merger control, a joint venture must be of a full-function character and satisfy two criteria: (i) existence of joint control in the joint venture and (ii) the joint venture being an independent economic entity established on a lasting basis (i.e. having adequate capital, labour and an indefinite duration). Additionally, regardless of whether the joint venture is full function, the joint venture should not have as its object or effect the restriction of competition among the parties or between the parties and the joint venture itself within the meaning of Article 4 of Law No. 4054, which prohibits restrictive agreements. If the parent undertakings of a joint venture operate in the same market or the downstream or upstream or neighbouring market as the joint venture, it could lead to coordination between independent undertakings that restrict competition within the meaning of Article 4 of the Law.

If the turnover thresholds are triggered by the parents, the JV transaction would be notifiable as long as it has a full-function nature. The fact that the JV's products/services are or will not be offered in Turkey would not change the analysis. Indeed, the Competition Board has adopted several clearance decisions whereby JVs that do not involve sales in Turkey, and

has considered that they are notifiable as long as the characteristics of the goods and services in question allow for a theoretical possibility that there "could" one day be sales by the JV into Turkey.

As a side note, in case the nature of the JV turns out to be non-full-functional, while the non-full function JVs are not under a mandatory merger control filing, non-full function JVs may fall under Article 4 of Law No 4054, which prohibits restrictive agreements. The parties have the ability to do a self-assessment individual exemption test, which is set out under Article 5 of Law No. 4054, on whether the JV meets the conditions of individual exemption (which are also very similar to, if not the same as EU regime). Notifying the transaction for individual exemption is not a positive duty of the parties, but it is an option granted to them.

10. **Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?**

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.

Other than the situation mentioned above where the Board evaluate these transactions as a single transaction, there are no other circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable.

11. **In relation to "foreign-to-foreign" mergers, do the jurisdictional thresholds vary?**

Foreign-to-foreign mergers are covered by Law 4054 on Protection of Competition to the extent that they affect the relevant markets within the territory of Turkey. Regardless of the parties' physical presence in Turkey, sales in Turkey may trigger the notification requirement to the extent that the turnover thresholds are met. Article 2 of Law 4054 sets out the effects criterion – that is, whether the undertakings concerned affect the goods and services markets in Turkey. Even if the undertakings concerned have no local subsidiaries, branches or sales outlets in Turkey, the transaction could still be subject to Turkish competition legislation if the goods or services of the participating undertakings are sold in Turkey and the transaction would thus affect the relevant Turkish market. In 2019 a total of 115 out of 208 transactions notified to the Board were foreign-to-foreign transactions.

The likelihood that the Board learns about a transaction is high as the Board vigorously follows mergers and acquisitions in the local and international press and also closely follows 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.

The Board has imposed a fine of 0.1% of the undertaking's turnover, for either closing the

transaction prior to clearance or not notifying the transaction at all.

- The highest gun jumping fine so far was approx. 1 million USD (Simsmetal/Fairless, 16.09.2009, 09-42/1057-269). This concerned a foreign to-foreign transaction. It was not discovered by the Authority but was notified by the parties after closing.
- There are several other foreign-to-foreign transactions where fines were imposed. See e.g. Brookfield/Johnson, 30.04.2020, 20-21/278-132; Longsheng; 02.06.2011, 11-33/723-226; CVRD Canada Inc., 08.07.2010, 10-49/949-332; Flir Systems Holding/Raymarine PLC, 17.06.2010, 10-44/762-246; Georgia Pacific Corporation, Fort James Corporation, 29.12.2005, 05-88/1219-352.
- There is to the knowledge of local counsel no fining decision concerning a foreign-to-foreign transaction involving a joint venture/target without activities or turnover in Turkey.

12. **For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?**

    Not applicable.

13. **What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?**

    The Law No. 7246 on the Amendment to the Law No. 4054 on Protection of Competition ("Amendment Law"), which is published on the Official Gazette and entered into force on 24 June 2020, 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. This amendment aims to allow a more reliable assessment of unilateral and cooperation effects that could arise as a result of mergers or acquisitions. With this new test, the Turkish Competition Board 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. As a matter of Article 7 of Law No.4054 and Article 13 of the Communiqué, mergers and acquisitions which do not create or strengthen a dominant position and do not significantly impede effective competition in a relevant product market within the whole or part of Turkey, shall be cleared by the Board.

    There is no case law or secondary legislation as of 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 Law No.4054 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*".

    There are certain other special merger control rules to be considered in respect of a

number of specific sectors.

First, similarly to the EU, there are specific rules regarding turnover calculation for specific sectors such as banks, financial institutions, leasing companies, factoring companies, securities agents, insurance companies, etc. See Article 9 of Communiqué No. 2010/4.

Second, there are specific merger control provisions for banks and privatisation tenders.

(i) Banks: Banking Law No. 5411 provides that Articles 7, 10 and 11 of the Law No.4054 are not applicable if the sectoral share of the total assets of the banks subject to the transaction does not exceed 20%. In practice, the Competition Board distinguishes between: (i) transactions involving foreign acquiring banks with no operations in Turkey, to which the Law No.4054 is fully applied; and (ii) foreign acquiring banks already operating in Turkey, to which the Law No.4054 is not applied if the conditions for the application of the Banking Law exception are fulfilled.

(ii) Privatisation tenders: Communiqué No. 2013/2 prescribes an additional pre-notification process. This only applies to privatisations in which the turnover of the undertaking or asset or unit intended for production of goods or services to be privatised exceeds TL 30 million (approximately EUR 4.7 million, USD5.2 million). For this calculation, sales to public institutions and organisations including local governments made on the basis of a legislative provision should not be taken into account. If the threshold is met, a pre-notification should be filed with the Competition Authority before the public announcement of the tender specifications. The Competition 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 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.

Third, there are various sector-specific rules alongside the merger control rules for sectors such as media, telecommunications, energy and petrochemicals. For example:

(i) Energy: regarding electricity and natural gas, approval is required for share transfers of more than 10% (5% in case of publicly traded company shares) following the Electricity Market License Regulation the Natural Gas Market License Regulation.

(ii) Broadcasting: under Law No. 6112, the transfer of the shares of a joint stock company holding a broadcasting licence should be notified to the Turkish Radio and Television Supreme Council.

In addition, it should also be noted that Article 3 of Communique No. 2017/2 introduced a new paragraph to be included to Article 10 of Communique No. 2010/4. This new paragraph

reads as follows:

"If the control is acquired from various sellers by way of series of transactions in terms of securities within the stock exchange, the concentration could be notified to the Turkish Competition Board after the realization of the transaction provided that the following conditions are satisfied: (a) the concentration should be notified to the Turkish Competition Board without delay, (b) the voting rights attached to the acquired securities are not exercised or exercised solely to maintain the full value of its investments based on a derogation granted by the Turkish Competition Board. The Turkish Competition Board may impose conditions and obligations in terms of such derogation in order to ensure conditions of effective competition."

This newly introduced provision by Article 3 of Communique No. 2017/2 is similar to Article 7(2) of European Commission Merger Regulation. At any rate, although there was no similar specific statutory rule in Turkey on this matter until the promulgation of Communique No. 2017/2, the case law of the Board were shedding light on this matter.

14. **Are factors unrelated to competition relevant?**

Non-competition issues are not taken into account.

15. **Are ancillary restraints covered by the authority's clearance decision?**

Article 13(5) of the Communique provides that the approval granted by the Board concerning the transaction shall also cover those restraints which are directly related and necessary to the implementation of the transaction. The parties may engage in self-assessment as to whether a particular restriction could be deemed as ancillary. In case the transaction involves restraints with a novel aspect which have not been addressed in the Guideline on Undertakings Concerned and the Board's previous decisions, upon the parties' request, the Board may assess the restraints in question. In the event the ancillary restrictions are not compliant, the parties may face an Article 4 investigation.

16. **For mandatory filing regimes, is there a statutory deadline for notification of the transaction?**

The Law No.4054 provides no specific deadline for filing but 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. It is important that the transaction is not closed before the approval of the Competition Board.

17. **What is the earliest time or stage in the transaction at which a notification can be made?**

In practice, a filing is seen as a one-sided review by the Authority, once a formal one-shot

notification is made. The Authority may of course issue various information requests, but it will only do so after the notification is made.

It is possible to notify a transaction on the basis of a close-to-final draft version of the transaction agreement instead of a signed agreement. It is also possible to submit the notification form under the MoU, letter of intent, term sheet, etc.

18. **Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?**

The Turkish merger control rules do not provide a pre-notification mechanism. Therefore, there are no pre-notification discussions with the authority.

19. **What is the basic timetable for the authority's review?**

The Competition 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 calendar days following a complete filing. There is an implied approval mechanism introduced with Article 10(2) of Law No. 4054 where a tacit approval is deemed if the Turkish Competition Board (Board) does not react within 30 calendar days upon a complete filing.

While the timing in the Law No.4054 gives the impression that the decision to proceed with Phase II should be formed within 15 calendar days, the Competition Board generally uses more than 15 calendar days to form their opinion concerning the substance of a notification, and it is more sensitive about the 30 calendar days deadline on announcement.

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. In practice, only exceptional cases require a Phase II review, and most notifications obtain a decision within about 45 calendar days from the original date of notification.

20. **Under what circumstances may the basic timetable be extended, reset or frozen?**

Any written information request by the Competition Board resets the clock and the review period starts again from day one once the responses are provided. As explained more fully in the previous section under Turkish law, the investigation takes about six months but if it deemed necessary, this period may be extended only once, for an additional period of up to six months, by the Competition Board.

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 Competition Board's subsequent request for further data.

Pursuant to article 15 of Communiqué No. 2010/4, the Competition 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.

While not common practice, it is possible for the third parties to submit complaints about a transaction during the review period.

In addition, in terms of Phase II review, if deemed necessary, it may be extended only once, for an additional period of up to six months by the Competition Board.

21. **Are there any circumstances in which the review timetable can be shortened?**

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.

22. **Which party is responsible for submitting the filing?**

Under the Turkish merger control regime, persons or undertakings that are parties to the transaction or their authorized representatives can make the filing, jointly or severally. In case of filing by one of the parties, the filing party should notify the other party of the fact of filing.

In practice, the majority of notifications are "buyer only". Joint notifications are not uncommon, but "seller only" notifications are relatively rare.

However, it should also be noted that, the acquirer(s) in case of an acquisition and both merging parties in case of a merger are also responsible to ensure that a filing has been made with respect to notifiable transactions. Pursuant to Article 16 of 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 (acquirer(s) in the case of an acquisition; both merging parties in the case of a merger).

23. **What information is required in the filing form?**

Communiqué No. 2010/4 provides a 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 Competition Board. In parallel with the notion that only transactions with a relevant nexus to the Turkish jurisdiction will be notified,

a wide range of information is requested by the Turkish Competition Board, 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 Competition 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.

There is a short-form notification (without a fast-track procedure) if: (i) one of the transaction parties will be acquiring the sole control of an undertaking over which it has joint control; or (ii) the total of the parties' respective market shares is less than 20 per cent in horizontally affected markets and each party's market share is less than 25 per cent in vertically affected markets. There are no informal ways to speed up the procedure.

24. **Which supporting documents, if any, must be filed with the authority?**

In terms of formalities/supporting documents, the parties need to submit the signed or latest version of the transaction document that brings about the concentration along with its sworn Turkish translation. Moreover, a signed, notarized and apostilled power of attorney(s) would be required to be able to represent the notifying party(ies) before the Competition Authority. The signed, notarized and apostilled power of attorney will require local legalization that needs to be performed by the notary public in Turkey (which concerns the notarization of the sworn Turkish translation of the executed, notarized and apostilled power of attorney).

The transaction parties will also need to submit officially approved documents (i.e. approved balance sheets) that show their latest accounts. In addition, where applicable, for the Turkish subsidiaries and/or affiliated entities of the parties, the latest certified balance sheets and/or profit and loss statements (as approved by the relevant Tax Office in Turkey) should be submitted along with the merger control filing. Finally the parties will need to submit organizational (corporate structure) charts or list of subsidiaries demonstrating each person or economic entity directly or indirectly controlled by the Parties. There is no formal requirement applicable for organizational (corporate structure) chart or list of subsidiaries for the parties.

For the sake of completeness, it is not required to submit certification of incorporation and articles of association as annexes to the merger control filing.

All of the required supporting documents should be submitted together with the notification

form, otherwise notification form would be incomplete and the notification is deemed filed only on the date when such information is completed upon the Competition Board's subsequent request for further data. Furthermore any written request by the Competition Board for missing information and documents resets the clock and the review period starts again from day one once the responses and documents are provided.

25. **Is there a filing fee?**

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

26. **Is there a public announcement that a notification has been filed?**

Once notified to the Authority, the "existence" of a transaction and notification will no longer be a confidential matter. The Authority will publish the notified transactions on its official website with the names of the parties and their areas of commercial activity. Moreover, the reasoned decision of the Board is also published on the Authority's official website upon its finalisation.

The main legislation that regulates the protection of commercial information is Communiqué No. 2010/3 on Regulation of Right to Access to File and Protection of Commercial Secrets (Communiqué No. 2010/3). Communiqué No. 2010/3 puts the burden of identifying and justifying information or documents as commercial secrets on the undertakings. Therefore, undertakings must request confidentiality from the Board in writing and justify their reasons for the confidential nature of the information or documents that are requested to be treated as commercial secrets. 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. The reasoned decisions of the Board are published on the website of the Authority after confidential business information is redacted.

Moreover, under Article 25 of the Law No.4054, the Board and personnel of the Authority are bound with a legal obligation of not disclosing any trade secrets or confidential information which they have acknowledged during their service.

27. **Does the authority seek or invite the views of third parties?**

Pursuant to article 15 of Communiqué No. 2010/4, the Competition 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

Competition Board during the investigation, provided that they prove their legitimate interest.

Although it is not a common practice; Competition Authority may even invite the views of third parties for a transaction that clearly does not raise competition issues. There is no specific provision that a market testing is carried out in the merger control filing process.

28. **What information may be published by the authority or made available to third parties?**

The main legislation that regulates the protection of commercial information is Article 25(4) of the Law No.4054 and Communiqué No. 2010/3 on Regulation of Right to Access to File and Protection of Commercial Secrets (Communiqué 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 Competition 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 Competition 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. Turkish Competition Authority publishes the parties' notification on its official website (www.rekabet.gov.tr), including only the names of the undertakings concerned and their areas of commercial activity. Lastly, the final decisions of the Competition Board are published on the website of the Competition Authority after confidential business information is taken out.

Pursuant to the Article 12(4) of Communiqué 2010/3, information that has been published, made public, or included in official registers or balance sheets as well as annual reports, together with information that has lost its trade significance due to causes such as the fact that it is five years old or more, may not be deemed trade secret.

Further to that, 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.

Moreover, under Article 25 of Law No.4054, the Board and personnel of the Authority are bound with a legal obligation of not disclosing any trade secrets or confidential information they have acknowledged during their service.

29. **Does the authority cooperate with antitrust authorities in other jurisdictions?**

The Authority is empowered to contact with certain regulatory authorities around the world to exchange information, including the European Commission. In this respect, Article 43 of Decision No. 1/95 of the EC-Turkey Association Council (Decision No. 1/95) authorises the 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.

Moreover, the research department of the Authority makes periodic consultations with relevant domestic and foreign institutions and organisations. The Commission has been reluctant to share any evidence or arguments with the Authority, in a few cases where the Authority explicitly asked for them.

Apart from those, 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 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 Ukrainian Anti-Monopoly Committee. These programmes were held according to the bilateral cooperation agreements.

30. **What kind of remedies are acceptable to the authority?**

As per the Guideline on Remedies Acceptable in Mergers and Acquisitions the parties can submit behavioural or structural remedies. The Remedies Guideline explains acceptable remedies such as:

- divestment;
- ending connections with competitors;
- remedies that enable undertakings to access certain infrastructure (eg, networks, intellectual property and essential facilities); and
- remedies on amending a long-term exclusive agreement.

The board conditions its clearance decision on the application of the remedies. Whether the parties may complete the merger before the remedies have been complied with depends on the nature of the remedies. Remedies may be either a condition precedent for the closing

or an obligation post-closing of the merger. The parties may complete the merger if the remedies are not designed as a condition precedent for the closing.

Under Turkish merger control regime the structural remedies take precedence over behavioural remedies. To that end, the behavioural remedies can be considered in isolation only if (i) structural remedies are impossible to implement and (ii) behavioural remedies are beyond doubt as effective as structural remedies (Remedy Guideline, paragraph 77).

While there are few decisions (see e.g. *Bekaert/Pirelli*, 15-04/52-25, 22.01.2015), *Migros/Anadolu Endüstri Holding*, 29/420-117, 09.07.2015) where behavioural remedies were recognized, a great majority of the conditional clearance decisions rely on structural remedies (see e.g.; *Luxottica/Essilor*, 18-36/585-286, 01.10.2018; *AFM/Mars*, 12-59/1590-M, 22.11.2012; *ÇimSA/Bilecik*, 08- 36/481-169, 02.06.2008; *Mey İçki/Diageo*, 11-45/1043-356, 17.08.2011; *Burgaz Rakı / Mey İçki*, 10- 49/900-314, 08.07.2010). In some of these cases (see e.g. *Bekaert/Pirelli*, 15-04/52-25, 22.01.2015; *Migros*, 15-29/420-117, 09.07.2015; *Cadbury/Schweppes*, 07-67/836-314,23.08.2007), the parties initially proposed purely behavioural remedies, which ultimately failed.

For example, in February 2018, the Board concluded its Phase II review regarding the transaction concerning the acquisition of Ulusoy Deniz Taşımacılığı A.Ş, Ulusoy Gemi İşletmeleri A.Ş., Ulusoy Ro-Ro İşletmeleri A.Ş., Ulusoy Ro-Ro Yatırımları A.Ş., Ulusoy Gemi Acenteliği A.Ş., Ulusoy Lojistik Taşımacılık ve Konteyner Hizmetleri A.Ş. and Ulusoy Çeşme Liman İşletmesi A.Ş. ('Ulusoy Ro-Ro') by U.N. Ro-Ro İşletmeleri A.Ş. ('U.N. Ro-Ro'). The Phase II review initiated in March, 2017 lasted approximately 7 months and several behavioral commitments have been proposed to eliminate the competition concerns that may arise in the relevant market. That said, as a result of Phase II review, the Board decided not to approve the transaction and held that that the transaction will strengthen U.N. Ro-Ro's dominant position in the market for Ro-Ro transport between Turkey and Europe and U.N. Ro-Ro will be dominant in the market for port management concerning Ro-Ro ships and therefore the competition in these markets will decrease significantly.

Furthermore, the Board conditionally approved the transaction regarding the acquisition of sole control by Harris Corporation over L3 Technologies, Inc. (19-22/327-145, 20.06.2019) upon a Phase I review. The Board held that the commitments have 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 has 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.

The form and content of the divestment remedies vary significantly in practice. 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.

As per the Remedy Guideline, in the case of a divestiture, a monitoring trustee is appointed by the parties to control the divestment process, and such an appointment must be approved by the Authority (e.g. *AFM*, 12-41/1164-M, 09.08.2012).

As set out within the Remedy Guideline, the aimed effect of the divestiture will take place only and only if the divestment business is assigned to a suitable purchaser which 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 in a way to cover the following requirements as well.

The decision of the Board within the framework of the commitments is also based on the presumption that a business that is viable in the market will be transferred to a suitable purchaser in a defined period of time. In terms of remedies that involve the divestiture of a business, it is the responsibility of the parties to find the suitable purchaser for the said business and to submit the said purchaser, together with an agreement to be signed with it, to

the approval of the Board. Therefore, unless the parties commit that they will not carry out the transaction that is covered in the remedy with a purchaser that has not been approved by the Board; the Board shall not authorize the acquisition.

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 the 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 competition problem. In case such a problem exists, a new remedy proposal shall not be accepted.
- The transfer to the purchaser must not cause a risk of delay in the implementation of the commitments. Therefore, the purchaser must stand capable of obtaining all the necessary authorizations from the relevant regulatory authorities as concerns the transfer of the divestment business.

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

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

Determination of the method depends on uncertainties relating to the implementation of the remedy proposal and the divestiture of the business, i.e. the nature and scope of the divestment business, the risk of the business to lose its value during the transition period up to the divestiture, the risk that a suitable purchaser may not be found.

31. **What procedure applies in the event that remedies are required in order to secure clearance?**

The parties may submit to the Board proposals for possible remedies either together with the notification form, 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. In any case, a signed version of the commitment text that contains detailed information on the context of the commitment and a separate summary should be submitted to the Authority.

As per the Remedy Guideline, it is at the parties' own discretion whether to submit a remedy. The Board will neither impose any remedies nor ex parte change the submitted remedy. In the event the Board considers the submitted remedies insufficient, the Board 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*, 08-25/254-83, 20.03.2008). In this regard, the Board also reviewed the acquisition of sole control over Monsanto by Bayer (May 8, 2018, 18-14/261-126) in 2018. The Board considered that the transaction may result in the creation or strengthening of Bayer's dominant position and thus, may significantly impede effective competition in the relevant market. It therefore decided to take the transaction into a Phase II review through its decision of May 15, 2017. Bayer's commitment to divest its global cotton and vegetable seeds businesses was then submitted to the EU Commission. The Board conditionally approved the transaction based on the commitments submitted to the Commission due to the fact that the new transaction would not result in the creation or strengthening of a dominant position not significantly impede competition, since the commitments submitted by Bayer with regards to the vegetable seeds, cotton seeds and corn seeds and seeds businesses and insecticide seed dressings for corn subject to the investigation would eliminate horizontal and vertical overlaps occurring in the relevant markets in Turkey.

The Board conditions its clearance decision on the application of the remedies. Whether or not the parties may complete the merger before the remedies have been complied with depends on the nature of the remedies. Remedies may either be a condition precedent for the closing or may be designed as an obligation post-closing of the merger. The parties may complete the merger if the remedies are not designed as a condition precedent for the closing.

32. **What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?**

Monetary fines for failure to notify or close before the Board's approval

In the event that the parties to a merger or an acquisition which requires the approval of the Board realise the transaction without the approval of the Board, 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 would be imposed on the incumbent firms, regardless of the outcome of the Board's review of the transaction.

In December 2018, the minimum amount of the monetary fine to be imposed as a result of a violation of a suspension requirement for the year 2019 has been amended. In the case of the violation of 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 (acquirer(s) in the case of an acquisition; both merging parties in the case of a merger). A monetary fine imposed as a result of a violation of suspension requirement shall in any event not be less than TL 26.027 – approximately EUR 4,582 or USD 5,388 – (rather than the former minimum amount of 21.036 – approximately EUR 5,118 or USD 5,779) as amended by the Communiqué No: 2018/1 on the Increase of the Lower Threshold for Administrative Fines Specified in Paragraph 1, Article 16 of the Law No 4054 on the Protection of Competition, to be Valid until December 31, 2019. It should also be noted that the wording of Article 16 of Law No. 4054 does not give the Board discretion on whether to impose a monetary fine in case of a violation of suspension requirement (i.e. once the violation of the suspension requirement is detected, the monetary fine will be imposed automatically). On a side note, the legal consequences of the violation of a suspension requirement are also applicable for foreign-to-foreign transactions since there is no exemption for foreign-to-foreign transactions.

Invalidity of the transaction

A notifiable merger or acquisition which is not notified to (and approved by) the Board would be deemed as legally invalid with all of its legal consequences.

Termination of infringement and interim measures

Pursuant to Article 9(1) of the Law No.4054, should the Board find any infringement of Article 7, it shall order the parties concerned, by a resolution, to take the necessary actions to restore the same status as before the completion of the transaction, and thereby restore the pre-transaction level of competition. Similarly, the Law No.4054 authorises the Board to take interim measures until the final resolution on the matter in cases where there is a possibility for serious and irreparable damages to occur.

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, the undertakings could 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. Employees and managers (of the undertakings concerned) that had a determining effect on the creation of the violation may also be fined up to five per cent of the fine imposed on the undertakings as a result of implementing a problematic transaction without the Board's approval.

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 taken unlawfully, return all shares and assets (if possible) to the places or persons where or who owned these shares or assets before the transaction or, if such measure is not possible, assign these to third parties; and meanwhile to forbid participation in control of these undertakings until this assignment takes place and to take all other necessary measures. Under Turkish merger control regime there is no criminal liability and/or imprisonment for failure to notify and implementation ahead of Board's approval decision.

If the parties to a notifiable transaction violate the suspension requirement, the statute of limitation regarding the sanctions for infringements is eight years pursuant to Article 20(3) of Law on Misdemeanours No. 5326.

As explained above in detail, foreign-to-foreign mergers are covered by Law 4054 on Protection of Competition to the extent that they affect the relevant markets within the territory of Turkey. Regardless of the parties' physical presence in Turkey, sales in Turkey may trigger the notification requirement to the extent that the turnover thresholds are met. To that end, penalties for failure to notify, late notification and breaches of a prohibition on closing do not differ in terms of 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 violation of suspension requirement (i.e. closing before clearance or not notifying the transaction at all), foreign-to-foreign mergers are caught under Law No. 4054 so long as one of the alternate thresholds is exceeded (which is the case for our transaction at hand.)

There have been many cases where companies have been fined for failing to file a notifiable transaction (Tex Holding/Labelon Group 16-42/693-311, 06.12.2016; 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.).

For the sake of completeness, in the Simsmetal/Fairless decision (09-42/1057-269, 16.09.2009), where both parties were only exporters into Turkey, the Board imposed an administrative monetary fine on Simsmetal East LLC (i.e., 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 Competition Board. Similarly, the Competition Board's Longsheng (11-33/723- 226, 02.06.2011), Flir Systems Holding/Raymarine PLC (10-44/762-246, 17.06.2010) and CVRD Canada Inc. (10-49/949-332, 08.07.2010,) 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.

Irrespective of the national scope of transaction (whether foreign-to-foreign, Turkish to Turkish or foreign to Turkish – vice versa), pursuant to Article 16 of Law No. 4054, if the parties to a notifiable transaction violate the suspension requirement (i.e., close a notifiable transaction without the approval of the Board or do not notify the notifiable transaction at all), 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 per cent) will be imposed on the acquirer in straight forward acquisitions. The wording of Article 16 of Law No. 4054 does not give the Board discretion on whether to impose a monetary fine in case of a violation of suspension requirement. In other words, once the violation of the suspension requirement is detected, the monetary fine will be imposed automatically.

33. **What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?**

As per Article 10(3) of Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board, if any change occurs during the Competition Board's review of a transaction regarding the information submitted in the filing, the parties have a legal duty to inform the board immediately. As a general rule, the parties are obliged to file correct and complete information with the Competition Authority. If the information requested in the notification form is incorrect or incomplete, the notification is deemed to have been filed only on the date when such information is completed following the Competition Board's request for further data. In addition, the authority will impose a turnover-based monetary fine of 0.1% of the Turkish turnover generated in the financial year preceding the date of the decision (if this is not calculable, the turnover generated in the

financial year closest to the date of the decision will be taken into account) on natural persons or legal entities which qualify as an undertaking or 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 filed notification.

34. **Can the authority's decision be appealed to a court?**

As per Law No. 6352, the administrative sanction decisions of the Board can be submitted for judicial review before the administrative courts in Ankara by the filing of an appeal case within 60 calendar days upon receipt by the parties of the justified (reasoned) decision of the Board.

Third parties can challenge the Competition Board's decision on the transaction before the competent administrative courts on the condition that they can prove a legitimate interest.

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 by the plaintiff, the court, providing its justifications, may decide the stay of the execution of the decision if such execution is likely to cause serious and irreparable damage; and if the decision is highly likely to be against the law (i.e. the showing of a prima facie case).

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.

Administrative litigation cases will be subject to judicial review before the regional courts (appellate courts), creating 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.

The regional courts will 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. In exceptional circumstances laid down in Article 46 of the Administrative Procedure Law, the decision of the regional court will be subject to the High State Court's review and therefore will not be considered as a final decision. In such a case, the High State Court may decide to uphold or reverse the regional courts' decision. If the decision is reversed, it will be remanded back to the deciding regional court, which will in turn issue a new decision to take

account of the High State Court’s decision.

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.

35. **What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment**

In 2019, the Board has overall assessed 208 transactions and took only two transactions into Phase II review. Only 1.44% of the 208 transactions were decided to be either outside of the scope of Article 7 of Law No. 4054 or not notifiable.

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.

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 organization/hosting sector.

The Board reviewed the acquisition of sole control over Monsanto by Bayer (8.3.2018, 18-14/261-126). The Board considered that the transaction may result in the creation or strengthening of Bayer’s dominant position and thus, may significantly impede effective competition in the relevant market. It therefore decided to take the transaction into a Phase II review through its decision of May 15 2017. The Board conditionally approved the transaction based on the commitments submitted to the Commission due to the fact that the new transaction would not result in the creation or strengthening of a dominant position not significantly impede competition, since the commitments submitted by Bayer would eliminate horizontal and vertical overlaps occurring in the relevant markets in Turkey.36. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

With respect to legislative reforms, the newly introduced Amendment Law, which entered

into force on 24 June 2020, aims to embody the 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 the way 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 as follows, the Amendment Law also brings about certain mechanisms:

- de minimis principle for agreements, concerted practices or decisions of association of undertakings;
- SIEC test for merger and acquisitions
- behavioral and structural remedies for anti-competitive conduct;
- commitments and settlement mechanisms.
- Clarification on the powers of the Authority in on-site inspections
- Clarification on the self-assessment procedure in individual exemption mechanism

36. **Are there any future developments or planned reforms of the merger control regime in your jurisdiction?**

With respect to the legislative reforms, the Draft Competition Law, which was issued by the Authority in 2013 and officially submitted to the Presidency of the Turkish Parliament on January 23 2014, is now null and void following the beginning of the new legislative year of the Turkish parliament. In order to re-initiate the parliamentary process, the draft law must again be proposed and submitted to the presidency of the Turkish Parliament. At this stage, it remains unknown whether the Turkish Parliament or the government will renew the draft law.