

International Comparative Legal Guides



Merger Control 2021

A practical cross-border insight into merger control issues

17th Edition

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The National Competition Authority for enforcing the Law on the Protection of Competition No. 4054 (the “Competition Law”) in Turkey is the Turkish Competition Authority (the “Authority”). The Authority consists of the Competition Board (the “Board”), Presidency, Main Service Units, Auxiliary Service Units and Advisory Units. In its capacity as the competent body of the Authority, the Board is responsible for, *inter alia*, reviewing and resolving merger control filings.

1.2 What is the merger legislation?

The principal legislation on merger control is the Competition Law and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (“Communiqué No. 2010/4”). In particular, Article 7 of the Competition Law governs mergers and acquisitions, and authorises the Board to regulate, through communiqués, which mergers and acquisitions require notification to the Authority to become legally valid. In accordance, Communiqué No. 2010/4 is the primary instrument in assessing merger cases in Turkey and sets forth the types of mergers and acquisitions which are subject to the Board’s review and approval. Recently, the Law No. 7246 on the Amendment to the Law No. 4054 on Protection of Competition was published in the Official Gazette and entered into force on 24 June 2020 (“Amendment Law”). However, the secondary legislation has not been revised and new secondary legislation has not been introduced in view of the Amendment Law.

With a continued interest in the harmonisation of Turkish competition law with European Union competition law, the Authority has published the following guidelines: (i) the Guideline on Cases Considered as Mergers and Acquisitions and the Concept of Control (“Guideline on the Concept of Control”); (ii) the Guideline on the Assessment of Horizontal Mergers and Acquisitions; (iii) the Guideline on the Assessment of Non-Horizontal Mergers and Acquisitions; (iv) the Guideline on Market Definition; (v) the Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions (“Guideline on Undertakings Concerned”); and (vi) the Guideline on Remedies Acceptable in Mergers and Acquisitions (“Remedy Guideline”).

1.3 Is there any other relevant legislation for foreign mergers?

There is no legislation for foreign mergers in terms of competition law in Turkey.

1.4 Is there any other relevant legislation for mergers in particular sectors?

The Banking Law No. 5411 (“Banking Law”) provides that the provisions of Articles 7, 10 and 11 of the Competition Law shall not be applicable on the condition that the sectorial share of the total assets of the banks subject to merger or acquisition does not exceed 20 per cent. The Board distinguishes between transactions involving foreign acquiring banks with no operations in Turkey and those foreign acquiring banks already operating in Turkey while applying the exception rule in the Banking Law. Therefore, while the Board applies the Competition Law to mergers and acquisitions where the foreign acquiring bank does not have any operations in Turkey, it does not apply the Competition Law if the foreign acquiring bank already has operations in Turkey under the exception rule in the Banking Law. The competition legislation provides no special regulation applicable to foreign investments. However, some special restrictions exist on foreign investments in other legislations, such as media.

1.5 Is there any other relevant legislation for mergers which might not be in the national interest?

There is no other relevant legislation in terms of competition law for mergers which might not be in the national interest other than the legislation regarding the Banking Law as explained under question 1.4.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a “merger” and how is the concept of “control” defined?

Communiqué No. 2010/4 defines the scope of the notifiable transactions in Article 5(1) as follows:

- a. a merger of two or more undertakings; or
- b. the acquisition of direct/indirect control over all or part of one or more undertakings by one or more undertakings or persons, who currently control at least one undertaking, through:

- the purchase of assets or a part or all of its shares;
- an agreement; or
- other instruments.

Concentrations that result in a change of control on a lasting basis are subject to the Board's approval, provided that they exceed the applicable thresholds. Communiqué No. 2010/4 and the Guideline on the Concept of Control provide a definition of "control" which is similar to the definition of this term in Article 3 of European Council Regulation No. 139/2004 ("EC Merger Regulation"). Article 5(2) of Communiqué No. 2010/4 stipulates the following:

"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."

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Acquisition of a minority shareholding can amount to a merger, if and to the extent that 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 the 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.

2.3 Are joint ventures subject to merger control?

Turkish merger control rules applicable to joint ventures are akin to – if not the same as – the EU rules. If the turnover thresholds are triggered, the joint venture transaction would be notifiable so long as the joint venture is a full-function joint venture. 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.

2.4 What are the jurisdictional thresholds for application of merger control?

Under Article 7 of Communiqué No. 2010/4, the transaction would be notifiable in cases where one of the below turnover thresholds are triggered:

- the aggregate Turkish turnover of the transaction parties exceeds TL 100 million (approximately €15.7 million or US\$17.6 million) and the Turkish turnovers of at least two of the transaction parties each exceed TL 30 million (€4.7 million or US\$5.2 million); or
- (i) the Turkish turnover of the transferred assets or businesses in acquisitions exceeds TL 30 million (approximately €4.7 million or US\$5.2 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 500 million (approximately €78.7 million

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

The Authority has introduced Communiqué No. 2017/2 Amending Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board. One of the amendments introduced to Communiqué No. 2010/4 is that Article 1 of Communiqué No. 2017/2 abolished Article 7(2) of Communiqué No. 2010/4 propounding that "[t]he thresholds (...) are re-determined by the Board biannually". Through the mentioned amendment, the Board no longer has 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.

2.5 Does merger control apply in the absence of a substantive overlap?

Yes. Article 7 of Communiqué No. 2010/4 provides turnover-based thresholds and no longer seeks the existence of an "affected market" in assessing whether a transaction triggers a notification requirement.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

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

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

There is no such mechanism under the Turkish merger control regime.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

Article 5(4) of Communiqué No. 2010/4 provides that closely related transactions which are tied to conditions or transactions realised over a short period of time by way of expedited exchange of securities are treated as a single transaction.

In terms of turnover calculation, together with the amendment through Article 2 of Communiqué No. 2017/2, Article 8(5) of Communiqué No. 2010/4 provides that the Board would 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.

Accordingly, pursuant to the Guideline on the Concept of Control, two or more transactions constitute a single concentration provided that the transactions are interdependent (i.e. one transaction would not have been carried out without the

other) and that the control is acquired by the same persons or undertaking(s). The conditionality of the transactions could be proven if the transactions are linked *de jure* (i.e. the agreements themselves are linked by mutual conditionality). *De facto* conditionality may also suffice if it can be satisfactorily demonstrated.

Lastly, Article 3 of Communiqué No. 2017/2 introduced a new paragraph to be included in Article 10 of Communiqué No. 2010/4. This provision by Article 3 of Communiqué No. 2017/2 is similar to Article 7(2) of the EC Merger Regulation. At any rate, although there was no similar specific statutory rule in Turkey on this matter, the case law of the Turkish Competition Board has shed light on this matter.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Once the thresholds are exceeded, there are no exceptions for filing a notification. There is no *de minimis* exception in terms of Turkish merger control rules. There is no specific deadline for filing, but the filing should be made before the closing of the transaction. Under Article 10(7), a transaction is deemed “realised” on the date on which the change of control occurs.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Article 6 of Communiqué No. 2010/4 provides the cases that are not considered as a merger or an acquisition as: (i) intra-group transactions and other transactions which do not lead to a change in control; (ii) operations of undertakings whose ordinary operations involve transactions with securities temporarily holding on to securities purchased for resale purposes, provided that the voting rights from those securities are not used to affect the competitive policies of the undertaking; (iii) acquisition of control by a public institution or organisation by operation of law; and (iv) mergers or acquisitions occurring as a result of inheritance.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

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. The minimum amount of this fine is set at TL 31,903 (approximately €3,434 or USD\$4,048 at the time of writing) for 2020 and is revised annually.

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 Competition Law, 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 Competition Law 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 which owned these shares or assets before the transaction or, if such measure is not possible, assign them 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.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

There is no normative regulation allowing or disallowing carve-out arrangements. Carve-out arrangements have been rejected by the Board 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 unconvincing.

Therefore, methods such as carve-out would not eliminate the filing requirement, and they cannot authoritatively be advised as safe for early closing mechanisms recognised by the Board.

3.5 At what stage in the transaction timetable can the notification be filed?

Under a Phase I review, the transaction should be notified at least 40 to 45 calendar days before the projected closing.

As for privatisation tenders, according to the 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 Board in cases where the turnover of the undertaking or the asset or service production unit to be privatised exceeds TL 30 million. Communiqué No. 2013/2 promulgates that in order for the acquisitions through privatisation which require pre-notification to the Authority to become legally valid, it is also mandatory to get approval from the Board. The application should be filed by

all winning bidders after the tender, but before the Privatisation Administration's decision on the final acquisition.

In cases of a public bid, filing can be performed at a stage where the documentation at hand adequately proves the irreversible intention to finalise the contemplated transaction.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The notification is deemed filed when received in complete form by the Authority. If the information requested in the notification form is incorrect or incomplete, the notification is deemed filed on the date on which such information is completed or corrected.

The Board, upon its preliminary review (i.e. Phase I), will decide either to approve or to investigate the transaction further (i.e. Phase II).

The Board notifies the parties of the outcome within 30 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. In practice, the Board almost always reacts within the 30-calendar-day period by either sending a written request for information or – very rarely – by already rendering its decision within the original 30-calendar-day period.

The Authority can send written information requests to the parties, any other party relating to the transaction or third parties such as competitors, customers or suppliers.

Any written request by the Authority for missing information will cut the review period and restart the 30-calendar-day period from Day 1 as of the date on which the responses are submitted.

If a notification leads to an investigation (Phase II), it transforms into a fully-fledged investigation. The investigation (Phase II) takes about six months and, if deemed necessary, it may be extended only once for an additional period of up to six months.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

There is an explicit suspension requirement. If a transaction is closed before clearance, the substantive nature of the concentration plays a significant role in determining the consequences. If the Board concludes that the transaction creates or strengthens a dominant position and significantly impedes effective competition in any relevant product market, the undertakings concerned, as well as their employees and managers that had a determining effect on the creation of the violation, could be subject to the monetary fines and sanctions highlighted in question 3.3 above. In any case, the violation of the suspension requirement would trigger a turnover-based monetary penalty of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision.

In addition, 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.

3.8 Where notification is required, is there a prescribed format?

Communiqué No. 2010/4 provides a complex notification form,

which is similar to the Form CO of the European Commission. One hard copy and an electronic copy of the notification form and its annexes need to be submitted to the Board. Additional documents, such as the executed or current copies and sworn Turkish translations of the transaction documents, financial statements of the parties, and, if available, market research reports for the relevant market are also required. In addition, a signed, notarised and apostilled power of attorney is required to be able to represent the party before the Authority.

Unlike the EU regime, under the Turkish merger control regime, there is no pre-notification process. All of the transactions (that are subject to a mandatory filing) should be notified to the Authority by way of a uniformed notification form.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

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.

3.10 Who is responsible for making the notification?

Persons or undertakings that are parties to the transaction or their authorised representatives can make the filing, jointly or severally. The filing party should notify the other party of the filing.

3.11 Are there any fees in relation to merger control?

There are no filing fees under the Turkish merger control regime.

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

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 by way of 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 should be notified to the Turkish Competition Board without delay; and (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. For the sake of completeness, 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 Communiqué No. 2017/2 is similar to Article 7(2) of the EC Merger Regulation. At any rate, although there was no similar specific statutory rule in Turkey on this matter, even before the promulgation of Communiqué No. 2017/2, the case law of the Turkish Competition Board was shedding light on this matter. In the Camargo decision (*Camargo Corréa S.A. decision 12-24/665-187*,

03.05.2012), the Board recognised that the parties can close a public bid on a listed company before the Turkish Competition Board's approval, subject to the condition that: (i) the transaction is notified to the Turkish Competition Board without any delay; and (ii) the acquirer does not exercise the control over the target pending the Turkish Competition Board's approval decision.

3.13 Will the notification be published?

Once notified to the Authority, the "existence" of a transaction 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 finalisation.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The Amendment Law amends Article 7 of the Competition Law 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 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 the Competition Law, mergers and acquisitions which do not create or strengthen a dominant position or do not significantly impede effective competition in a relevant product market within the whole or part of Turkey, shall be cleared by the Board.

4.2 To what extent are efficiency considerations taken into account?

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

4.3 Are non-competition issues taken into account in assessing the merger?

The Board does not take non-competition issues into account in assessing the merger (such as public policy considerations, among others).

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Pursuant to Article 15 of Communiqué No. 2010/4, the Board may request information from third parties including the customers, competitors and suppliers of the parties, and other persons related to the transaction. If the Authority asks for another public authority's opinion, this would cut the 30-day review period and restart it anew from Day 1.

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

4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

Under Article 14 and Article 15 of the Competition Law, the Authority may send requests for information, and may carry out on-the-spot investigations. Monetary penalties are applicable in the case of non-compliance. In this regard, pursuant to Article 16 of the Competition Law, if the information requested is incorrect or incomplete or the requested information is not provided to the Authority, the Authority will impose a turnover-based monetary fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) on natural persons or legal entities that qualify as an undertaking or as an association of undertakings, as well as the members of these associations in cases where incorrect or misleading information is provided by the undertakings or associations of undertakings in a notification filed for exemption, negative clearance or the approval of a merger or acquisition, or in connection with notifications and applications concerning agreements made before the Competition Law entered into force. As indicated above, the minimum amount of this fine is set at TL 31,903 (approximately €3,434 or USD\$4,048 at the time of writing) for 2020 and is revised annually.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

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 Competition Law, 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.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The Board may either render an approval or a prohibition decision concerning the proposed transaction. It may also give a conditional approval. The reasoned decisions of the Board are served on the representative(s) of the notifying party/parties, and are also published on the website of the Authority.

5.2 Where competition problems are identified, is it possible to negotiate “remedies” which are acceptable to the parties?

Article 14 of Communiqué No. 2010/4 enables the parties to provide commitments to remedy substantive competition law issues of a concentration under Article 7 of the Competition Law. Strategic thinking at the time of filing is somewhat discouraged through explicit language confirming that the review periods will start only after the filing is made. The Board is now explicitly given the right to secure certain conditions and obligations to ensure the proper performance of commitments. 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 that 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.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

As foreign-to-foreign mergers fall within the scope of the Turkish merger control regime to the extent that the turnover thresholds are triggered, remedies can also be submitted in foreign-to-foreign transactions by the parties, and thus the Remedy Guideline is also applicable in terms of foreign-to-foreign transactions.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

The parties may submit to the Board proposals for possible remedies either together with the notification document, during the preliminary review or during the investigation period. If the parties decide to submit the commitment during the preliminary review period, the notification is deemed filed 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 should be submitted to the Authority.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

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, the parties are required to submit detailed information regarding how the remedy would be applied and how it would resolve competition concerns. The Remedy Guideline states that the parties can submit behavioural or structural remedies. It explains acceptable remedies, such as divestment, to cease all kinds of connection with the competitors, remedies that enable undertakings to access certain infrastructure (e.g. networks, intellectual properties, essential facilities) and remedies on amending the long-term exclusive agreement.

5.6 Can the parties complete the merger before the remedies have been complied with?

The Board’s clearance decision is conditional 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.

5.7 How are any negotiated remedies enforced?

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. *Luxottica/Essilor*, 01.10.2018, 18-36/585-286; *AFM*, 09.08.2012, 12-41/1164-M). In terms of behavioural remedies, the Board monitors the application of the behavioural commitments submitted to the Authority (e.g. *Bekaert-Pirelli*, 22.01.2015, 15-04/52-25; *Migros*, 09.07.2015, 15-29/420-117).

5.8 Will a clearance decision cover ancillary restrictions?

Article 13(5) of Communiqué No. 2010/4 provides that the approval granted by the Board concerning the transaction would 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 cases where 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 that the ancillary restrictions are not compliant, the parties may face an Article 4 investigation.

5.9 Can a decision on merger clearance be appealed?

Yes. As per Article 55 of the Competition Law, the administrative sanction decisions of the Board can be submitted to judicial review before the administrative courts in Ankara.

5.10 What is the time limit for any appeal?

The Board’s administrative sanction decisions can be appealed before the administrative courts in Ankara by filing an appeal case within 60 days upon receipt by the parties of the reasoned decision of the Board.

5.11 Is there a time limit for enforcement of merger control legislation?

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.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

The Authority is empowered to contact certain regulatory authorities around the world in order 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 a 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.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

According to the Merger and Acquisition Insight Report of the Turkish Competition Authority for 2019, the Board finalised 208 merger control cases. These transactions included 204 merger and acquisition transactions and one privatisation, three cases out of the scope of merger control (i.e. they either did not meet the turnover thresholds or fell outside the scope of the merger control system due to lack of change in control) and two information notes. Among these transactions, two concentrations were taken into Phase II review in 2019. Moreover, the Board conditionally approved three concentrations within the framework of the commitments submitted by the transaction parties. In 2019, 115 transactions notified to the Board were foreign-to-foreign transactions, which constitute more than half of the concentrations notified within 2019.

In addition, according to Decision Statistics for the first six months of 2020, the Competition Board reviewed 107 merger and acquisitions and 14 out of the scope of merger control.

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

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 and mechanisms introduced by the Amendment Law are as follows:

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

6.4 Please identify the date as at which your answers are up to date.

These answers are up to date as of 13 October 2020.

7 Is Merger Control Fit for Digital Services and Products?

7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?

There are no debates before the Turkish Competition Authority related to the suitability of the merger tools to address digital mergers in specific, and the current dominance test is applicable for these mergers as well.

7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

There are no changes to law, process or guidance in relation to digital mergers in terms of the competition law.

7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?

There are no cases where the Competition Board has highlighted the difficulties of dealing with digital mergers.



Gönenç Gürkaynak is a founding partner of ELIG Gürkaynak Attorneys-at-Law. He holds an LL.M. degree from Harvard Law School, and is qualified to practise in Istanbul, Brussels, New York, and England and Wales (currently a non-practising solicitor). Before founding ELIG Gürkaynak in 2005, he worked as an attorney in the Istanbul, New York and Brussels offices of a global law firm for more than eight years. Mr. Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 45 lawyers. He 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 35 written and oral defences in investigations of the Turkish Competition Authority, over 15 antitrust appeal cases in the high administrative court, and over 85 merger clearances of the Turkish Competition Authority, in addition to coordinating 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. Mr. Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 150 articles in English and Turkish by various international and local publishers. Mr. Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.

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ELIG Gürkaynak Attorneys-at-Law is an eminent, independent Turkish law firm based in Istanbul. ELIG Gürkaynak's competition law and regulatory department is led by the founding partner, Mr. Gonenç Gürkaynak, and consists of three partners, five counsel and 40 associates. ELIG Gürkaynak 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. 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 an antitrust investigation. We have in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations and all other forms of restrictive horizontal and vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations. Furthermore, in addition to significant antitrust litigation expertise, our firm has considerable expertise in administrative law, and is therefore well-equipped to represent

clients before the High State Council, both on the merits of a case, and for injunctive relief. ELIG Gürkaynak also advises clients on a day-to-day basis concerning business transactions that almost always contain antitrust law issues, including distributorship, licensing, franchising, and toll manufacturing. During the past year, ELIG Gürkaynak has been involved in over 85 merger clearances by the Turkish Competition Authority, more than 35 defence project investigations, and over two antitrust appeals before the administrative courts. ELIG Gürkaynak also provided more than 75 anti-trust education seminars to employees of its clients.

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