Merger Control

Jurisdictional comparisons **Second edition 2014**

General Editors:
Jean-François Bellis & Porter Elliott,
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THE EUROPEAN LAWYER
REFERENCE

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THOMSON REUTERS

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Published in February 2014 by Sweet & Maxwell,
100 Avenue Road, London NW3 3PF
part of Thomson Reuters (Professional) UK Limited
(Registered in England & Wales, Company No 1679046.
Registered Office and address for service:
Aldgate House, 33 Aldgate High Street, London EC3N 1DL)

Printed and bound in the UK by Polestar UK Print Limited, Wheaton

A CIP catalogue record for this book is available from the British Library.

ISBN: 9780414033481

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Foreword

Jean-François Bellis & Porter Elliott, Van Bael & Bellis

There was a time not so long ago when very few countries in the world had merger control laws. In most jurisdictions, there was no need to notify a merger for prior approval before closing. How different the situation is today. It is estimated that upwards of 100 countries now have merger control laws, and in most of these countries, qualifying mergers, acquisitions and – in some cases – joint ventures must be notified and cleared by the local regulators before they can be implemented. Today, the need to obtain merger control approvals is often the number one factor delaying the closing of deals around the world.

Unfortunately, while more countries have merger control than ever before, there remains relatively little harmonisation, with each jurisdiction having its own rules on what types of transactions must be notified, what thresholds apply, what the procedure is and how long it takes. Even the substantive test for determining whether a notified transaction will be approved is not the same in every jurisdiction. With merger control authorities becoming tougher in their enforcement practices, the challenges facing merging companies have never been more daunting. This book aims to help.

With contributions from leading law firms covering 49 of the most important jurisdictions worldwide, this second edition of *Merger Control* endeavours to address the most common and critical questions of merging companies and their lawyers, including some which are less often addressed in other books of its kind, such as whether pre-notification consultations are customary in a given jurisdiction, whether 'carve-out' arrangements may be implemented to allow for closing to take place in jurisdictions where approval is still pending, whether the jurisdiction at issue has a track record of fining foreign companies for failure to file and whether it has ever issued penalties for 'gun-jumping' offences.

Adopting the reader-friendly Q&A format that has been used successfully in other volumes of *The European Lawyer Reference Series*, including the first edition of *Merger Control* (2011), this book sets out to answer for each jurisdiction the key questions those on the front line are most likely to have, including:

- Whether notification is mandatory (as in most jurisdictions where the thresholds are met) or voluntary (as, for example, in Australia, New Zealand, Singapore and the UK). If mandatory, is the requirement to file based purely on the parties' turnover (as in the EU and many other jurisdictions worldwide), or are there other factors that need to be considered, such as market share (eg, in Portugal, Spain and the UK), asset value (eg, in Russia and Ukraine) or the size of the transaction (eg, in the US)?
- Is there a filing deadline and/or a requirement to suspend implementation pending receipt of an approval decision? In most jurisdictions, there is no filing deadline so long as the deal is not closed until it has been approved, but there are exceptions.

- How onerous is the filing? Most jurisdictions have detailed notification forms that must be completed (Germany being a notable exception), although some forms take far more time to complete than others. For example, although certainly not always the case, it is not unusual for notifications to the European Commission to exceed 100 pages (not counting annexes) and to include very detailed legal and economic analysis. By comparison, the US Hart-Scott-Rodino form is short and straightforward, and it can usually be completed in a matter of days (although a second request in the US can be extremely burdensome).
- What factors are likely to be considered by the relevant authorities in assessing the legality of the transaction? While it must be assumed that every authority will focus first and foremost on whether the transaction would raise competition concerns in its territory, some authorities are more likely than others to consider theories of competitive harm that go beyond traditional concerns related to high combined market shares, such as the risks of vertical foreclosure. Similarly, non-competition issues, such as industrial policy or labour policy, may be more likely to be considered in some jurisdictions than others.

Although by no means a substitute to seeking the advice of local counsel, this book aims to address these and other critical questions in a concise and practical way, and therefore to serve as a valuable resource to companies and counsel navigating their way through the twists and turns of obtaining the required merger control approvals worldwide.

Compiling the second edition of *Merger Control* has truly been a group effort. With this in mind, we would like to thank all the authors for their contributions, as well as the team of *The European Lawyer* for their diligence in bringing this book to fruition. We also wish to express our gratitude to our colleagues at Van Bael & Bellis who assisted us on this project, in particular Reign Lee for her editorial support, and Els Lagasse and Veerle Roelens for their secretarial assistance.

Brussels, March 2014

Foreword

Bernd Langeheine, Deputy Director-General, DG Competition, European Commission

Nowadays, an ever larger number of mergers need to obtain regulatory approval in several jurisdictions. The popularity of merger control is due to a general recognition that it is desirable to maintain a market structure which is conducive to effective competition and, therefore, crucial for a robust, innovative economic landscape. This is in the interest of consumers and market players at different levels alike.

As a consequence of globalisation, free trade and open markets merger control has become a key element of almost all competition law regimes around the world. Apart from problems related to costs and delays for closing the deal, multiple filings create a risk of inconsistent or even contradictory decisions. This is why all major competition authorities should cooperate closely on cases which require notification in several countries.

During 2011 and 2012, the European Commission, for example, worked together with other antitrust enforcers in about half of all cases for which an in-depth investigation was opened. The most notable example was the wide-ranging cooperation (ie with the US, Chinese, Japanese, Korean and Australian competition authorities) in the 'Hard-disk-drive cases' in 2011. Parties to a merger and their counsel generally have a keen interest in facilitating such cooperation in order to avoid conflicting decisions. This, in turn, requires knowledge about jurisdictional thresholds and other filing requirements as well as about the timelines of proceedings. This book provides a wealth of information on these and other relevant points for all important merger control systems around the world.

Competition rules and their enforcement will continue to be fragmented for lack of an international authority that would have jurisdiction over mergers and could take decisions for more than one country. There are, however, tendencies to avoid multiple filings at least at the regional level. In Europe, the situation is alleviated by the fact that, since 1990, there has been a merger control regime at the EU level under which mergers of a certain size that concern the competitive situation in several Member States are normally vetted by the European Commission. This is complemented by national rules on merger control which apply to all other relevant transactions, ie mainly those which are of a lesser size and which only concern one Member State.

In the EU, there are clear and explicit rules that lay down which (EU or national) authority has original jurisdiction over a merger. But there is also a mature system of referral mechanisms which mitigates the rigidity of the rules for case allocations and ensures that the best-placed authority deals with a particular merger. These referral provisions apply, in particular, where an operation needs to be notified in several Member States or where markets are wider than the national level and trade between Member States is affected.

The transfer of such cases from national authorities to the Commission will reduce the administrative burden for companies to the largest possible extent and avoid multiple filings. But the rules on referrals also foresee the transfer of merger cases from the EU level to a national authority in certain justified cases. A referral can take place upon the request of the parties, before an operation is notified or after notification at the request of a national competition authority. The application of these mechanisms has produced encouraging results over recent years. Between 2004 and the end of 2013, there were almost 280 referrals from national competition authorities to the EU Commission and approximately 130 in the other direction, ie to the national authority of a Member State. Nevertheless, one-stop shopping does not always work and there are still a large number of cases every year which are scrutinised by competition authorities in two or more EU countries (eg, 240 cases in 2007).

At the international level, the picture remains diverse. Intensive merger scrutiny in traditionally strong antitrust jurisdictions has been matched by new merger control regimes springing up in all parts of the world, most notably Asia and Latin America. Today, there are more than 100 merger control systems in force around the world which vary greatly not only with regard to notification requirements, but also with regard to other key elements such as timelines and filing fees.

Notifying parties and their lawyers continue to struggle with the proliferation of merger regimes and the ensuing divergences regarding procedures and substantive criteria or benchmarks. This situation is time-consuming and costly, in particular in cases where the actual impact of an operation in a given country is rather unimportant, but where low national jurisdiction thresholds nevertheless require a notification.

There are various discussion and coordination fora at the international level, such as the International Competition Network (ICN) or the Competition Committee of the Organisation for Economic Cooperation and Development which endeavour to produce more convergence of national merger control systems. Some progress has been achieved in the context of the ICN with the adoption of recommended practices on matters such as jurisdiction, procedure and even substantive assessment. Given the wide variety of underlying national circumstances (nature of the authority, administrative culture, enforcement powers) and the sensitivities often connected to issues of merger control, this remains, however, an undertaking which requires a lot of patience and which will only be crowned by success in the long term. In the meantime, the coexistence and parallel application of a large number of national merger control systems will continue.

Managing multiple filings with a variety of national competition authorities requires important skills in terms of legal knowledge, organisation and coordination. This book provides valuable insights and guidance with regard to these complicated processes and it will be of great assistance to corporations and their counsel.

Brussels, March 2014

Turkey

ELIG, Attorneys-at-Law Gönenç Gürkaynak, Esq.

LEGISLATION AND JURISDICTION

1. What is the relevant merger control legislation? Is there any pending legislation that would affect or amend the current merger control rules described below?

The relevant legislation on merger control is:

- The Law on Protection of Competition No. 4054 dated 13 December 1994 (Competition Law or Law No.4054).
- Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4), published on 7 October 2010 by the Turkish Competition Authority (*Rekabet Kurumu*) (Competition Authority).

In particular, Article 7 of the Competition Law governs mergers and acquisitions, and authorises the Competition Board to regulate through communiqués which mergers and acquisitions should be notified to gain legal validity. Under this provision, Communiqué No. 2010/4 abolished Communiqué No. 1997/1 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Old Communiqué) as of 1 January 2011, as the primary instrument in assessing merger cases in Turkey. Communiqué No. 2010/4 lists the types of mergers and acquisitions which are subject to the Competition Board's review and approval, together with some significant changes to the Turkish merger control regime.

2. What are the relevant enforcement authorities, and what are their contact details?

The national competition authority for enforcing the Competition Law is the Competition Authority, a legal entity with administrative and economic independence.

The Competition Authority consists of the:

- Competition Board. In its capacity as the competent body of the Competition Authority, the Competition Board is responsible for, among other things, reviewing and resolving notifications concerning mergers, acquisitions, and joint ventures. The Competition Board consists of seven members and is seated in Ankara.
- Presidency.
- Service Departments. The Service Departments consist of five supervision and enforcement departments with sector-specific work distribution, which handle competition law enforcement work.

In its capacity as the competent body of the Competition Authority, the Competition Board is responsible for, among other things, reviewing and

resolving notifications concerning mergers, acquisitions and joint ventures. The Competition Authority (*Rekabet Kurumu*) Head. The Presidency of the Turkish Competition Authority (*Nurettin Kaldırımcı*).

The contact details are as follows:

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3. What types of transactions are potentially caught by the relevant legislation?

The following transactions may be notifiable (Article 5/I Communiqué No. 2010/4):

- a merger of two or more undertakings;
- an acquisition or control by an entity or a person of: (i) another undertaking's assets; or (ii) a part or all of another undertaking's assets or shares or instruments granting it management rights.

Joint ventures are subject to notification to, and approval of, the Competition Board.

Communiqué No. 2010/4 provides a definition of control, which is similar to the definition of control in Article 3 of Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation). Under Article 5/II of Communiqué No. 2010/4, control can be constituted by rights, agreements or any other means which, either separately or jointly, *de facto* or *de jure*, confer the possibility of exercising decisive influence on an undertaking. These rights or agreements are instruments which confer decisive influence, in particular by:

- ownership or the right to use all or part of the assets of an undertaking;
- rights or agreements which confer decisive influence on the composition or decisions of the organs of an undertaking.

Control is deemed acquired by persons or undertakings which (Article 5/II, Communiqué No. 2010/4):

- are the holders of the rights;
- are entitled to the rights under the agreements concerned; and
- while not being the holders of the rights or entitled to rights under agreements, have *de facto* power to exercise these rights.

4. Are joint ventures caught, and if so, in what circumstances?

Joint ventures are subject to notification to, and approval of, the Competition Board. Joint ventures that permanently meet all functions of an independent economic entity are deemed notifiable (Article 5/III, Communiqué

No. 2010/4). Article 13 of Communiqué No. 2010/4 provides that cooperative joint ventures are also subject to a merger control notification and analysis, on top of an individual exemption analysis, if warranted.

Once the thresholds are exceeded, joint ventures are subject to the Competition Board's approval.

5. What are the jurisdictional thresholds

Communiqué No. 2012/3 on the Amendment of Communiqué No. 2010/4 (Communiqué No. 2010/4) on the Mergers and Acquisitions Subject to the Approval of the Competition Board (Communiqué No. 2012/3), which amends Article 7 of Communique No. 2010/4, has been effective since 1 February 2013. Communiqué No. 2010/4 provides turnover-based thresholds. The transaction may be subject to the Board's approval if either (Article 7, Communiqué No. 2010/4):

(a) the aggregate Turkish turnovers of the transaction parties exceeding TL 100 million and the Turkish turnovers of at least two of the transaction parties each exceeding TL 30 million; *or*

(b) (i) the Turkish turnover of the transferred assets or businesses in acquisitions exceeding TL 30 million and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 500 million; or (ii) the Turkish turnover of any of the parties in mergers exceeding TL 30 million and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 500 million.

The new regulation no longer seeks the existence of an 'affected market' in assessing whether a transaction triggers a notification requirement.

6. Are these thresholds subject to regular adjustment?

Pursuant to paragraph 2 of Article 7 of Communiqué No. 2010/4, these thresholds shall be re-established every two years after Communiqué No. 2010/4 comes into force.

7. Are there any sector-specific thresholds?

Law No. 4054 does not recognise any sector-specific thresholds. However, Banking Law No. 5411 provides that the provisions of Articles 7, 10 and 11 of the Competition Law are not applicable if the sectoral share of the total assets of the banks subject to a merger or acquisition does not exceed 20 per cent.

In applying the exception rule in Banking Law No. 5411, the Competition Board distinguishes between:

- transactions involving foreign acquiring banks with no operations in Turkey. The Competition Board applies the Competition Law to these mergers and acquisitions; and
- foreign acquiring banks already operating in Turkey. The Competition Board does not apply the Competition Law to these transactions, under the exception rule in Banking Law No. 5411.

The competition legislation provides no specific regulation applicable to foreign investments. However, there are specific restrictions on foreign investment in other legislation, such as in the media sector.

8. In the event the relevant thresholds are met, is a filing mandatory or voluntary?
Notification is mandatory once the turnover thresholds are exceeded. There is no *de minimis* exception.

9. Can a notification be avoided even where the thresholds are met, based on a 'lack of effects' argument?
No. Notification is mandatory once the turnover thresholds are exceeded.

10. Are there special rules by which a notification of a 'foreign-to-foreign' transaction can be avoided even where the thresholds are met?
There is no other relevant legislation in Turkey for foreign mergers. Pursuant to Article 2 of the Competition Law, foreign-to-foreign mergers fall within the scope of the Turkish merger control regime, to the extent they affect the relevant markets within the territory of the Republic of Turkey. Mere sales into Turkey may trigger notification necessity, to the extent the thresholds are met.

11. Does the relevant authority have jurisdiction to initiate a review of transactions which do not meet the thresholds for a notification?
There is no such mechanism.

NOTIFICATION REQUIREMENTS, TIMING AND POTENTIAL PENALTIES

12. Is there a specified deadline by which a notification must be made?
There is no specific deadline for filing but it is advisable to file the transaction at least 45 calendar days before closing. Communiqué No. 2010/4 has introduced a much more complex notification form to be used in merger filings, so that the timeframe required for the preparation of a notification form would be longer than the old regime. (A transaction is deemed closed on the date when the change in control occurs (Article 10, Communiqué No. 2010/4)).

The filing process differs for privatisation tenders. According to the newly published 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. Further to that, Communiqué No. 2013/2 promulgates that in order for the acquisitions through privatisation which require pre-notification to the Competition Authority to become legally valid, it is also mandatory to get approval from the Competition Board. The application should be filed by all winner bidders after the tender but before the Privatisation Administration's decision on the final acquisition. In case 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.

13. Can a notification be made prior to signing a definitive agreement?
Pursuant to section 4 of the notification form, and as opposed to the old notification form, the notification form no longer insists on 'signed copies of the agreement leading to the notified concentration'; it is sufficient to enclose a copy of the final or current version of the agreement concerning the notified merger or acquisition with the notification form.

14. Who is responsible for notifying?
Persons or undertakings that are parties to the transaction in question, or their authorised representatives, can make the filing, jointly or severally (Article 10, Communiqué No. 2010/4). The filing party should notify the other party of the filing.

15. What are the filing fees, if any?
There is no filing fee.

16. Where a notification is necessary, is approval needed before the transaction is closed/implemented (is there a waiting period or a suspension requirement)?
There is an explicit suspension requirement. Therefore, completing a notifiable transaction before approval is prohibited.

If a merger or an acquisition is closed before clearance, the substantive nature of the concentration plays a significant role in determining the consequences. If the Competition Board concludes that the transaction creates or strengthens a dominant position and significantly lessens 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) are subject to monetary fines and sanctions, highlighted in question 19.

In any case, regardless of whether the transaction would have been rejected had it been notified, 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 is also imposed.

In addition, a notifiable merger or acquisition, not notified to or approved by the Competition Board shall be deemed as legally invalid with all its legal consequences.

17. If there is a suspension requirement, is it possible to apply for a derogation in order to close before approval is granted? If so, under what circumstances?
Unlike the EU merger control rules, once the jurisdictional thresholds are exceeded, there are no exceptions for filing a notification under the Turkish merger control regime. The derogation regime does not exist.

18. Are any other exceptions (carve-outs etc) available to allow parties to close/implement prior to approval?
The Competition Board has so far constantly dismissed carve-out

arrangements. The issue of whether this position will change Communiqué No. 2010/4 remains to be seen.

19. What are the possible sanctions for failing to notify a transaction?
In the event that the parties to a merger or an acquisition which requires the approval of the Competition Board realise the transaction without the approval of the Competition 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 (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) shall be imposed on the incumbent firms (acquirer(s) in the case of an acquisition; both merging parties in the case of a merger), regardless of the outcome of the Competition Board's review of the transaction. The minimum amount of monetary fine imposed for failing to notify a transaction is TL 14.651 for 2013.

Another important sanction is set out under Article 7 of the Competition Law: a notifiable merger or acquisition which is not notified to and approved by the Competition Board shall be deemed as legally invalid with all its legal consequences.

Furthermore, pursuant to Article 9/1 of the Competition Law, should the Competition Board find any infringement of Article 7, it shall order the parties concerned, by a resolution to take the necessary actions in order to restore the same status as before the completion of the transaction infringing the Competition Law, and thereby restore the pre-transaction level of competition. Similarly, the Competition Law authorises the Competition Board to take interim measures until the final resolution on the matter, in case there is a possibility for serious and irreparable damage to occur.

If, at the end of its review of a notifiable transaction that was not notified, the Competition Board decides that the transaction falls within the prohibition of Article 7 of the Competition Law (in other words, it creates or strengthens a dominant position and causes a significant decrease in competition), the undertakings shall be subject to fines of up to 10 per cent of their turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees and managers of parties 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 respective party. In determining the monetary fines, the Competition Board shall take into consideration the existence of wilful misconduct, intent, economic power of the entities concerned, level of fault and amount of possible damage in the relevant market, as well as the market power of the undertaking or undertakings within the relevant market.

In addition to the monetary sanction, the Competition 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.

20. What are the possible sanctions for implementing a transaction prior to receiving approval (so-called 'gun-jumping')?

Turkish merger control legislation provides for a clear suspension requirement concerning the implementation of a notifiable concentration until clearance by the Turkish Competition Board. As also explained in question 19, the Turkish merger control regime indicates that a notifiable concentration is invalid with all its legal consequences, unless and until it is approved by the Competition Board. The implementation of a notifiable transaction is suspended until clearance by the Turkish Competition Authority is obtained. Therefore, a notifiable merger or an acquisition shall not be legally valid until the approval of the Competition Board, and such notifiable transaction cannot be closed in Turkey before the clearance of the Turkish Competition Authority.

If a merger or an acquisition is closed before clearance, the substantive nature of the concentration plays a significant role in determining the consequences. If the Competition Board concludes that the transaction creates or strengthens a dominant position and significantly lessens 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 will be subject to the monetary fines and sanctions highlighted in question 19. In any case, regardless of whether the transaction would have been rejected had it been notified, 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 is also imposed.

21. What are the possible sanctions for implementing a transaction despite a prohibition decision or in breach of a condition/obligation imposed by a conditional clearance decision?

The Competition Board will impose a monetary fine if the parties implement a transaction despite a prohibition decision or if the parties breach a condition/obligation that is imposed by a conditional clearance decision. As explained in question 19, in the event that the parties to a merger or an acquisition which requires the approval of the Competition Board realise the transaction without the approval of the Competition 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 (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) shall be imposed on the incumbent firms (acquirer(s) in the case of an acquisition; both merging parties in the case of a merger), regardless of the outcome of the Competition Board's review of the transaction.

Article 17 of the Competition Law introduces periodic monetary fines to be imposed on the undertakings, associations of undertakings or members of

the latter at a rate equivalent to 0.05 per cent (for each day) of their annual turnover generated in the financial year preceding the date of the decision in order to comply with the obligations imposed by a conclusive decision, preliminary injunction or commitments undertaken by the entities.

22. What are the different phases of a review? Is there any way to speed up the review process?

The review consists of two phases:

- *Preliminary review (phase 1)*. The Competition Board, on its preliminary review (phase 1) of the notification decides either to approve or to investigate the transaction further (see below, phase 2). The Competition Board notifies the parties of the outcome within 30 days following a complete filing. The notification is deemed filed when received in complete form by the Competition Authority. If the information requested in the notification form is incorrect or incomplete, the notification is deemed filed only on the date when this information is completed on the Competition Board's subsequent request for further data. There is an implied approval mechanism where a tacit approval is deemed if the Turkish Competition Board does not react within 30 calendar days upon a complete filing.
- *Investigation (phase 2)*. If a notification leads to an investigation (phase 2), it becomes a fully fledged investigation. Phase 2 must be completed within six months from the date when the Competition Board decides to open an investigation. If deemed necessary, the Competition Board can extend this period only once, for an additional period of up to six months.

During either phase, the Competition Authority can send written requests to the parties to the transaction, any other party relating to the transaction or third parties such as parties' competitors, customers or suppliers.

If the Competition Authority asks for another public authority's opinion in reviewing a transaction, the applicable time periods for the deemed approval mechanism (see above, preliminary review (phase 1)) automatically restart from day one as of the date on which the relevant public authority submits its opinion to the Competition Authority.

There is no way to speed up the process.

23. Is there a possibility for a 'simplified' procedure or shorter notification form and, if so, under what conditions would this apply?

There is now a short-form notification (without a fast-track procedure) if either:

- a transition from joint control to full control is involved; or
- the total of the parties' respective market shares is less than 20 per cent in horizontally affected markets and one party's market share is less than 25 per cent in vertically affected markets.

In this case, the information requested in sections 6, 7 and 8 of the notification form regarding the information on affected markets, market entry conditions and potential competition, and efficiency gain is not required.

24. What types of data and what level of detail is required for a notification?

Communiqué No. 2010/4 has introduced a new and much more complex notification form, which is similar to Form CO of the European Commission. One hard copy and an electronic copy of the merger notification form must be submitted to the Competition Board.

There is also an increase in information requested, including data with respect to supply and demand structure, imports, potential competition, expected efficiencies and so on.

25. In which language(s) may notifications be submitted?

The notification must be submitted in Turkish.

26. Which documents must be submitted along with a notification?

Some additional documents along with a notification are also required, such as:

- the executed or current copies, and sworn Turkish translations, of some of the transaction documents; and
- annual reports, including balance sheets of the parties and their Turkish subsidiaries. If available, market research reports for the relevant market.

27. What are the possible sanctions for providing incorrect, misleading or incomplete information in a notification?

If the information requested in the notification form is incorrect or incomplete, the notification is deemed filed only on the date when this information is completed on the Competition Board's subsequent request for further data.

In addition, the Competition Authority can impose a turnover-based monetary fine if the undertakings or associations of undertakings provide incorrect or misleading information either: (i) in a notification filed for exemption or negative clearance, or for the approval of a merger or acquisition; or (ii) in connection with notifications and applications concerning agreements made before the Competition Law entered into force. This fine amounts to 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (or, if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision is taken into account). This fine can be imposed on:

(i) natural persons; and
(ii) legal entities which qualify as an undertaking or as an association of undertakings, or members of these associations. The liable parties are the acquirer(s) in the case of an acquisition or both merging parties in the case of a merger.

28. To what extent is the relevant authority available for pre-notification discussions? Are pre-notification consultations customary?

There are no pre-notification discussions that are held with the Competition

Board. However, the notification process differs for the privatisation tenders. According to Communique No. 2013/2, a pre-notification is made before the tender and notifications of the bidders are submitted to the Competition Board following the tender by the Privatisation Authority.

29. Where pre-notification consultations are possible, what measures does the relevant authority take to ensure that such discussions are treated confidentially?

There are no pre-notification discussions that are held with the Competition Board. See question 28.

30. At what point and in what forum does the relevant authority make public the fact that a notification has been made?

All final decisions of the Competition Board are published on the Competition Authority's website after confidential business information is removed. Communiqué No. 2010/4 introduced a mechanism in which the Competition Authority publishes the notified transactions on its official website (*www. rekabet.gov.tr*), including only the names of the parties and their areas of commercial activity. Therefore, once notified to the Competition Authority, the existence of a transaction is no longer a confidential matter.

31. Once the authority has issued its decision, what information about the transaction and the decision is made publicly available?

See question 30.

SUBSTANTIVE ASSESSMENT OF THE MERGER, ROLE OF THIRD PARTIES AND REMEDIES

32. What is the substantive test for assessing the legality of a notified transaction?

The substantive test is a typical dominance test. The Competition Board clears 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 (Article 7, Competition Law and Article 13, Communiqué No. 2010/4).

Article 3 of the Competition Law defines dominant position as any position enjoyed in a certain market by one or more undertakings, by virtue of which those undertakings have the power to act independently from their competitors and purchasers in determining economic parameters, such as the amount of production, distribution, price and supply. However, the substantive test is a two-prong test and a merger or acquisition can only be blocked when the concentration not only creates or strengthens a dominant position but also significantly impedes the competition in the whole territory of Turkey or in a substantial part of it.

33. What theories of harm are considered by the authority in assessing the transaction? How concerned are the authorities with non-horizontal (eg, vertical or conglomerate) effects, and are any other theories of harm analysed (eg, coordination in the case of joint ventures)?

Unilateral effects have been the predominant criteria in the Turkish Competition Authority's assessment of mergers and acquisitions in Turkey. That said, in recent years, there have been a couple of exceptional cases where the Competition Board discussed the coordinated effects under a 'joint dominance test', and rejected the transaction on those grounds. These cases related to the sale of certain cement factories by the Savings Deposit Insurance Fund. The Competition Board evaluated the coordinated effects of the mergers under a joint dominance test and blocked the transactions on the ground that the transactions would lead to joint dominance in the relevant market. The Board took note of factors such as 'structural links between the undertakings in the market' and 'past coordinative behaviour', in addition to 'entry barriers', 'transparency of the market' and the 'structure of demand'. It concluded that certain factory sales would result in the establishment of joint dominance by certain players in the market whereby competition would be significantly impeded.

Regarding one such decision, when an appeal was made before the Council of State it ruled by mentioning, *inter alia*, that the Competition Law prohibited only single dominance and therefore stayed the execution of the decision by the Competition Board, which was based on collective dominance. No transaction has been blocked on the grounds of 'vertical foreclosure' or 'conglomerate effects' yet. A few decisions discuss those theories of harm.

Additionally, the Guidelines on the Assessment of Non-horizontal Mergers and Acquisitions ('Non-horizontal Guidelines') and Guidelines on the Assessment of Horizontal Mergers and Acquisitions ('Horizontal Guidelines') were published on 12 September 2013. The above-mentioned guidelines put forward the general principles of the Competition Board while assessing the non-horizontal and horizontal mergers and acquisitions. With these guidelines, the Competition Authority set forth its perspective concerning the review of the merger and acquisition transactions. The guidelines are in line with EU competition law regulations.

In addition, under the Turkish merger control regime, the Competition Board assessed the coordination in case of joint venture with a specific section in the notification form.

34. Are non-competition issues, such as industrial policy or labour policy, commonly taken into account in the assessment of the transaction?

The Competition Board's decision will be deemed to also cover only the directly related and necessary extent of restraints in competition brought by the concentration (eg, non-compete, non-solicitation, confidentiality etc). This will allow the parties to engage in self-assessment, and the Competition

Board will not have to devote a separate part of its decision to the ancillary status of all restraints brought with the transaction anymore. Non-competition issues are in principle not taken into account.

35. Are economic efficiencies considered as a mitigating factor in the substantive assessment?

Efficiencies are openly recognised and discussed under Article 13 of Communiqué No. 2010/4. The wording of the provision allows an inference that efficiencies will be taken into consideration in favour of approving the transaction only to the extent they demonstrably serve consumer welfare maximisation objectives, and that the total welfare maximisation benefits will not lead to a dramatic impact unless it trickles down specifically to consumers.

36. Does the relevant authority typically cooperate/share information with authorities in other jurisdictions?

The Competition Authority can notify and request the European Commission to apply relevant measures if the Competition Board believes that cartels organised in the territory of the EU adversely affect competition in Turkey (Article 43, Decision No. 1/95 of the EC–Turkey Association Council (Decision No. 1/95)). The provision grants reciprocal rights and obligations to the parties, and therefore the European Commission has the authority to request the Competition Board to apply relevant measures to restore competition in relevant markets.

There are also a number of bilateral cooperation agreements between the Competition Authority and the competition agencies in other jurisdictions (eg, Romania, South Korea, Bulgaria, Portugal, Bosnia-Herzegovina, Russia, Croatia, Austria, Turkish Republic of Northern Cyprus, Egypt, Kazakhstan and Mongolia) on cartel enforcement matters.

The Competition Authority's research department has periodic consultations with relevant domestic and foreign institutions and organisations about the protection of competition, to assess their results, and submits its recommendations to the Competition Board. In this respect, a cooperation protocol was signed on 14 October 2009 between the Competition Authority and the Public Procurement Authority to procure a healthy competition environment with regard to public tenders by cooperating and sharing information.

37. To what extent are third parties involved in the review process?

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. If the Competition Authority asks for another public authority's opinion, this would cut the review period and restart it anew from day one.

38. Is it possible for the parties to propose remedies for potential competition issues?

Article 14 of Communiqué No. 2010/4 enables the parties to provide

commitments to remedy substantive competition law issues of a concentration under Article 7 of the Competition Law. The parties may submit to the Competition Board proposals for possible remedies either during the preliminary review or the investigation period. If the parties decide to submit the commitment during the preliminary review period, the notification is deemed filed only on the date of the submission of the commitment. The commitment can be also served together with the notification form. In such a case, a signed version of the commitment that contains detailed information on the context of the commitment should be attached to the notification form.

Strategic thinking at the time of filing is somewhat discouraged through an explicit language confirming that the review periods would start only after the filing is made. This is already the current situation in practice, but now it is explicitly stated. The Competition Board is now explicitly given the right to secure certain conditions and obligations to ensure the proper performance of commitments.

39. What types of remedies are likely to be accepted by the authority (eg, divestment remedies, other structural remedies, behavioural remedies etc)?

The parties to a transaction may present some additional divestment, licensing or behavioural commitments to help resolve potential issues that may be raised by the Competition Board. These commitments are increasing in practice and may either be foreseen in the transaction documents or may be given during the review process or an investigation.

In particular, the form and content of the divestment remedies vary significantly in practice. Examples of the Competition Board's pro-competitive divestment remedies include divestitures, ownership unbundling, legal separation, access to essential facilities, obligations to apply non-discriminatory terms etc. There is no standard approach to the terms and conditions to be applied to a divestment.

40. What power does the relevant authority have to enforce a prohibition decision?

The Competition Board has the power to prohibit the transaction that has not met the relevant conditions sought by both the Competition Law as well as by Communiqué No. 2010/4. In other words, as per the authority bestowed on it by the Competition Law, the Competition Board need not apply to any national court in order to enforce any prohibition decision or formally prohibit a transaction nor does it have to enforce its decisions extraterritorially in light of the duties and powers of the Competition Board as stipulated in Article 27 of the Competition Law.

JUDICIAL REVIEW

41. Is it possible to challenge decisions approving or prohibiting transactions? If so, before which court or tribunal?

As per Law No. 6352, which took effect on 5 July 2012, the administrative

sanction decisions of the Competition Board can be submitted to judicial review before the administrative courts in Ankara.

Final decisions of the Competition Board, including its decisions on interim measures and fines, can be submitted to judicial review before the administrative court by filing an appeal case within 60 days of receipt by the parties of the Competition Board's reasoned decision. Filing an administrative action does not automatically stop the execution of the Competition Board's decision (Article 27, Administrative Procedural Law). However, on the claimant's request, the court, providing its justifications, can decide stop the decision's execution if both:

- the decision's execution is likely to cause serious and irreparable damages; and
- the decision is highly likely to be against the law.

Decisions of courts in private suits are appealable before the Council of State.

42. What is the typical duration of a review on appeal?

The judicial review period before the administrative court usually takes about 24 to 30 months. If the challenged decision is annulled in full or in part, the administrative court remands it to the Competition Board for review and reconsideration.

The appeal process in private suits is governed by the general procedural laws and usually takes more than 18 months. (See question 41.)

43. Have there been any successful appeals?

In 2011, there were 12 appeals that were made with respect to the decisions of the Competition Board, and which were reviewed again by the Competition Board following their appeals. In 2012, there were 12 appeals.

STATISTICS

44. Approximately how many notifications does the authority receive per year?

The Competition Authority receives approximately 200 notifications per year.

45. Has the authority ever prohibited a transaction? How many prohibition decisions has the authority issued in the past five years?

Under Law No. 4054 and Communiqué 2010/4, the Competition Authority can prohibit a transaction. Statistical information with respect to the number of prohibition decisions that the Competition Authority has given is available for the past five years. The Competition Authority did not make any prohibition decisions in 2008, 2009, 2010, 2011 and 2012.

46. Over the past five years, in what percentage of cases have binding commitments been required in order to obtain clearance for a transaction?

From 2008 to October 2013, approximately 3 per cent of notified concentrations cleared with conditions.

47. How frequently has the authority imposed fines in the past five years?

Based on the statistical information made available by the Competition Board, over the past years the Competition Board imposed fines under the merger control regime for providing missing, misleading and incorrect information and realising a transaction without the clearance of the Competition Board.

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Merger Control

Provisions on merger control are a key element of almost all competition laws around the globe, from the United States to the European Union, from China to Brazil.

Today, the need to obtain merger control approvals is often the number one factor delaying the closing of M&A deals worldwide. While more countries have merger control laws than ever before, merger control regimes differ dramatically from one another, not only with regard to notification requirements, but also in other key elements such as timing and costs.

Managing multiple filings with a variety of competition authorities requires important skills in terms of knowledge, organisation and coordination.

This second edition of ‘Merger Control’ provides valuable insights and guidance to these complicated processes and will be of great assistance to corporations and their counsel.