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The International Comparative Legal Guide to:

Merger Control 2013

9th Edition

A practical cross-border insight into merger control

Published by Global Legal Group, with contributions from:

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Sub Editors

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Editor

Suzie Kidd

Senior Editor

Penny Smale

Group Consulting Editor

Alan Falach

Group Publisher

Richard Firth

Published by

Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

istockphoto

Printed by

Ashford Colour Press Ltd.
November 2012

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ISBN 978-1-908070-41-8

ISSN 1745-347X

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EDITORIAL

Welcome to the ninth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control in 54 jurisdictions.

All chapters are written by leading merger control lawyers and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Nigel Parr and Ruth Sander of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk.

Turkey



ELIG, Attorneys-at-Law

Gönenc Gürkaynak

1 Relevant Authorities and Legislation

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

The national competition authority enforcing the Law on Protection of Competition No. 4054 dated 13 December 1994 (the Competition Law) is the Turkish Competition Authority, a legal entity with administrative and economic independence. The Competition Authority consists of the Competition Board, Presidency and Main Service Units. In its capacity as the competent body of the Competition Authority, the Competition Board is responsible for, *inter alia*, reviewing and resolving notifications concerning mergers, acquisitions, and joint-ventures. The Competition Board consists of seven members and is seated in Ankara. The Main Service Units consists of five supervision and enforcement departments with sector-specific work distribution and they handle competition law enforcement work through approximately 120 case handlers along with a department of decisions, an economic analysis and research department, an information management department, an external relations, training and competition advocacy department, a strategy development, regulation and budget department and a cartel on-the-spot inspections support division.

1.2 What is the merger legislation?

The relevant legislation on merger control is the Competition Law and a *Communiqué* published by the Turkish 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 in order to gain legal validity. In accordance with this provision, *Communiqué* No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (the New *Communiqué*), published on 7 October 2010, replaces *Communiqué* No. 1997/1 on Mergers and Acquisitions Requiring the Approval of the Competition Board (the Old *Communiqué*) as of 1 January 2011, as the primary instrument in assessing merger cases in Turkey. The New *Communiqué* sets forth 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.

1.3 Is there any other relevant legislation for foreign mergers?

There is no other relevant legislation in Turkey for foreign mergers.

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

Banking Law No. 5411 provides that the provisions of articles 7, 10 and 11 of the Competition Law shall not be applicable on the condition that the sectoral share of the total assets of the banks subject to merger or acquisition does not exceed 20 per cent. The Competition 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 Banking Law No. 5411. Therefore, while the Competition 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 No. 5411. The competition legislation provides no special regulation applicable to foreign investments. However, there exist some special restrictions on foreign investment in other legislations, such as media.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught - in particular, how is the concept of "control" defined?

The New *Communiqué* defines the scope of the notifiable transactions in Article 5/I as follows:

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

The New *Communiqué* provides a definition of 'control', which does not fall far from the definition of this term in Article 3 of the Council Regulation No. 139/2004. According to Article 5/II of the New *Communiqué*: "*Control can be constituted by rights, agreements or any other means which, either separately or jointly, de facto or de jure, confer the possibility of exercising decisive influence on an undertaking. These rights or agreements are instruments which confer decisive influence in particular by ownership or right to use all or part of the assets of an undertaking, or by rights or agreements which confer decisive influence on the composition or decisions of the organs of an undertaking*".

Pursuant to the presumption regulated under Article 5/II of the New *Communiqué*: "*Control shall be deemed acquired by persons or undertakings which are the holders of the rights, or entitled to the*

rights under the agreements concerned, or while not being the holders of the said rights or entitled to rights under such agreements, have de facto power to exercise these rights”.

In short, much like the EC regime, mergers and acquisitions resulting in a change of control may be subject to the approval of the Competition Board. “Control” is understood to be the right to exercise decisive influence over day-to-day management or on long-term strategic business decisions; and it can be exercised *de jure* or *de facto*.

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 it leads to a change in the control structure of the target entity. The Competition Board’s precedents accept that acquiring *de facto* majority at general assembly meetings confers the acquirer *de facto* control over the target and leads to a change of control within the meaning of the *Communiqué* (see e.g. *Bouygues/Alstom*, 15 June 2006, 06-44/551-149; *Total/Cepsa*, 20 December 2006, 06-92/1186-355; *Jacobs/Adecco*, 14 April 2006, 06-27/319-74).

2.3 Are joint ventures subject to merger control?

Joint ventures are subject to notification to, and approval of, the Competition Board. Pursuant to Article 5/III of the New *Communiqué*, joint ventures that permanently meet all functions of an independent economic entity are deemed as a notifiable transaction. Article 13 of the New *Communiqué* provides that cooperative joint ventures are also subject to a merger control notification and analysis, on top of an individual exemption analysis, if warranted.

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

Article 7 of the New *Communiqué* brings new and only turnover-based thresholds if:

- the total turnover of the parties to a concentration in Turkey exceeds TL 100 million and the respective turnovers of at least two of the parties individually exceed TL 30 million; or
- the worldwide turnover of one of the parties exceeds TL 500 million and the Turkish turnover of at least one of the other parties exceeds TL 5 million.

If either condition is satisfied then the transaction may be subject to the Board’s approval.

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

No. However, merger control still applies to joint ventures even when there is no substantive overlap.

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

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. Merely sales into Turkey may trigger notification necessity, to the extent the thresholds are met and the transaction results in an overlap.

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

There is no such mechanism.

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?

Recent precedents determine the borderlines of the circumstances in which various stages of a merger or acquisition would constitute a single transaction or a series of transactions (see *Swicorp Co/Is Girisim*, 03 July 2008, 08-43/590-222). The answer to the question of whether the stage(s) in question amount to a separate and single-integrated transaction depends on whether such stage(s) lead to a change of control in and of themselves. (Please refer to question 2.1 for a definition of control for the purposes of the Turkish merger control regime.)

Article 5/IV provides that conditional transactions and closely-related 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, Article 8 provides that multiple transactions between the same undertakings realised over a period of two years are deemed as a single transaction.

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 and there is an overlap, there are no exceptions for filing a notification. There is no *de-minimis* exception. There is no specific deadline for filing but the filing should be made before the closing of the transaction. Under Article 10, a transaction is deemed “realised” on the date when the change in control occurs.

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

Except for joint ventures, non-overlap transactions that do not result in an affected market are not notifiable, even if the thresholds are exceeded. Overlap transactions are where: (i) two or more of the parties have commercial activities in the same product market (horizontal relationship); or (ii) at least one of the other parties is engaged in commercial activities in markets upstream or downstream the product market in which one party is active (vertical relationship). Transactions that do not fall within this definition are non-overlap transactions.

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

Monetary fines for failure to notify (mere violation of the suspension requirement)

In the event that the parties to a merger or an acquisition which requires the approval of the Competition Board realise the transaction without 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 (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 fine is TL 13,591 (around EUR 5,852 at the time of writing) for 2012.

Invalidity of the transaction

Another very important sanction is set out under Article 7 of the Turkish 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.

Termination of infringement and interim measures

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 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 Competition Board decides that the transaction falls within the prohibition of Article 7 (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 5 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, whether they comply with the commitments given, whether they assist with the examination, 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 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.

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

Under Article 10 of the New *Communiqué*, a transaction is deemed to be 'realised' (i.e. closed) on the date when the change in control occurs. It remains to be seen whether this provision will be interpreted by the Turkish Competition Authority in a way that provides the parties to a notification to carve out the Turkish jurisdiction with a hold-separate agreement. This has been rejected by the Turkish Competition Board so far (e.g. Turkish Competition

Board's Total SA decision dated 20 December 2006 and numbered 06-92/1186-355, and CVR Inc- Inco Limited decision dated 1 February 2007 and numbered 07-11/71-23), the Board arguing that a closing is sufficient for the suspension violation fine to be imposed, and that a further analysis of whether the change in control which actually took effect in Turkey is unwarranted.

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

It is advisable to file the transaction at least 45 calendar days before closing. The New *Communiqué* has introduced a much more complex notification form to be used in merger filings so the time frame required for the preparation of a notification form would be longer than the old regime.

The filing process differs for privatisation tenders. According to the *Communiqué* No. 1998/4, a pre-notification is done before the tender and notifications of the three highest bidders are submitted to the Competition Board following the tender by the Privatisation Authority.

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.

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 Competition Authority. The notification shall be submitted in Turkish. If the information requested in the Notification Form is incorrect or incomplete, the notification is deemed filed only on the date when such information is completed upon the Competition Board's subsequent request for further data.

The Competition Board, upon its preliminary review (i.e. Phase 1) of the notification will decide either to approve, or to investigate the transaction further (i.e. Phase 2). It notifies the parties of the outcome within 30 days following a complete filing. In the absence of any such notification, the decision is deemed to be an 'approval', through an implied approval mechanism introduced with the relevant legislation. While the timing in the Competition Law gives the impression that the decision to proceed with Phase 2 should be formed within 15 days, the Competition Board generally uses more than 15 days to form their opinion concerning the substance of a notification, and they are more sensitive about the 30-day deadline on announcement. The Competition Authority can send written requests to the parties of 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 "tacit approval" mechanism (i.e. review period) will start running anew from day 1 as of the date on which the relevant public authority has submitted its opinion to the Competition Authority.

If a notification leads to an investigation (Phase 2), it changes into a fully-fledged investigation. Under Turkish law, the investigation (Phase 2) takes about six months. If deemed necessary, this period may be extended only once, for an additional period of up to six months by the Competition Board.

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. 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, will be subject to the monetary fines and sanctions highlighted in question 3.3 above. 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.

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

The New *Communiqué* has introduced a new and much more complex notification form, which is similar to the Form CO of the European Commission. One hard copy and an electronic copy of the merger notification form shall be submitted to the Competition Board. The notification form itself is revised from the Old *Communiqué*; in parallel with the new notion that only transactions with a relevant nexus to the Turkish jurisdiction will be notified, there is an increase in information requested, including data with respect to supply and demand structure, imports, potential competition, expected efficiencies, etc. Some additional documents such as the executed or current copies and sworn Turkish translations of some of the transaction documents, annual reports including balance sheets of the parties, and, if available, market research reports for the relevant market are also required.

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?

With the New *Communiqué*, there is now a short-form notification (without a fast-track procedure) if: (i) a transition from joint control to full control is at stake; and (ii) 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. There are no informal ways to speed up the procedure.

3.10 Who is responsible for making the notification and are there any filing fees?

Article 10 of the New *Communiqué* provides that persons or undertakings that are parties to the transaction in question or their authorised representatives can make the filing, jointly or severally. The filing party should notify the other party of the filing. The incumbent firms for the fines applicable in cases of failure to notify a notifiable transaction/violation of the suspension requirement are

the acquirer(s) in the case of an acquisition and both merging parties in the case of a merger.

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

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

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

3.12 Will the notification be published?

The Competition Authority will publish the notified transactions on its official website (<http://www.rekabet.gov.tr>) with only the names of the parties, and their areas of commercial activity. To that end, once notified to the Turkish Competition Authority, the "existence" of a transaction will no longer be a confidential matter.

Moreover, the reasoned decision of the Competition Board is also published on the Competition 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?

It is a typical dominance test. As a matter of Article 7 of Law No. 4054 and Article 13 of the New *Communiqué*, mergers and acquisitions which do not create or strengthen a dominant position and do not significantly impede effective competition in a relevant product market within the whole or part of Turkey, shall be cleared by the Competition Board.

Article 3 of Law No. 4054 defines a dominant position as "any position enjoyed in a certain market by one or more undertakings by virtue of which, those undertakings have the power to act independently from their competitors and purchasers in determining economic parameters such as the amount of production, distribution, price and supply". 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.

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 the market share of both parties exceed 25 per cent for vertical overlaps. In cases where the market shares remain below these thresholds, the parties are at liberty to skip the relevant sections of the notification form on efficiencies. The Board may take into account efficiencies in reviewing a concentration to the extent they operate as a beneficial factor in terms of better-quality production and/or cost-savings such as reduced product development costs through the integration, reduced procurement and production costs, etc.

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

The Board's approval decision will be deemed to also cover only the directly related and necessary extent of restraints in competition brought by the concentration (e.g. non-compete, non-solicitation, confidentiality, etc.). This will allow the parties to engage in self-assessment, and the Board will not have to devote a separate part of its decision to the ancillary status of all restraints brought with the transaction anymore. Non-competition issues are, in principle, not taken into account.

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

Pursuant to Article 15 of the New *Communiqué*, 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 1.

4.5 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

Under Article 14 and Article 15 of the Competition Law, the Competition Authority may send requests for information and may carry out on-the-spot investigations. Monetary penalties are applicable in the case of non-compliance.

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, which was enacted in April 2010. *Communiqué* No. 2010/3 puts the burden of identifying and justifying information or documents as commercial secrets to the undertakings. Therefore, undertakings must request confidentiality from the Competition Board and justify their reasons for the confidential nature of the information or documents that are requested to be treated as commercial secrets. This request must be made in writing. While the Competition Board can also *ex officio* evaluate the information or documents, the general rule is that information or documents that are not requested to be treated as confidential are accepted as not confidential. The final decisions of the Competition Board are published on the website of the Turkish Competition Authority after confidential business information is taken out.

Moreover, under Article 25 of the Competition Law, the Board and personnel of the Competition Authority are bound with a legal obligation of not disclosing any trade secrets or confidential information they have acknowledged during their service.

On the other hand, the Competition Authority will publish the notified transactions on its official website (<http://www.rekabet.gov.tr>) with only the names of the parties, and their areas of commercial activity. To that end, once notified to the Turkish Competition Authority, the "existence" of a transaction will no longer be a confidential matter.

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

5.1 How does the regulatory process end?

The Competition Board may either render a clearance or a prohibition decision. It may also give a conditional approval. The reasoned decisions of the Competition Board are served on the representative(s) to the notifying party/parties and are also published on the website of the Competition Authority (<http://www.rekabet.gov.tr>).

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

Article 14 of the New *Communiqué* 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 an explicit language confirming that the review periods would 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 Guideline on the Remedies that would be Permitted by the Turkish Competition Authority in the Mergers and Acquisitions ("Remedy Guideline"), it is at parties' own discretion whether to submit a remedy. The Competition Board will neither impose any remedies nor *ex-parte* change the submitted remedy. In the event the Competition Board considers the submitted remedies insufficient, the Competition Board may enable the parties for making further changes on the remedies. If the remedy is still insufficient to resolve the competition problems, the Competition Board may not grant clearance.

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

According to the Remedy Guideline, remedies can be presented to the Authority at the time of notification, together with the notification form, or following the submission of the notification. If the Authority finds that a notified concentration raises competition concerns that it could significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, it will inform the parties to the transaction. Once the Authority informs them of the problematic nature of the concentration, the parties may seek to modify the concentration in order to resolve the competition concerns and thereby gain clearance.

As indicated under question 2.6, 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. Therefore, they are subject to the same Remedy Guideline to the extent they call for a mandatory filing before the Competition Authority.

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 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 also be served together with the notification form. In any case, a signed version of the commitment text that contains detailed information on the context of the commitment and a separate summary should be submitted to the Competition Authority. The Guideline also provides a form that shows the necessary information and documents regarding the commitment. Since the Guideline was only recently published, it has never been tested.

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 Competition Board's pro-competitive divestment remedies include divestitures, ownership unbundling, legal separation, access to essential facilities, obligations to apply non-discriminatory terms, etc.

All procedural steps and conditions are now described in the Guideline. As per the Guideline, the parties are required to submit detailed information regarding how the remedy would be applied and how it would resolve the competition authorities. The Guideline states that the parties can submit behavioural or structural remedies. It explains the 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?

No they cannot.

5.7 How are any negotiated remedies enforced?

As per the Guideline, in the case of a divestiture, a monitoring trustee is appointed by the parties in order to control the divestment process. Such appointment must be approved by the Competition Authority. Since the Guideline was only recently published, it has never been tested.

5.8 Will a clearance decision cover ancillary restrictions?

As explained in question 4.3, the Board's approval decision will be deemed to also cover only the directly related and necessary extent of restraints in competition brought by the concentration (e.g. non-compete, non-solicitation, confidentiality, etc.). This will allow the parties to engage in self-assessment, and the Board will not have to devote a separate part of its decision to the ancillary status of all restraints brought with the transaction anymore. In the event 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 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.

5.10 What is the time limit for any appeal?

The Competition 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 justified (reasoned) decision of the Board.

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

As discussed in question 3.6 in more detail, if the Competition Board does not notify the parties of the outcome within 30 days following a complete filing, the decision is deemed to be an 'approval', through an implied approval mechanism introduced with the relevant legislation.

6 Miscellaneous

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

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

Moreover, the research department of the Competition Authority makes periodic consultations with relevant domestic and foreign institutions and organisations.

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

6.2 Are there any proposals for reform of the merger control regime in Turkey?

A draft proposal amending the Competition Law was delivered to the Grand National Assembly of Turkey for its enactment however it has lapsed of time. Therefore, currently, there are not any proposals for reform.

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

The answers are correct as of 11 September 2012.



Gönenç Gürkaynak

ELIG, Attorneys-at-Law
Çitlenbik Sokak No. 12 Yıldız Mahallesi
Besiktas
34349 Istanbul
Turkey

Tel: +90 212 327 1724
Fax: +90 212 327 1725
Email: gonenc.gurkaynak@elig.com
URL: www.elig.com

Gönenç Gürkaynak holds an LL.M. degree from Harvard Law School, and he is qualified in Istanbul, New York and England and Wales (currently a non-practising Solicitor). Mr. Gürkaynak heads the competition law and regulatory department of **ELIG**, which currently consists of 12 associates. He has unparalleled experience in Turkish competition law issues with over 12 years of competition law experience, starting with the establishment of the Turkish Competition Authority. He files notifications to and obtains clearances from the Turkish Competition Authority in more than 35 notifications every year, he has led defence teams in several written and oral defences before the Turkish Competition Authority, represented numerous multinational companies and large Turkish entities before Administrative Courts and the High State Court on tens of appeals, 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. Prior to joining **ELIG** as a partner more than seven years ago, he worked at the Istanbul, New York, Brussels and again in Istanbul offices of White & Case LLP for more than eight years.

ELIG

Attorneys at Law

ELIG aims at providing its clients with high-quality legal service in an efficient and business-minded manner. All members of the **ELIG** team are fluent in English.

ELIG represents corporations, business associations, investment banks, partnerships and individuals in a wide variety of competition law matters. The firm also collaborates with many international law firms on Turkish competition law matters.

In addition to an unparalleled experience in merger control issues, **ELIG** has vast experience defending companies before the 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 a 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** 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.

So far in 2012, **ELIG** was involved in more than 35 clearances of merger notifications, more than 17 defence projects in investigations, and over eight appeals at the High State Council; together with approximately 37 antitrust education seminars provided to the employees of clients.

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59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk