The Merger Control Review

Third Edition

Editor
Ilene Knable Gotts

Law Business Research

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THIRD EDITION

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EDITOR'S PREFACE

Perhaps one of the most successful exports from the United States has been the adoption of mandatory pre-merger competition notification regimes in jurisdictions throughout the world. Although adoption of pre-merger notification requirements was initially slow – with a 13-year gap between the enactment of the United States' Hart-Scott-Rodino Act in 1976 and the adoption of the European Community's merger regulation in 1989 – such laws were implemented at a rapid pace in the 1990s, and many more were adopted and amended during the past decade. China and India have just implemented comprehensive pre-merger review laws, and although their entry into this forum is recent, it is likely that they will become significant constituencies for transaction parties to deal with when trying to close their transactions. Indonesia also finally issued the government regulation that was needed to implement the merger control provisions of its Antimonopoly Law. Many of the jurisdictions that were 'early adopters' have either refined their processes and procedures in substantial ways or have proposals pending to do so, typically to conform their regime with the pre-merger regimes of other jurisdictions (e.g., Brazil, Canada and the UK). This book provides an overview of the process in each of the jurisdictions as well as a discussion of recent decisions, strategic considerations and likely upcoming developments in each of these. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

As shown in further detail in the chapters, some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions either already vest exclusive authority to transactions in one agency or are moving in that direction (e.g., Brazil, France and the UK). The US and China may end up being the outliers in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are a few jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia

and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. But, there are some jurisdictions that take a more expansive view. For instance, Turkey recently issued a decision finding that a joint venture ('JV') that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. Germany also takes an expansive view, by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the UK and Venezuela), the vast majority impose mandatory notification requirements.

Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, the Netherlands, Romania, Spain and Turkey). Some jurisdictions impose strict time frames by which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Brazil requires that the notification be made within 15 business days of execution of the agreements; and Hungary and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina and Serbia) for mandatory pre-merger review by federal antitrust authorities.

Most jurisdictions more closely resemble the European Union model than the US model. In these jurisdictions, pre-filing consultations are more common (and even encouraged), parties can offer undertakings during the initial stage to resolve competitive concerns, and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japanese Federal Trade Commission ('JFTC') announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU model. For instance, in Austria the obligation to file can be triggered if only one of the involved undertakings has sales in Austria as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are even to be provided with a redacted copy of the merger notification and have the right to participate in Tribunal merger hearings and the Tribunal will typically permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EU and Germany), third parties may file an objection against a clearance.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The US is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period for challenging a notified transaction.

As discussed below, it is becoming the norm in large cross-border transactions raising competition concerns for the US, EU and Canadian authorities to work closely with one another during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with that in Brazil, and Brazil's CADE has worked with Chile and with Portugal. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Serbia, Montenegro and Slovenia similarly maintain close ties and cooperate on transactions. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and EU on some mergers and entered into a cooperation agreement with the US authorities in 2011, and the US has also announced plans to enter into a cooperation agreement with India.

Minority holdings and concern over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, seem to be gaining increased attention in many jurisdictions, such as Australia. Some jurisdictions will consider as reviewable acquisitions in which only 10 per cent interest or less is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise 20 per cent of a target; and Japan and Russia, at any amount exceeding 20 per cent of the target). Jurisdictions will often require some measure of negative (e.g., veto) control rights, to the extent that it may give rise to *de jure* or *de facto* control (e.g., Turkey).

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the merger worldwide even though less than 10 per cent of each of the undertakings was attributable to Germany. Thus, it is critical from the outset for counsel to develop a comprehensive plan to determine how to navigate the jurisdictions requiring notification, even if the companies operate primarily outside some of the jurisdictions.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. As discussed in the last chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current

environment, obtaining the approval of jurisdictions such as China and Brazil can be as important as the approval of the US or EU. This book should provide a useful starting point in this important aspect of any cross-border transaction being contemplated in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2012

Chapter 41

TURKEY

Gönenç Gürkaynak and K Korhan Yıldırım[1]

I INTRODUCTION

The national competition agency for enforcing merger control rules in Turkey is the Turkish Competition Authority, a legal entity with administrative and financial autonomy. The Turkish Competition Authority consists of the Competition Board, Presidency and Service Departments. As the competent decision-making body of the Turkish Competition Authority, the Competition Board is responsible for, *inter alia*, reviewing and resolving merger and acquisition notifications. The Competition Board consists of seven members and is based in Ankara. The Service Departments consist of five technical units, one research unit, one leniency unit, one decisions unit, one information management unit, one external relations unit and one strategy development unit. There is a 'sectoral' job definition of each technical unit.

The relevant legislation on merger control is Law No. 4,054 on Protection of Competition and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board. The Competition Board has also issued guidelines to supplement and provide guidance on the enforcement of Turkish merger control rules. One of the guidelines is on market definition, which was issued in 2008. The guideline is closely modelled on the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (97/C372/03). The Competition Board has very recently released two comprehensive guidelines on merger control matters. The first is the guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions, covering certain topics and questions about the concepts of undertakings concerned, turnover calculations and ancillary restraints. It is closely modelled on Council Regulation (EC) No. 139/2004 on the Control of Concentrations between Undertakings. The second is the Guideline on Remedies Acceptable to the

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Turkish Competition Authority in Mergers and Acquisitions ('the Remedy Guideline'). The Remedy Guideline is an almost exact Turkish translation of the Commission Notice on Remedies Acceptable Under Council Regulation (EC) No. 139/2004 and Under Commission Regulation (EC) No. 802/2004.

Turkey is a jurisdiction with a suspensory pre-merger notification and approval requirement. Much like the EC regime, concentrations that result in a change of control are subject to the Competition Board's approval, provided that they reach the applicable thresholds. 'Control' is defined as the right to exercise decisive influence over day-to-day management or on long-term strategic business decisions of a company; and it can be exercised *de jure* or *de facto*.

Communiqué No. 2010/4 has abolished the market share thresholds and replaced them with turnover thresholds. The reasoning behind this move was to reduce the number of merger notifications and to help undertakings reach legal certainty more easily without needing to deal with market definitions and shares. A pre-merger notification and approval is required where either the total turnover of the transaction parties in Turkey exceeds 100 million lira, and turnover of at least two of the transaction parties in Turkey each exceeds 30 million lira; or the global turnover of one of the transaction parties exceeds 500 million lira, and at least one of the remaining transaction parties has a turnover in Turkey exceeding 5 million lira. Apart from joint ventures, transactions that do not affect a market do not trigger a pre-merger notification or approval requirement, even if they exceed the thresholds. Joint-venture transactions require pre-merger notification and approval if they exceed the thresholds, regardless of whether they result in an affected market or not. Foreign-to-foreign transactions are caught if they exceed the applicable thresholds and they affect a market – except for joint ventures for which the existence of an affected market is not sought.

The recently introduced Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions provides that a horizontal or vertical overlap between the worldwide activities of the transaction parties is sufficient to infer the existence of an affected market, provided that one of the transaction parties is active in such an overlapping segment in Turkey. The specific challenges posed by this new approach are outlined below in Section II.

Acquisition of a minority shareholding can constitute a notifiable merger if, and to the extent that, it leads to a change in the control structure of the target entity. Joint ventures that emerge as independent economic entities possessing assets and labour to achieve their objectives and do not aim at or effectively result in the restriction of competition among the parties, or between the parties and the joint venture itself, are subject to notification to, and approval of, the Competition Board. As per Article 13 of Communiqué No. 2010/4, cooperative joint ventures will also be subject to a merger control notification and analysis on top of an individual exemption analysis, if warranted.

The implementing regulations provide for important exemptions and special rules. In particular:

a Banking Law No. 5411 provides an exception from the application of merger control rules for mergers and acquisitions of banks. The exemption is subject to the condition that the market share of the total assets of the relevant banks does not exceed 20 per cent;

b mandatory acquisitions by public institutions as a result of financial distress, concordat, liquidation, etc., do not require a pre-merger notification;

c intra-corporate transactions are not notifiable;

d acquisitions by inheritance are not subject to merger control;

e acquisitions made by financial securities companies solely for investment purposes do not require a notification, subject to the condition that the securities company does not exercise control over the target entity in a manner that influences its competitive behaviour;

f multiple transactions between the same undertakings realised over a period of two years are deemed a single transaction for turnover calculation purposes. They warrant separate notifications if their cumulative effect exceeds the thresholds, regardless of whether the transactions are in the same market or sector, or whether they were notified before or not; and

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

There are also specific methods of turnover calculation for certain sectors. These special methods apply to banks, special financial institutions, leasing companies, factoring companies, securities agents and insurance companies. The Turkish merger control regime does not, however, recognise any *de minimis* exceptions.

Failing to file or closing the transaction before the Competition Board's approval can result in a turnover-based monetary fine. The fine is calculated according to the annual local Turkish turnover of the acquirer generated in the financial year preceding the fining decision at a rate of 0.1 per cent. It will be imposed on the acquirer party. In the case of mergers, it will apply to both merging parties. The monetary fine will, in any event, not be less than 13,591 lira. This monetary fine does not depend on whether the Turkish Competition Authority will ultimately clear the transaction.

If, however, there truly is a risk that the transaction is problematic under the dominance test applicable in Turkey, the Turkish Competition Authority may (1) *ex officio* launch an investigation into the transaction; (2) order structural and behavioural remedies to restore the situation as before the closing (*restitutio in integrum*); and (3) impose a turnover-based fine of up to 10 per cent of the parties' annual turnover. Executive members and employees of the undertakings concerned who are determined to have played a significant role in the violation (failing to file or closing before the approval) may also receive monetary fines of up to 5 per cent of the fine imposed on the undertakings. The transaction will also be invalid and unenforceable in Turkey.

The Competition Board has so far consistently rejected all carve-out or hold-separate arrangements proposed by merging undertakings.[2] Communiqué No. 2010/4 provides that a transaction is deemed to be 'realised' (i.e., closed) 'on the date when the

2 *Total/Cepsa*, 20 December 2006, 06-92/1186-355; *Ajans Press MedyaTakip AŞ/İnterpressMedya HizmetleriTicaret AŞ*, 21 October 2010, 10-66/1402-523.

change in control occurs'. While the wording of the new regulation allows some room to speculate that carve-out or hold-separate arrangements are now allowed, it remains to be seen if the Competition Authority will interpret this provision in such a way. As noted above, this has so far been consistently rejected by the Competition Board, arguing that a closing is sufficient for the suspension violation fine to be imposed, and that a further analysis of whether change in control actually took effect in Turkey is unwarranted.

II YEAR IN REVIEW

With the introduction of Communiqué No. 2010/4, the Competition Board was expected to shift its focus from merger control cases to concentrate more on the fight against cartels and cases of abuses of dominance. Raising the merger control thresholds and seeking the existence of an affected market for notifiability were considered as solid measures to decrease the number of merger notifications and were expected to result in significantly lower numbers. However, it appears that the new thresholds, questions and concerns as to the concept of affected market and the introduction of the new Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions have reversed this trend. First, the Guideline finds the existence of one or more overlaps at the global level sufficient to trigger a notification requirement, provided that one of the transaction parties has activities in Turkey in at least one of such overlap areas. Second, indications in practice show that undertakings are hesitant to take the interpretation risk over the concept of affected market and prefer to file a transaction to reach legal certainty. Third, the new merger control thresholds – and the alternative global turnover threshold in particular – still proved too low. As a result, the Competition Authority has publicly announced a significant increase in the number of merger control filings in 2011. This could signal that the Competition Board may be inclined to raise the thresholds up in the near future. While the Competition Board's initial purpose was to decrease merger control notifications and to concentrate on a much more rigorous antitrust enforcement, it appears that the new Guideline, low thresholds and questions over the concept of affected market have blocked this trend.

In 2011, the Competition Board granted unconditional clearances for the vast majority of transactions notified to it. Certain transactions fell to Phase II reviews,[3] whereas certain others received conditional clearances.

In *Diageo/Mey İçki*,[4] the Competition Board cleared the transaction but conditioned the clearance on the merger parties making certain commitments regarding the anti-competitive issues that might have arisen after the merger in the markets for gin and liquor.

3 Mey İçki (17.8.2011, 11-45/1043-356), Şok Market (17.8.2011, 11-45/1044-357), AFM-Mars Sinema (17.11.2011;11-57/1473-539); Samsung-Seagate(29.12.2011, 11-64/1656-586).

4 11-45/1043-356, 17.08.2011.

In *LurBerri/LBOF/Financière de Kiel,*[5] the Turkish Competition Board concluded that a JV transaction that produced no effect on Turkish markets (where the parties do not have any overlapping activities in any market in Turkey) was notifiable, and rendered an approval decision. The conclusion rested on the fact that the JV's products (festive food) 'could be' imported into Turkey, so the transaction 'could' potentially produce an impact on the Turkish market.

In *Galenica/Fresenius*,[6] the JV was established outside Turkey to do R&D and distribution activities for some kidney treatment medicines. The JV did not have a nexus with Turkey and the parties expected that the product would be distributed by as late as 2028. Despite all this, the Competition Board found that the transaction was notifiable and granted an 'approval' to it.

On the other hand, in *Sorgenia/KKR*,[7] the Competition Board did not find the transaction to be notifiable, since the JV's products (generation and wholesale of electricity) could not in any possible scenario be sold in Turkey due to direct infrastructure constraints.

In *International Paper Company*,[8] the Competition Board granted unconditional approval to the transaction in which the buyer had activities in Turkey but the target did not. It was decided that even if the target did not generate any turnover in Turkey, there was a horizontal overlap between the worldwide activities of the target and the buyer's subsidiary in Turkey.

All these precedents support a colourful debate on the 'effects theory' under Section 2 of Law No. 4054 as these recent approaches taken by the Competition Board have stirred considerable controversy among Turkish competition law circles. Having said that, these debates are all settled now, and the Turkish Competition Authority is quite entrenched in its belief that it must review and approve mergers even in cases where the transaction will not produce any effect on the Turkish markets in the foreseeable future.

In *Mars Sinema*,[9] after extensive evaluations and discussions, the Turkish Competition Board has cleared the transaction conditional upon divestment of certain assets.

There is an easily detectable increase in the number of joint venture cases. It is now becoming more common for transactions that have the purpose and effect of restricting competition and that bring about joint ventures to be considered within the scope of Communiqué No. 2010/4. This is especially observed in the *Park Bravo*[10] and *Jantsa*[11] cases.

5 12.12.2011, 11-61/1580-565.
6 11-59/1515-540, 24.11.2011.
7 14.07.2011, 11-43/919-288.
8 18.10.2011, 11-53/1347-476.
9 17.11.2011, 11-57/1473-539.
10 3.8.2011, 11-44/984-331.
11 21.12.2011, 11-62/1632-569.

The most important talking point concerning the Turkish merger control regime was undoubtedly the introduction of Communiqué 2010/4 and the new approaches adopted in the Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions. The main purpose of the Communiqué and Guideline was to clarify thresholds for businesses. However, they arguably have had the unintended effect of raising more questions than answers.

The Competition Authority has reviewed around 240 merger cases and has granted clearance to a large number of notifications. The consolidated statistics of the Turkish Competition Authority's merger control activity report indicated that a great number of mergers were in the chemicals, energy, computer/office equipment, machinery, food, transportation and financial services sectors in 2011 in Turkey.

Recent indications in practice show that 'remedies' and conditional clearances are becoming increasingly important in Turkish merger control enforcement. The number of cases in which the Competition Board decided on divestment or licensing commitments or other structural or behavioural remedies has increased dramatically over the past four years. Examples include some of the most important decisions in the history of Turkish merger control enforcement.[12]

In line with this trend, the Competition Authority issued the Remedy Guideline. The Remedy Guideline aims to provide guidance on remedies that can be offered to dismiss competition law concerns regarding a particular concentration that may otherwise be deemed as problematic under the dominance test. The Remedy Guideline sets out the general principles applicable to the remedies acceptable to the Competition Board, the main types of commitments that may be accepted by the Competition Board, the specific requirements that commitment proposals need to fulfil and the main mechanisms for the implementation of such commitments.

Another talking point continued to be the treatment of attorney–client privileged documents. After years of not respecting attorney–client privilege, the Competition Board has now developed a more sensitive and prudent approach to the issue. Before *Sanofi-Aventis*[13] and *CNR/NTSR*,[14] legal professional privilege was an extremely under-developed area of Turkish procedural law. In the past, it was debatable as to whether the Competition Board allowed any room for companies to exercise their right not to disclose information covered by any form of legal professional privilege during a dawn raid or when responding to a formal request for information. In *Sanofi-Aventis*, the Competition Board indirectly recognised that the principles adopted by the Court of Justice of the European Communities in *AM&S v. Commission*[15] might apply to attorney–client privileged documents in Turkish enforcement in the future. In *CNR/NTSR*, the Competition Board took even more major steps forward. It elaborated in

12 *Vatan/Doğan*, 10 March 2008, 08-23/237-75; ÇimSA/Bilecik, 2 June 2008, 08-36/481-169; *OYAK/Lafarge*, 18 November 2009, 09-56/1338-341; *THY/HAVAS*, 27 August 2009, 09-40/986-248; *Burgaz/MeyIckı*, 8 July 2010, 10-49/900-314.

13 20 April 2009, 09-16/374-88.

14 13 October 2009, 09-46/1154-290.

15 Case 155/79 AM&S *Europe v. Commission* [1982] ECR 1575.

detail the privilege rules applied in the EC and tacitly concluded that the same rules would apply in Turkish antitrust enforcement.

With the introduction of a new merger regulation, the form and content of merger control notifications have changed substantially. The Competition Board has modified the structure and content of the standard notification form to take into account the European Commission's Form CO master document. This now allows the Turkish Competition Authority experts to more easily and effectively review the competition parameters of the relevant market.

Second, the Competition Board is now more focused on competition parameters such as vertical integration, state of demand, state of supply, market entry and expansion, etc., in reviewing merger control filings.

Third, the Competition Board has broadened the exemptions provided in the current implementing regulations to cover more investment-related acquisitions.

Fourth, where a transaction takes place in stages, the Competition Board has clarified the principles to be applied in order to identify whether the various stages constitute a single transaction or a series of transactions.

Fifth, the Competition Board is now using much more complex methods for calculating turnovers.

Sixth, the notified transactions are being published on the Turkish Competition Authority's website during the review process. Once notified, the existence of the transaction is no longer a confidential matter, but the contents of the notification form remain confidential, as the announcements cover only the names of the undertakings concerned and their areas of commercial activity.

Finally, the Communiqué showed that the new statutory basis allows us to expect that the Competition Board may drop its rigid and dismissive approach to carve-out mechanisms by making it only relate to control effect in Turkey.

The recent enforcement actions suggest a more focused merger control enforcement in the near future, though some aspects of the new system are highly questionable. First, we were expecting to see a decline in the number of merger control notifications. Relatively higher thresholds were meant to operate in such a way that the Competition Board would no longer review low-profile transactions that have limited impact on the economy. The Competition Board was expected to shift its focus to cartel and dominance cases. This trend appears to have been reversed for reasons explained above.

Second, the time frame required to prepare a notification has increased slightly. That means that transacting parties that have a certain degree of professional need to close their transaction on a particular date must be diligent in preparing a notification a little earlier than past practice required.

Third, we are likely to see even more remedies in Turkish merger control enforcement due to a potential rise in strategic transactions in lieu of private equity or financial transactions and the recent dramatic increase in conditional clearances.

Fourth, we may hopefully see a change in the Competition Board's rigid approach to carve-out and hold-separate arrangements. Given that foreign-to-foreign transactions are increasingly significant in Turkish merger control enforcement, a new and softer approach to the problem would be a relief for foreign transaction parties.

Fifth, the Competition Board's approval decision is deemed to also cover the directly related and necessary extent of restraints in competition brought by the concentration (non-compete, non-solicitation, confidentiality, etc.). This will allow the parties to engage in self-assessment, and the Competition Board will no longer have to devote a separate part of its decision to the ancillary status of all restraints brought with the transaction.

III THE MERGER CONTROL REGIME

There is no specific deadline for making a notification in Turkey. There is, however, a suspension requirement (i.e., a mandatory waiting period): a notifiable transaction (whether or not it is problematic under the applicable dominance test) is invalid, with all the ensuing legal consequences, unless and until the Turkish Competition Authority approves it.

The notification is deemed filed when the Competition Authority receives it in its complete form. If the information provided to the Competition Board 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 notification is submitted in Turkish. Transaction parties are required to provide a sworn Turkish translation of the final, executed or current version of the transaction agreement.

The Competition Board, upon its preliminary review of the notification (i.e., Phase I), will decide either to approve or to investigate the transaction further (i.e., Phase II). It notifies the parties of the outcome within 30 calendar 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 wording of the law implies that the Competition Board should decide within 15 calendar days whether to proceed with Phase II, the Competition Board generally takes more than 15 calendar days to form its opinion concerning the substance of a notification. It is more sensitive to the 30-calendar-day deadline on announcement. Moreover, any written request by the Competition Board for missing information will stop the review process and restart the 30-calendar-day period at the date of provision of such information. In practice, the Turkish Competition Authority is quite keen on asking formal questions and adding more time to the review process. Therefore, it is recommendable that the filing be done at least 45 to 50 calendar days before the projected closing.

If a notification leads to a Phase II review, it turns into a fully fledged investigation. Under Turkish law, the Phase II investigation takes about six months. If necessary, the Competition Board may extend this period only once, for an additional period of up to six months. In practice, only extremely exceptional cases require a Phase II review, and most notifications obtain a decision between 30 and 45 to 50 days after the original date of notification.

The filing process differs for privatisation tenders. Communiqué No. 1998/4 provides that a pre-notification is done before the tender and notifications of the three highest bidders are submitted to the Competition Board following the Privatisation Authority's public privatisation tender. In the case of a public bid, the merger control

filing can be performed when the documentation adequately proves the irreversible intention to finalise the contemplated transaction.

There is no special rule for hostile takeovers; the Competition Board treats notifications for hostile transactions in the same manner as other notifications. If the target does not cooperate and if there is a genuine inability to provide information due to the one-sided nature of the transaction, the Turkish Competition Authority tends to use most of its powers of investigation or information request under Articles 14 and 15 of Law No. 4054.

Aside from close follow-up with the case handlers reviewing the transaction, the parties have no available means to speed up the review process.

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. The Competition Board uses this power especially to define the market and determine the market shares of the parties. Third parties, including the customers and competitors of the parties, and other persons related to the merger or acquisition, may request a hearing from the Competition Board during the investigation, subject to the condition that they prove their legitimate interest. They may also challenge the Competition Board's decision on the transaction before the competent judicial tribunal, again subject to the condition that they prove their legitimate interest.

The Competition Board may grant conditional clearance and make the clearance subject to the parties observing certain structural or behavioural remedies, such as divestiture, ownership unbundling, account separation, right of access, etc. As noted above, the number of conditional clearances has increased significantly in recent years.

Final decisions of the Competition Board, including its decisions on interim measures and fines, can be submitted for judicial review before the High State Court. The appellants may make a submission by filing an appeal within 60 days of the parties' receipt of the Competition Board's reasoned decision. Decisions of the Competition Board are considered as administrative acts. Filing an appeal does not automatically stay the execution of the Competition Board's decision. However, upon request of the plaintiff, the court may decide to stay the execution. The court will stay the execution of the challenged act only if (1) execution of the decision is likely to cause irreparable damages; and (2) there is a *prima facie* reason to believe that the decision is highly likely to violate the law.

The deadline to appeal the Competition Board's final decisions to the High State Court is 60 days starting from receipt of the reasoned decision. The appeal process may take up to two-and-a-half years.

IV OTHER STRATEGIC CONSIDERATIONS

With the recent changes in Law No. 4054, the Competition Board has geared up for a merger control regime focusing much more on deterrents. As part of that trend, monetary fines have increased significantly for not filing or closing a transaction without the Competition Board's approval. It is now even more advisable for the transaction parties to observe the notification and suspension requirements and avoid potential violations. This is particularly important when transaction parties intend to put in place carve-out

or hold-separate measures to override the operation of the notification and suspension requirements in foreign-to-foreign mergers. As noted above, the Competition Board is currently rather dismissive of carve-out and hold-separate arrangements, even though the wording of the new regulation allows some room to speculate that carve-out or hold-separate arrangements are now allowed. Because the position the Competition Authority will take in interpreting this provision is not yet clear, such arrangements cannot be considered as safe early-closing mechanisms recognised by the Competition Board.

Many cross-border transactions meeting the jurisdictional thresholds of Communiqué No. 2010/4 will require merger control approval in a number of other jurisdictions as well. The current indications in practice suggest that the Competition Board is willing to cooperate more with other jurisdictions in reviewing cross-border transactions.[16] Article 43 of Decision No. 1/95 of the EC–Turkey Association Council authorises the Turkish Competition Authority to notify and request the European Commission (Competition Directorate-General) to apply relevant measures. The Turkish Competition Authority may implement the provision if the Competition Board believes that transactions realised in the territory of the European Union adversely affect competition in Turkey. The provision grants reciprocal rights and obligations to the parties (EU and Turkey). Therefore, the European Commission has the authority to request that the Competition Board apply relevant measures to restore competition in relevant markets. Moreover, the research department of the Competition Authority periodically consults with relevant domestic and foreign institutions and organisations. The European Commission, however, 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.

V OUTLOOK AND CONCLUSIONS

A current proposal to change the entire competition law legislation is pending before Turkey's Grand National Assembly. If enacted, the proposal will bring about significant amendments to Law No. 4054, such as the introduction of *de minimis* exceptions. It is still uncertain, however, when the relevant proposal will be on the Grand National Assembly's agenda.

Subsequent to the enactment of the amendments, the Competition Board is expected to put in place important implementing regulations. The details of these regulations are not entirely clear as of yet.

As the number of conditional approvals has significantly increased in recent years, the Competition Board has finally issued a guideline to clarify the details of the methods for divestments and other remedies.

16 The trend for more zealous inter-agency cooperation is even more apparent in leniency procedures for international cartels.

Appendix 1

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Gönenç Gürkaynak holds an LLM degree from Harvard Law School, and he is qualified in Istanbul, New York, and England and Wales (currently a non-practising solicitor). He has unparalleled experience in all matters of Turkish competition law counselling with over 15 years' experience, starting with the establishment of the Turkish Competition Authority. Prior to joining ELIG as a partner more than seven years ago, Mr Gürkaynak worked as an attorney at the Istanbul, New York, Brussels and again in Istanbul offices of a global law firm for more than eight years. He also holds a teaching position at undergraduate and graduate levels at the Bilkent University Law School in the fields of competition law, and law and economics. Mr Gürkaynak heads the competition law and regulatory department of ELIG. ELIG consists of 30 lawyers, with 12 of them in the competition law and regulatory department. He has had many international and local articles published in English and in Turkish, and a book published by the Turkish Competition Authority.

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