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Turkey

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MERGER CONTROL

1. Are mergers and acquisitions subject to merger control in your jurisdiction? If so, what is the regulatory framework and what authorities are responsible for merger control?

Regulatory framework

The relevant legislation on merger control is:

- The Law on Protection of Competition No. 4054 dated 13 December 1994 (Competition Law).
- Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (New Communiqué), 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, the New Communiqué 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. The New Communiqué 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.

Regulatory authority

The national competition authority for enforcing the Competition Law is the Competition Authority, a legal entity with administrative and economic independence (*see box, The regulatory authority*).

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.
- Main Service Units, which comprise the following:
  - five supervision and enforcement departments;
  - department of decisions;
  - economic analyses and research department;
  - information management department;
  - external relations, training and competition advocacy department;
  - strategy development, regulation and budget department; and
  - cartel on-the-spot inspections support division.

  Each service unit has a sectoral job definition.

Triggering events/thresholds

2. What are the relevant jurisdictional triggering events/thresholds?

Triggering events

The following transactions may be notifiable (*Article 5/I, New Communiqué*):

- A merger of two or more undertakings.
- An acquisition or control by an entity or a person of:
  - another undertaking's assets; or
  - 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 (*see Question 3, Mandatory or voluntary* and *Question 37*).

The New Communiqué provides a definition of control, which is similar to the definition of control under Article 3 of Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation). Under 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 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, New Communiqué*):

- Are the holders of the rights.
- Are entitled to the rights under the agreements concerned.
- While not being the holders of the rights or entitled to rights under agreements, have *de facto* power to exercise these rights.

Thresholds

The New Communiqué provides new and turnover-based thresholds. The transaction may be subject to the Board's approval if either (*Article 7, New Communiqué*):

- The total turnover of the parties to a concentration in Turkey exceeds TRY100 million (as as 1 December 2011, US$1 was about TRY1.7) and the respective turnovers of at least two of the parties individually exceed TRY30 million. (In calculating the turnover, the Turkish Central Bank's average yearly rate in the year in which the turnover was generated should be used (*Article 8/6, New Communiqué*).)
- The worldwide turnover of one of the parties exceeds TRY500 million and the Turkish turnover of at least one of the other parties exceeds TRY5 million.

Notification

3. What are the notification requirements for mergers?

Mandatory or voluntary

Notification is mandatory once the thresholds (*see Question 2, Thresholds*) are exceeded and either:

- Two or more of the parties have commercial activities in the same product market (horizontal relationship).
- At least one of the other parties is engaged in commercial activities in markets upstream or downstream to the product market in which one party is active (vertical relationship).

Once the thresholds are exceeded, joint ventures are subject to the Competition Board's approval even if they do not result in affected markets (*see Question 37*).

There is no *de minimis* exception (*see Question 16*).

Timing

There is no specific deadline for filing but it is advisable to file the transaction at least 45 calendar days before closing. (A transaction is deemed closed on the date when the change in control occurs (*Article 10, New Communiqué*)).

The filing process differs for privatisation tenders. 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 Republic Of Turkey Prime Ministry Privatization Administration (*Communiqué No. 1998/4*).

A public bid can be notified at a stage where the documentation at hand adequately proves the irreversible intention to finalise the contemplated transaction.

Formal/informal guidance

Formal or informal guidance is not available.

Responsibility for notification

Persons or undertakings that are parties to the transaction in question, or their authorised representatives, can make the filing, jointly or severally (*Article 10, New Communiqué*). The filing party should notify the other party of the filing.

Relevant authority

Notification must be made to the Competition Authority.

Form of notification

Standard notification. The New Communiqué 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.

The notification form is revised in parallel with the new notion that only transactions with a relevant nexus (that is, an overlap) to Turkey will be notified. 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.

Some additional documents are also required, 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.
- If available, market research reports for the relevant market.

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

- A transition from joint control to sole control is involved.
- The total of the parties' respective market shares is less than 20% in horizontally affected markets and one party's market share is less than 25% 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.

Filing fee

There is no filing fee.

Obligation to suspend

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.

Irrespective of whether the transaction would have been rejected had it been notified, a turnover-based monetary penalty of 0.1% of the turnover generated in the financial year preceding the date of the fining decision in Turkey is also imposed (*see Question 9, Implementation before approval or after prohibition*).

Procedure and timetable

4. What are the applicable procedures and timetable?

It is advisable to file the transaction at least 45 calendar days before closing.

The procedure comprises two phases:

- **Preliminary review (Phase I).** The Competition Board, on its preliminary review of the notification decides either to approve or to investigate the transaction further (*see below, Investigation (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.

  If the Competition Board fails to notify the parties of its decision, the decision is deemed to be an approval, through an implied approval mechanism.

  The Competition Law implies that the decision to proceed to Phase 2 should be made within 15 days. However, the Competition Board generally requires more than 15 days to form its opinion on the substance of a notification, and they are more sensitive to the 30-day deadline for announcement.

- **Investigation (Phase II).** If a notification leads to an investigation, it becomes a fully fledged investigation. Phase II 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.

For an overview of the notification process, see flowchart, *Turkey: merger notifications*.

Publicity and confidentiality

5. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

Publicity

All final decisions of the Competition Board are published on the Competition Authority's website after confidential business information is removed. The New Communiqué introduced a new mechanism under 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.

Procedural stage

The main legislation regulating 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 places the burden of identifying and justifying information or documents as commercial secrets on the undertakings. In addition, the Competition Board and personnel of the Competition Authority have a legal obligation to not disclose any trade secrets or confidential information they have acknowledged as such during their service (*Article 25, Competition Law*) (*see below, Confidentiality on request*).

Automatic confidentiality

While the Competition Board can also evaluate the information or documents *ex officio*, the general rule is that information or documents that are not requested to be treated as confidential are accepted as not confidential.

Confidentiality on request

Undertakings must request in writing 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.

Rights of third parties

6. What rights (if any) do third parties have to make representations, access documents or be heard during the course of an investigation?

Representations

The Competition Board can request information from third parties, including the parties' customers, competitors and suppliers, and other persons related to the merger or acquisition (*Article 15, New Communiqué*) (*see Question 4*).

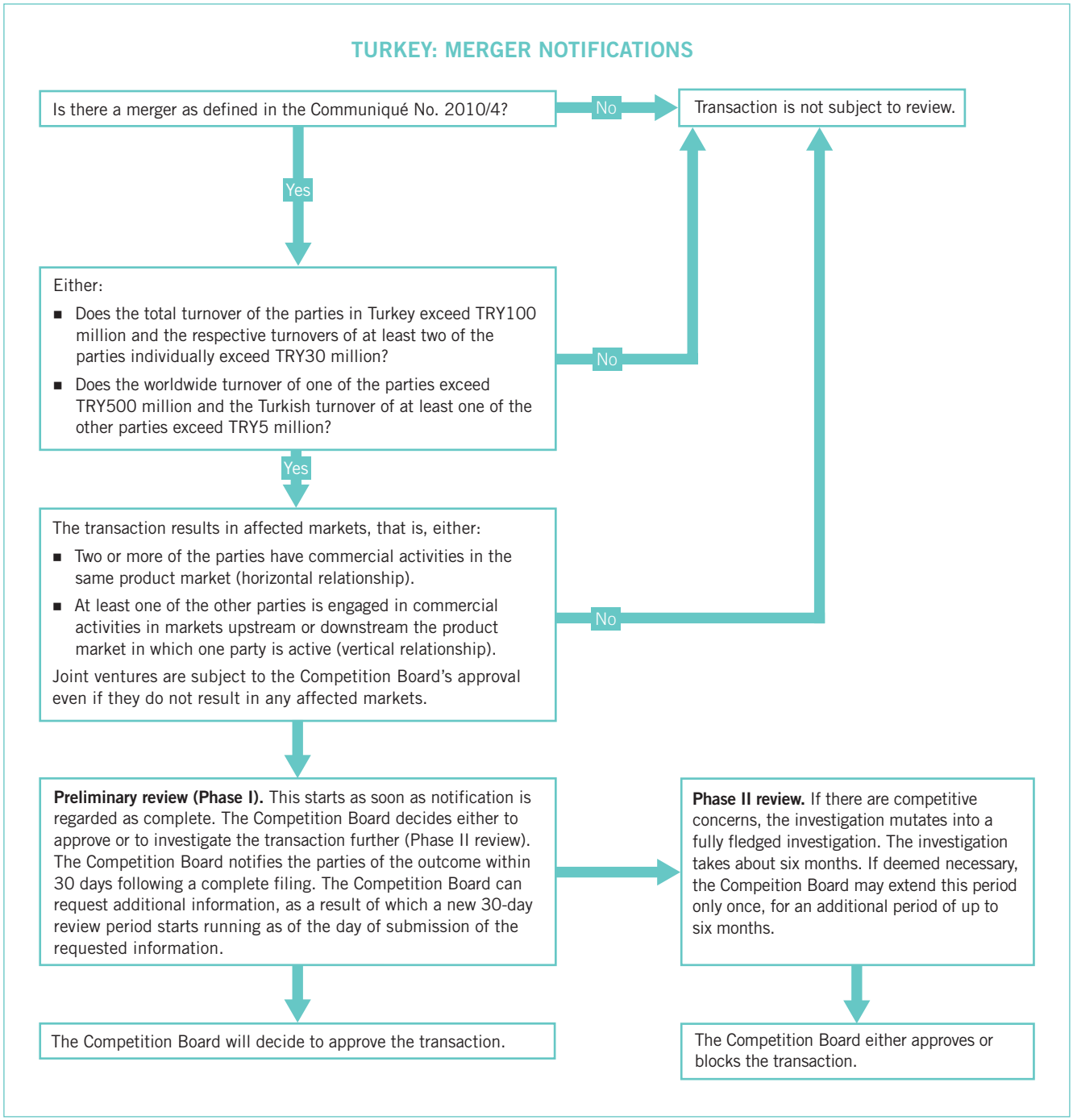
If the Competition Authority asks another public authority's opinion, the review period re-starts from day one (*see Question 4*).

Document access

The complainants and other third parties have a right to access the file (*Communiqué No. 2010/3 on Regulation of Right to Access to File and Protection of Commercial Secrets (Communique No. 2010/3)*). The right to access the file can be exercised on written request at any time until the end of the period for submitting the last written statement.

Be heard

The third parties can attend the oral hearing and be heard by submitting a petition and presenting information and documents that show their interest in the subject matter of the oral hearing.



Country Q&A

Substantive test

7. What is the substantive test?

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, New Communiqué*).

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.

Remedies, penalties and appeal

8. What remedies can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

The parties can provide commitments to remedy substantive competition law issues relating to a concentration under Article

7 of the Competition Law (*Article 14, Competition Law*). The Competition Board is now explicitly given the right to secure certain conditions and obligations to ensure the proper performance of commitments. The Competition Authority stipulates that structural and behavioural remedies may be imposed to restore the situation as before the closing (*restitutio in integrum*).

It is at parties' own discretion whether to offer a remedy (*Guideline on the Remedies that Would Be Permitted by the Turkish Competition Authority in the Mergers and Acquisitions (Guideline)*). The parties can submit behavioural or structural remedies (*Guideline*). The Competition Board will neither impose any remedies nor *ex parte* amend the submitted remedy. If the Competition Board considers the submitted remedies insufficient, it may enable the parties to make further changes to the remedies. If the remedies are still insufficient to resolve the competition concerns, the Competition Board cannot grant clearance.

The form and content of the divestiture remedies vary significantly in practice. Examples of the Competition Board's pro-competitive divestiture remedies include ownership unbundling, legal separation, access to essential facilities, obligations to apply non-discriminatory terms and so on. The Guideline sets out all of the applicable procedural steps and conditions. The parties must submit detailed information as to how the remedy would be applied and how it would resolve the competition concerns (*Guideline*).

The parties can submit to the Competition Board proposals for possible remedies either during the preliminary review (Phase I) or the investigation period (Phase II). If the parties decide to submit the commitments during Phase I, the notification is deemed filed only on the date of the submission of the commitments. The commitments can be also filed together with the notification form. In any case, a signed version of the commitments that contains detailed information on their context and a separate summary should be submitted to the Competition Authority. The Guideline also provides a form that lists the necessary information and documents to be submitted in relation to the commitments. Since the Guideline was recently published, it has never been tested.

9. What are the penalties for failing to comply with the merger control rules?

Failure to notify correctly

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

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:

- In a notification filed for exemption or negative clearance, or for the approval of a merger or acquisition.
- In connection with notifications and applications concerning agreements made before the Competition Law entered into force.

This fine amounts to 0.1% 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:

- Natural persons.
- 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.
- Both merging parties in the case of a merger.

Implementation before approval or after prohibition

If the parties to a notifiable merger or acquisition realise the transaction without approval of the Competition Board, a turnover-based monetary fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision is imposed. If this is not calculable, the fine is based on the turnover generated in the financial year nearest to the date of the fining decision. This is imposed on the following parties, irrespective of the outcome of the Competition Board's review of the transaction:

- The acquirer(s) in the case of an acquisition.
- Both merging parties in the case of a merger.

Fines for implementation of a transaction that creates or strengthens a dominant position, and significantly impedes effective competition in a relevant product market within the whole or part of Turkey, range from a mandatory minimum level (TRY13,591 in 2012) up to 10% of the violator's annual gross income in the preceding year (*Article 16, Competition Law*).

A notifiable merger or acquisition which is not notified to and approved by the Competition Board is deemed legally invalid, with all its legal consequences (*Article 7, Competition Law*).

Failure to observe

Periodic monetary fines can be imposed on the undertakings, associations of undertakings or members of the latter at a rate equivalent to 0.05% (for each day) of their annual turnover generated in the financial year preceding the date of the decision, to comply with:

- The obligations imposed by a conclusive decision.
- A preliminary injunction.
- Commitments undertaken by the entities.

10. Is there a right of appeal against any decision? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties or only the parties to the decision?

Rights of appeal and procedure

The Competition Board's final decisions can be submitted to judicial review before the Council of State by filing an appeal case within 60 days of the receipt by the parties of the Competition Board's reasoned decision. Rights of appeal are available only to the parties to the decision.

Third party rights of appeal

Third parties can challenge the Competition Board's decision before the competent judicial tribunal, subject to the condition that they prove their legitimate interest.

Automatic clearance of restrictive provisions

11. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

The Competition Board's approval decision is deemed to also cover only the directly related and necessary extent of restraints on competition brought by the concentration (for example, non-compete, non-solicitation and confidentiality). This allows the parties to engage in self-assessment. Therefore, the Competition Board no longer has to devote a separate part of its decision to the ancillary status of all restraints brought with the transaction. If the ancillary restrictions are not compliant, the parties may face an investigation under Article 4 of the Competition Law (*see Question 13*).

Regulation of specific industries

12. What industries (if any) are specifically regulated?

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 merger or acquisition does not exceed 20% (*Banking Law No. 5411*).

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.
- Foreign acquiring banks already operating in Turkey. The Competition Board does not apply the Competition Law to these transactions, under the exception rule in the 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.

RESTRICTIVE AGREEMENTS AND PRACTICES

Scope of rules

13. Are restrictive agreements and practices regulated? If so, what are the substantive provisions and regulatory authority?

The statutory basis for cartel prohibition is the Competition Law. The Competition Law finds its underlying rationale in Article 167 of the Turkish Constitution of 1982, which authorises the government to take appropriate measures and actions to secure free market economy. The Turkish cartel regime is administrative and civil in nature, not criminal. The Competition Law applies to individuals and companies, if and to the extent they act as an undertaking within the meaning of the Competition Law.

The applicable provision for cartel-specific cases is Article 4 of the Competition Law, which provides the basic principles of cartel regulation. The provision is closely modelled on Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (Article 101(1)). It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which have (or may have) as their object or effect the prevention, restriction or distortion of competition within, or within a part of, a Turkish product or services market. Similarly to Article 101(1), the provision does not provide a definition of cartel. It rather prohibits all forms of restrictive agreements, which would include any form of cartel agreement. Therefore, the scope of application of the prohibition extends beyond cartel activity.

Article 4 also prohibits any form of agreement which has the potential to prevent, restrict or distort competition. Similarly to Article 101(1), Article 4 of the Competition Law provides a non-exhaustive list of restrictive agreements. In particular, it prohibits agreements which:

- Directly or indirectly fix purchase or selling prices or any other trading conditions.
- Share markets or sources of supply.
- Limit or control production, output or demand in the market.
- Place competitors at a competitive disadvantage or involve exclusionary practices such as boycotts.
- Aside from exclusive dealing, apply dissimilar conditions to equivalent transactions with other trading parties.
- Make the conclusion of contracts, in a manner contrary to customary commercial practices, subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

The list is intended to generate further examples of restrictive agreements.

14. Do the regulations only apply to formal agreements or can they apply to informal practices? Are there broad categories of agreements that might violate the law?

A number of horizontal restrictive agreement types such as price-fixing, market allocation, collective refusals to deal (group boycotts) and bid-rigging have consistently been deemed to be *per se* illegal.

The Turkish anti-trust regime also condemns concerted practices, and the Competition Authority shifts the burden of proof in connection with concerted practice allegations onto the accused party, through the presumption of concerted practice mechanism.

A concerted practice is a form of co-ordination, without a formal agreement or decision, by which two or more companies come to an understanding to avoid competing with each other. The

Country Q&A

co-ordination need not be in writing. It is sufficient if the parties have expressed their joint intention to behave in a particular way, for example in a meeting, a telephone call or an exchange of letters.

Exemptions and exclusions

15. Are there any exemptions? If so, what are the criteria for individual exemption and any applicable block exemptions?

The prohibition on restrictive agreements and practices does not apply to agreements which benefit from a block exemption or an individual exemption issued by the Competition Board.

The block exemption rules currently applicable are the:

- Block Exemption Communiqué No. 2002/2 on Vertical Agreements.
- Block Exemption Communiqué No. 2005/4 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector.
- Block Exemption Communiqué No. 2003/2 on R&D Agreements.
- Block Exemption Communiqué No. 2008/3 for the Insurance Sector.
- Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements.

These block exemption *communiqués* are all modelled on EU law. Restrictive agreements that do not benefit from the block exemption under the relevant *communiqué* or individual exemption issued by the Competition Board are caught by the prohibition in Article 4 of the Competition Law.

The Competition Board can grant, on the parties' application, an individual exemption for agreements between undertakings if the agreement fulfils all of the following requirements:

- It ensures new developments and improvements, or economic or technical development in the production or distribution of goods and in providing services.
- It allows the consumer to benefit from these developments and improvements.
- It does not eliminate competition in a significant part of the relevant market.
- It does not impose a restraint on competition that is more than what is necessary to attain the objectives in the first two bullets above.

In this case, the agreement for which an individual exemption is granted is not subject to the prohibition in Article 4 of the Competition Law.

Exemption decisions may be granted for a certain period of time or indefinitely. Exemption decisions may be granted subject to the satisfaction of particular conditions or obligations. Once the granted exemption period expires, the exemption decision can be renewed on the application of the parties concerned, if the conditions for exemption still exist.

16. Are there any exclusions? Are there statutes of limitation associated with restrictive agreements and practices?

Exclusions

Unlike the TFEU, Article 4 of the Competition Law does not refer to appreciable effect or substantial part of a market, and therefore excludes any *de minimis* exception.

Statutes of limitation

Not applicable (*see above, Exclusions*).

Notification

17. What are the notification requirements for restrictive agreements and practices?

Notification

Agreements or actions falling within the scope of Article 4 of the Competition Law must be notified to the Competition Authority to obtain an individual exemption. No individual exemption provision is applied to agreements that are not notified to the Competition Authority.

Informal guidance/opinion

No informal guidance or opinion is available.

Responsibility for notification

Persons or undertakings that are parties to the transaction, or their authorised representatives, can make the filing, jointly or severally.

Relevant authority

The Competition Authority is the relevant authority.

Form of notification

One copy of the notification form (which is attached to the Guidelines on the Voluntary Notification of Agreements, Concerted Practices and Decisions of Associations of Undertakings) must be submitted to the Competition Board. Some additional documents are also required, such as:

- The executed copies and sworn Turkish translations of some of the documents.
- Annual reports, including balance sheets of the parties.
- If available, market research reports for the relevant market.

Filing fee

There is no filing fee.

Investigations

18. Who can start an investigation into a restrictive agreement or practice?

Regulators

The Competition Board can launch an investigation into an alleged cartel activity *ex officio*.

Third parties

Third parties can file a complaint to the Competition Board. A notice or complaint can be submitted verbally or through a petition.

19. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

Representations

The complainants can attend the oral hearing if they make a written request within the period determined by the Competition Board (*Communiqué No. 2010/2 on Oral Hearings Made Before the Competition Board (Communiqué No. 2010/2)* and *Article 6, Competition Law*).

Third parties can attend the oral hearing by submitting a petition and presenting information and documents that show their interest in the subject matter of the oral hearing. The Competition Board notifies its decision to the relevant persons before the hearing.

On the request of the investigation committee or *ex officio,* the Competition Board can also invite the other natural or legal persons whom it deems to be relevant, or from whom it needs to receive information, to the oral hearing. Following the presentation of the investigation committee, the Competition Board listens to (in this order):

- Any complainants.
- Third parties.
- The Ministry of Industry and Commerce.
- The undertakings subject to the investigation.

Document access

The complainants and other third parties have a right to access the file (*Communiqué No. 2010/3 on Regulation of Right to Access to File and Protection of Commercial Secrets (Communique No. 2010/3)*). The right to access the file can be exercised on written request at any time until the end of the period for submitting the last written statement.

Be heard

See above, *Representations*.

20. What are the stages of the investigation and timetable?

The Competition Board rejects a notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Competition Board remains silent for 60 days.

Pre-investigation

The Competition Board decides to conduct a pre-investigation, if it finds the notice or complaint to be serious. At this preliminary stage, unless there is a dawn raid (that is, an unannounced on-site inspection), the undertakings concerned are not notified that they are under investigation. Dawn raids and other investigatory tools (for example, formal information request letters) are used during this pre-investigation process.

The Competition Authority's experts' preliminary report is submitted to the Competition Board within 30 days after a pre-investigation decision is taken by the Competition Board. The Competition Board will then decide, within ten days from the receipt of the preliminary report, whether to launch a formal investigation or not. If the Competition Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 days.

Formal investigation

The investigation must be completed within six months. If deemed necessary, the Competition Board can extend this period only once, for an additional period of up to six months.

The following are the main stages of the formal investigation:

- The investigated undertakings have 30 calendar days as of the formal service of the notice to prepare and submit their first written defence.
- Subsequently, the Competition Authority issues its main investigation report.
- Once the main investigation report is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (second written defence).
- The investigation committee then has 15 days to prepare an opinion concerning the second written defence (additional opinion).
- The defending parties have another 30 days to reply to the additional opinion (third written defence).
- When the parties' responses to the additional opinion is served on the Competition Authority, the investigation process will be completed (that is, the written phase of investigation involving claim/defence exchange will close with the submission of the third written defence).

Oral hearings

An oral hearing must be held on the parties' request. The Competition Board can also *ex officio* decide to hold an oral hearing:

- Oral hearings are held within at least 30 and at most 60 days following the completion of the investigation process.
- The Competition Board renders its final decision within:
  - 15 calendar days from the hearing, if an oral hearing is held; or
  - 30 calendar days from the completion of the investigation process, if no oral hearing is held.

It usually takes around two to three months, from the announcement of the final decision, for the Competition Board to serve a reasoned decision on the parties concerned.

21. How much information is made publicly available concerning investigations into potentially restrictive agreements or practices? Is any information made automatically confidential and is confidentiality available on request?

This is the same as for mergers (*see Question 5*).

Country Q&A

22. What are the powers (if any) that the relevant regulator has to investigate potentially restrictive agreements or practices?

The Competition Law gives the Competition Authority considerable authority to conduct dawn raids. A judicial authorisation is obtained by the Competition Board only if the subject undertaking refuses to allow the dawn raid, which would also result in a monetary fine. The Competition Authority's experts fully examine computer records, including but not limited to the deleted items.

Officials conducting a dawn raid must have a deed of authorisation from the Competition Board. The deed of authorisation must specify the subject matter and purpose of the investigation. The inspectors are not entitled to exercise their investigative powers (copying records, recording statements by company staff and so on) in relation to matters which do not fall within the scope of the investigation (that is, the scope as described on the deed of authorisation).

The Competition Authority can also use formal information request letters when investigating potentially restrictive agreements or practices.

23. Can the regulator reach settlements with the parties without reaching an infringement decision? If so, what are the circumstances in which settlements can be reached and the applicable procedure?

Other than in relation to leniency (*see Question 24, Immunity/leniency*), the Competition Board does not enter into plea bargain arrangements.

Mutual agreements (which must take the form of an administrative contract) on other liability matters have not been tested in Turkey.

Penalties and enforcement

24. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice?

The sanctions that can be imposed under the Competition Law are administrative in nature. Therefore, breaches of Competition Law lead to administrative fines (and civil liability) but no criminal sanctions. However, there are circumstances where the matter is referred to a public prosecutor after the competition law investigation is complete. For example:

- Bid-rigging activity can be subject to criminal prosecution under sections 235 and following of the Criminal Code.
- Illegal price manipulation (that is, manipulation through disinformation or other fraudulent means) can also carry up to two years' imprisonment and a civil monetary fine under section 237 of the Criminal Code.

Orders

The Competition Board is authorised to take all necessary measures to:

- Terminate the restrictive agreement.
- Remove all factual and legal consequences of every action that has been taken unlawfully.
- Take all other necessary measures to restore the level of competition and status as before the infringement.

Apart from that, Article 9 of the Competition Law, which generally entitles the Competition Board to order structural or behavioural remedies to restore competition as before the infringement, sometimes operates as a conduit through which infringement allegations are settled before a full-blown investigation is launched.

Fines

In the case of proven cartel activity, the companies concerned are separately subject to fines of up to 10% of their Turkish 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 is taken into account).

The Competition Law refers to Article 17 of the Law on Minor Offences, to require the Competition Board to take into consideration, in determining the magnitude of the monetary fine, factors such as:

- The level of fault and amount of possible damage in the relevant market.
- The market power of the undertaking(s) within the relevant market.
- The duration and recurrence of the infringement.
- The co-operation or driving role of the undertaking(s) in the infringement.
- The financial power of the undertaking(s).
- Compliance with the commitments.

In line with this, the Competition Authority enacted the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance (Regulation on Fines). The Regulation on Fines sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an anti-trust violation. The Regulation on Fines applies to both cartel activity and abuse of dominance, but does not cover illegal concentrations.

Fines are calculated by (*Regulation on Fines*):

- First of all, determining the basic level. In the case of cartels, this is between 2% and 4% of the company's turnover in the financial year preceding the date of the fining decision (if this is not calculable, the turnover for the financial year nearest to the date of the decision).
- Then, factoring in aggravating and mitigating factors.

Personal liability

In the case of a proven cartel activity, employees and managers of the undertakings, or association of undertakings, that had a determining effect on the creation of the violation are also fined up to 5% of the fine imposed on the undertaking or association of undertakings. The Regulation on Fines also applies to managers or employees that had a determining effect on the violation (such as participating in cartel meetings and making decisions that would involve the company in cartel activity), and provides for certain reductions in their favour (*see above, Fines*).

Immunity/leniency

The Regulation on Active Cooperation for Discovery of Cartels (Regulation on Leniency) provides the main principles of the immunity and leniency programmes. The leniency programme is only available for cartel participants. It does not apply to other forms of anti-trust infringement. The Regulation on Leniency provides a definition of cartel for this purpose.

A cartel participant can apply for leniency until the investigation report is officially served. Depending on the application order, there may be total immunity from, or reduction of, a fine. This immunity or reduction includes both the undertakings and its employees/managers, with the exception of the ringleader, which can only benefit from a second degree fine reduction. The Regulation on Leniency provides the conditions for benefiting from the immunity or reduction.

Impact on agreements

A restrictive agreement is deemed legally invalid and unenforceable, with all its legal consequences. Similarly, the Competition Board can take interim measures until the final resolution on the matter, if there is a possibility of serious and irreparable damage (*Competition Law*).

Third party damages claims and appeals

25. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, what special procedures or rules (if any) apply? Are class actions possible?

Third party damages

Any person who is injured in his business or property by reason of anything the anti-trust laws prohibit can sue the violators for three times their damages, plus litigation costs and lawyers' fees (*Articles 57 et seq., Competition Law*).

Special procedures/rules

The case must be brought before the competent general civil court. In practice, courts usually do not engage in an analysis of whether there is actually a condemnable agreement or concerted practice. Instead they wait for the Competition Board to render its opinion on the matter, therefore treating the issue as a prejudicial question. Therefore, the court decision can be obtained in a shorter period in follow-on actions.

Class actions

Procedural law denies the possibility of any class action or procedure. The courts do not grant class certification requests.

26. Is there a right of appeal against any decision of the regulator? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

Rights of appeal and procedure

Final decisions of the Competition Board, including its decisions on interim measures and fines, can be submitted to judicial review before the High State Council by filing an appeal case within 60 days of the receipt by the concerned parties of the Competition Board's reasoned decision. Filing an administrative action does not automatically stay 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 to stay the decision's execution if both:

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

The judicial review period before the High State Council usually takes about 24 to 30 months. If the challenged decision is annulled in full or in part, the High State Council remands it to the Competition Board for review and re-consideration.

Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually takes more than 18 months.

Third party rights of appeal

Third parties can challenge the Competition Board's decision before the competent judicial tribunal, subject to the condition that they prove their legitimate interest.

MONOPOLIES AND ABUSES OF MARKET POWER

Scope of rules

27. Are monopolies and abuses of market power regulated under civil and/or criminal law? If so, what are the substantive provisions and regulatory authority?

The main legislation applying specifically to the behaviour of dominant firms is Article 6 of the Competition Law. It provides that any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position in a market for goods or services within the whole or part of Turkey, is unlawful and prohibited.

Article 6 of the Competition Law provides a non-exhaustive list of specific forms of abuse, which is similar to Article 102 of the TFEU. This abuse can consist of:

- Directly or indirectly preventing entries into the market or hindering competitor activity in the market.
- Directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties.
- Making the conclusion of contracts subject to acceptance by the:
  - other parties of restrictions concerning resale conditions such as the purchase of other goods and services;
  - intermediary purchasers of displaying other goods and services, or maintenance of a minimum resale price.
- Distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market.
- Limiting production, markets or technical development to the prejudice of consumers.

Country Q&A

THE REGULATORY AUTHORITY

Competition Authority (*Rekabet Kurumu*)

Head. Nurettin Kaldırımcı (The Presidency of the Turkish Competition Authority)

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Outline structure. The Competition Authority consists of the:

- Competition Board, which consists of seven members and is seated in Ankara.
- Presidency.
- Main Service Units, which comprise the following:
  - five supervision and enforcement departments;
  - department of decisions;
  - economic analyses and research department;
  - information management department;
  - external relations, training and competition advocacy department;
  - strategy development, regulation and budget department; and
  - cartel on-the-spot inspections support division.

Each service unit has a sectoral job definition.

Responsibilities. 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.

Procedure for obtaining documents. The application form is attached to Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (New Communiqué).

28. How is dominance/market power determined?

Dominance is defined as the power of one or more undertakings in a certain market to determine economic parameters such as price, output, supply and distribution, independently from competitors and customers (*Article 3, Competition Law*). Enforcement trends show that the Competition Board is increasingly inclined to broaden the scope of application of Article 6 of the Competition Law prohibition, by diluting the independence from competitors and customers element of the definition. Therefore, the Competition Board can infer dominance even in cases of dependence or inter-dependence (see, for example, *Anadolu Cam, 1 December 2004, 04-76/1086-271* and *Warner Bros, 24 March 2005, 05-18/224-66*).

The Competition Board considers high market shares as the most indicative factor of dominance. However, it also takes account of other factors (such as legal or economic barriers to entry, portfolio power and financial power of the incumbent firm) in assessing and inferring dominance.

29. Are there any broad categories of behaviour that may constitute abusive conduct?

The Competition Law is silent on the definition of abuse. It only contains a non-exhaustive sample list of specific forms of abuse. Article 2 of the Competition Law adopts an effects-based approach to identifying anti-competitive conduct, with the result that the determining factor in assessing whether a practice amounts to an abuse is the effect on the market, not the type of conduct.

Exemptions and exclusions

30. Are there any exemptions or exclusions?

Exemptions and exclusions are not available.

Notification

31. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, what is the applicable procedure?

There is no notification mechanism.

Investigations

32. What (if any) procedural differences are there between investigations into monopolies and abuses of market power and investigations into restrictive agreements and practices?

This is the same as for restrictive agreements and practices (*see Questions 18 to 21* and *Question 23*).

33. What are the regulator's powers of investigation?

This is the same as for restrictive agreements and practices (*see Question 22*).

Penalties and enforcement

34. What are the penalties for abuse of market power and what orders can the regulator make?

This is the same as for restrictive agreements and practices (*see Question 24*).

Third party damages claims

35. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, what special procedures or rules (if any) apply? Are class actions possible?

This is the same as for restrictive agreements and practices (*see Question 25*).

EU LAW

36. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

Not applicable.

JOINT VENTURES

37. How are joint ventures analysed under competition law?

Joint ventures are subject to notification to, and approval of, the Competition Board (*see Question 3, Mandatory or voluntary*).

Joint ventures that permanently meet all functions of an independent economic entity are deemed notifiable (*Article 5/III, New Communiqué*). Co-operative joint ventures are also subject to a merger control notification and analysis, on top of an individual exemption analysis, if warranted (*Article 13, New Communiqué*).

INTER-AGENCY CO-OPERATION

38. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

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 co-operation agreements on cartel enforcement matters between the Competition Authority and the competition agencies in other jurisdictions (for example, Romania, South Korea, Bulgaria, Portugal, Bosnia-Herzegovina and Mongolia).

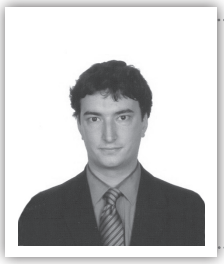
The Competition Authority's research department has periodic consultations with relevant domestic and foreign institutions and organisations about the protection of competition, assesses their results, and submits its recommendations to the Competition Board. In this respect, a co-operation protocol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

PROPOSALS FOR REFORM

39. Are there any proposals for reform of competition law?

A draft proposal amending the Competition Law has been delivered to the Grand National Assembly of Turkey for its enactment. However, it is uncertain when this reform proposal will be considered by the Grand National Assembly.

CONTRIBUTOR DETAILS



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Recent transactions

- Representing Mercedes Benz Türk A.Ş in an investigation before the Turkish Competition Authority.
- Representing an undertaking active in the global electronics sector in a leniency application before the Turkish Competition Authority.
- Advised Apple Inc. on a proposed alliance with a Turkish telecom services provider.
- Merger notification filed with and approved by the Competition Board with respect to the acquisition of some commodities trade operations of RBS Sempra Commodities LLP and The Royal Bank of Scotland plc by JPMorgan Chase & Co and some of its subsidiaries.

ELİG

Attorneys at Law

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 very 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 a vast experience in 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 2011, **ELIG** was involved in more than 27 clearances of merger notifications, more than 13 defence projects in investigations, and over 6 appeals at the High State Council; together with approximately 22 antitrust education seminars provided to the employees of clients.