GETTING THE DEAL THROUGH

GCR GLOBAL COMPETITION REVIEW

Merger Control

The international regulation of mergers and joint ventures in 69 jurisdictions worldwide

2012

Consulting editor: John Davies

Published by
Getting the Deal Through
in association with:

Allens Arthur Robinson
Anastasios Antoniou LLC
Bae, Kim & Lee, LLC
Borovtsov & Salei
Bowman Gilfillan
Carey y Cía
Castañeda y Asociados
Chitale & Chitale Partners
Corpus Legal Practitioners
Coulson Harney
Čakmakova Advocates
D'Empaire Reyna Abogados
Davis Polk & Wardwell LLP
Djingov, Gouginski, Kyutchukov & Velichkov
Dr Dr Batliner & Dr Gasser
Drew & Napier LLC
ELIG, Attorneys-at-Law
Elvinger, Hoss & Prussen
Epstein, Chomsky, Osnat & Co Law Offices
Freshfields Bruckhaus Deringer
GTG Advocates
Guevara & Gutiérrez SC
Kinstellar
Koep & Partners
Konnov & Sozanovsky Attorneys at Law
Kromann Reumert
LAWIN
Lenz & Staehelin
M & M Bomchil
Mannheimer Swartling Advokatbyrå
Marques Mendes & Associados
Mason Hayes+Curran
McMillan LLP
Oppenheim
Panagopoulos, Vainanidis, Schina, Economou
Posse, Herrera & Ruiz Abogados
Raidla Lejins & Norcous
Rizkiyana & Iswanto Antitrust and Corporate Lawyers
Roschier, Attorneys Ltd
Rubin Meyer Doru & Trandafir, SCA
Russell McVeagh
Sanguinetti Foderé Abogados
SimmonsCooper Partners
TozziniFreire Advogados
Weerawong, Chinnavat & Peangpanor Ltd
Wikborg Rein
WKB Wiercinski Kwiecinski Baehr
Wolf Theiss
YangMing Partners

GETTING THE DEAL THROUGH®

Merger Control 2012

Consulting editor:
John Davies
Freshfields Bruckhaus Deringer

Business development managers
Alan Lee
George Ingledew
Robyn Hetherington
Dan White

Marketing managers
Ellie Notley
Sarah Walsh
Alice Hazard

Marketing assistants
William Bentley
Sarah Savage

Subscriptions manager
Nadine Radcliffe
Subscriptions@gettingthedealthrough.com

Assistant editor
Adam Myers

Editorial assistant
Lydia Gerges

Senior production editor
Jonathan Cowie

Chief subeditor
Jonathan Allen

Subeditors
Davet Hyland
Sarah Morgan
Caroline Rawson
Joanne Morley

Editor-in-chief
Callum Campbell

Publisher
Richard Davey

Merger Control 2012
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

ISSN 1365-7976

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law Business Research

CONTENTS

Turkey

Gönenç Gürkaynak

ELIG, Attorneys-at-Law

Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The relevant legislation on merger control is the Law on Protection of Competition No. 4054 dated 13 December 1994 (the Competition Law) and a communiqué published by the Turkish Competition Authority. In particular, article 7 of the Competition Law governs mergers and acquisitions.

Article 7 authorises the Competition Board to regulate, through communiqués, which mergers and acquisitions should be notified in order to gain validity. Further to this provision, Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (the new Communiqué) published on 7 October 2010, replaces Communiqué No. 1997/1 on Mergers and Acquisitions Requiring the Approval of the Competition Board (the old Communiqué) as of 1 January 2011, as a primary instrument in assessing merger cases in Turkey. The new Communiqué sets forth the types of mergers and acquisitions that are subject to the Competition Board's review and approval, bringing together some significant changes to the Turkish merger control regime.

The national competition authority for enforcing the Competition Law 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 body of the Turkish Competition Authority, the Competition Board is responsible for, inter alia, reviewing and resolving on merger and acquisition notifications. The Competition Board consists of seven members and is seated in Ankara.

The Service Departments consist of four technical units and one research unit. There is a 'sectoral' job definition of each technical unit.

2 What kinds of mergers are caught?

With the enactment of the new Communiqué, the Turkish competition law regime is now utilising a 'significant lessening of competition' test. Accordingly, the new Communiqué defines the scope of the notifiable transactions in article 5 as follows:

- a merger of two or more undertakings;
- acquisition of or direct/indirect control over all or part of one or more undertakings by one or more undertakings or persons, who currently control at least one undertaking, through (i) the purchase of assets or a part or all of its shares, (ii) an agreement or (iii) other instruments.

Pursuant to article 6 of the new Communiqué, the following transactions do not fall within the scope of article 7 of the Competition Law and therefore will not be subject to the approval of the Competition Board:

- intra-group transactions and other transactions that do not lead to change in control;
- temporary possession of securities for resale purposes by undertakings whose normal activities are to conduct transactions with such securities for their own account or for the account of others, provided that the voting rights attached to such securities are not exercised in a way that affects the competition policies of the undertaking issuing the securities;
- acquisitions by public institutions or organisations further to the order of law, for reasons such as liquidation, winding-up, insolvency, cessation of payments, concordat or for privatisation purposes; and
- acquisition by inheritance as provided for in article 5 of the new Communiqué.

3 Are joint ventures caught?

According to article 5(3) of the new Communiqué, joint ventures are subject to notification to, and approval of, the Competition Board. Joint ventures that permanently meet all functions of an independent economic entity are deemed notifiable. Article 13 of the new Communiqué provides that cooperative joint ventures are also subject to a merger control notification and analysis, on top of an individual exemption analysis, if warranted.

Once the thresholds are exceeded, joint ventures are subject to the Competition Board's approval even if they do not involve any affected markets.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The new Communiqué provides a definition of 'control', which does not fall far from the definition of this term in article 3 of the Council Regulation No. 139/2004. According to article 5(2) of the new Communiqué:

> *Control can be constituted by rights, agreements or any other means which, either separately or jointly, de facto or de jure, confer the possibility of exercising decisive influence on an undertaking. These rights or agreements are instruments which confer decisive influence in particular by ownership or right to use all or part of the assets of an undertaking, or by rights or agreements which confer decisive influence on the composition or decisions of the organs of an undertaking.*

Pursuant to the presumption regulated under article 5(2) of the new Communiqué:

> *control shall be deemed acquired by persons or undertakings that are the holders of the rights, or entitled to the rights under the agreements concerned, or while not being the holders of the said rights or entitled to rights under such agreements, have de facto power to exercise these rights.*

In short, much like the EU regime, under Turkish Competition Law, mergers and acquisitions resulting in a change of control are subject to the approval of the Competition Board. Control is understood to be the right to exercise decisive influence over day-to-day management or on long-term strategic business decisions; and it can be exercised de jure or de facto. Thus, minority and other interests that do not lead to a change of control do not trigger the filing requirement. However, if minority interests acquired are granted certain veto rights that may influence management of the company (eg, privileged shares conferring management powers), then the nature of control could be deemed as changed (from sole to joint control) and the transaction could be subject to filing.

5 What are the jurisdictional thresholds?

Article 7 of the new Communiqué introduces new thresholds based solely on turnover: if the total turnover of the parties to a concentration in Turkey exceeds 100 million lira and the respective turnovers in Turkey of at least two of the parties individually exceed 30 million lira, or the worldwide turnover of one of the parties exceeds 500 million lira and the Turkish turnover of at least one of the other parties exceeds 5 million lira, then the transaction may be subject to the Competition Board's approval. Please also see the response to question 6 concerning the impact of the existence or lack of an affected market on notifiability.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Once the thresholds are exceeded and there is an overlap, there is no exception for filing a notification cited in the Turkish Competition Law and its secondary legislation. Overlap transactions are where two or more of the parties have commercial activities in the same product market (horizontal relationship), or at least one of the other parties is engaged in commercial activities in markets upstream or downstream the product market in which one party is active (vertical relationship). Transactions that do not fall within this definition are non-overlap transactions.

Once the thresholds are exceeded, joint ventures are subject to the Competition Board's approval even if they do not result in any overlap in Turkey.

There is no de minimis exception or other exceptions under the Turkish merger control regime, except for a certain type of merger in the banking sector.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Foreign-to-foreign mergers are caught under the Competition Law to the extent they affect the relevant markets within the territory of the Republic of Turkey. Merely sales into Turkey may trigger notification necessity, to the extent the thresholds are met and the transaction results in an overlap. Article 2 of the Competition Law provides the 'effects criteria', pursuant to which the criterion to apply is whether the undertakings concerned affect the goods and services markets in Turkey. Even if the undertakings concerned do not have local subsidiaries, branches, sales outlets, etc, in Turkey, the transaction could still be subject to the provisions of the Turkish competition legislation if the goods or services of such undertakings are sold in Turkey and thus have effects on the relevant Turkish market.

Notification and clearance timetable

8 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Deadlines for filing

The Competition Law provides no specific deadline for filing but it is advisable to file the transaction at least 45 calendar days before closing. The new Communiqué has introduced a much more complex notification form to be used in merger filings, so that the time frame required for the preparation of a notification form would be longer than the old regime. It is important that the transaction is not implemented before the approval of the Competition Board.

Penalties for not filing

In the event that the parties to a merger or an acquisition that requires the approval of the Competition Board realise the transaction without obtaining the approval of the Board, a monetary fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) shall be imposed on the incumbent firms (acquirers in the case of an acquisition; both merging parties in the case of a merger), regardless of the outcome of the Competition Board's review of the transaction. The minimum fine for 2011 is 12,327 lira.

Invalidity of the transaction

Another very important sanction, which is legal rather than economic, is set out under article 7 of the Turkish Competition Law and article 10 of the new Communiqué: a notifiable merger or acquisition that is not notified to and approved by the Competition Board shall be deemed as legally invalid with all its legal consequences.

Termination of infringement and interim measures

Pursuant to article 9(1) of the Competition Law, should the Competition Board find any infringement of article 7, it shall order the parties concerned, by a resolution, to take the necessary actions in order to restore the level of competition and status as before the completion of the transaction infringing the Competition Law. Similarly, the Competition Law authorises the Competition Board to take interim measures until the final resolution on the matter, in case there is a possibility for serious and irreparable damages to occur.

Termination of the transaction and turnover-based monetary fines

If, at the end of its review of a notifiable transaction that was not notified, the Competition Board decides that the transaction falls within the prohibition of article 7 (in other words, it creates or strengthens a dominant position and causes a significant decrease in competition), the undertakings shall be subject to fines of up to 10 per cent of their turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Managers or employees of parties that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the respective party. In determining the monetary fines on the parties, the Competition Board shall take into consideration repetition of the infringement, its duration, the market power of the undertakings, their decisive influence in the realisation of the infringement, whether they comply with the commitments given, whether they assist with the examination, and the severity of damage that takes place or is likely to take place.

In addition to the monetary sanction, the Board is authorised to take all necessary measures to terminate the transaction, remove all de facto legal consequences of every action that has been taken unlawfully, return all shares and assets if possible to the places or persons where or who owned these shares or assets before the transaction or, if such measure is not possible, assign these to third parties; and meanwhile to forbid participation in control of these undertakings until this assignment takes place and to take all other necessary measures.

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 such information is completed upon the Competition Board's subsequent request for further data. In addition, the Competition Authority may impose a turnover-based monetary fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) on natural persons or legal entities which qualify as an undertaking or as an association of undertakings, as well as the members of these associations in cases where incorrect or misleading information is provided by the undertakings or associations of undertakings in a notification filed for (i) exemption, negative clearance or the approval of a merger or acquisition, or (ii) in connection with notifications and applications concerning agreements made before the Competition Law entered into force.

9 Who is responsible for filing and are filing fees required?

In principle, under the merger control regime, a filing can be made by either of the parties to the transaction, or jointly. In case of filing by one of the parties, the filing party should notify the other party of the fact of filing.

There are no filing fees required under Turkish merger control proceedings.

10 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Competition Board, upon its preliminary review (stage 1) of the notification will decide either to approve, or to investigate the transaction further (stage 2). It notifies the parties of the outcome within 30 days following a complete filing. In the absence of any such notification, the decision is deemed to be an 'approval', through an implied approval mechanism introduced with article 10(2) of the Competition Law. While the timing in the Competition Law gives the impression that the decision to proceed with stage 2 should be formed within 15 days, the Competition Board generally uses more than 15 days to form their opinion concerning the substance of a notification, and it is more sensitive about the 30-day deadline on announcement. Moreover, any written request by the Competition Board for missing information will restart the 30-day period.

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

11 What are the possible sanctions involved in closing before clearance and are they applied in practice?

If a merger or an acquisition is closed before clearance, the substantive test is the main important issue for determination of the consequences. If the Competition Board reaches the conclusion 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 directors will be subject to the monetary fines and sanctions stated in question 8. In any case, a notifiable merger or acquisition not notified to and approved by the Competition Board shall be deemed as legally invalid with all its legal consequences.

As also provided under question 8, the wording of article 16 of the Competition Law envisages imposing a monetary penalty if merger or acquisition transactions subject to approval are realised without the approval of the Competition Board. The monetary fine is 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) in Turkey. The liability for fines is on firms that are the acquirers in the case of an acquisition; and on both merging parties in the case of a merger. The minimum fine is 12,327 lira for 2011. There were eight cases in 2010 where the Competition Board issued fines for closing the transaction before obtaining approval of the Turkish Competition Board.

12 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Under article 10 of the new Communique, a transaction is deemed to be 'realised' (ie, closed) on the date when the change in control occurs. It remains to be seen whether this provision will be interpreted by the Turkish Competition Authority in a way that provides the parties to a notification to carve out the Turkish jurisdiction with a hold-separate agreement. This has been rejected by the Turkish Competition Board so far (eg, Turkish Competition Board's *Total SA* decision dated 20 December 2006 and numbered 06-92/1186-355, and *CVR Inc-Inco Limited* decision dated 1 February 2007 and numbered 07-11/71-23), the Board arguing that a closing is sufficient for the suspension violation fine to be imposed, and that a further analysis of whether change in control actually took effect in Turkey is unwarranted.

13 Are there any special merger control rules applicable to public takeover bids?

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

According to Communiqué No. 1998/4, it is necessary to make a pre-notification to the Turkish Competition Authority before tender conditions are announced to the public, if the entity being privatised has a market share over 20 per cent, has turnover exceeding 20 million lira, or enjoys statutory or de facto privileges not accorded to private firms in the relevant market even if the market share and turnover thresholds are not exceeded. This pre-notification stage applies before the tender is announced to the public, so that the Competition Board can provide its views, as its views may be taken as a basis in the preparation of tender documents.

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

14 What is the level of detail required in the preparation of a filing?

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

15 What is the timetable for clearance and can it be speeded up?

The notification is deemed filed when received by the Turkish Competition Authority in Ankara. The notification shall be submitted in Turkish. Notifications made to the Istanbul branch of the Turkish Competition Authority or by unauthorised persons are deemed not to have been submitted. If the information requested in the notification form is incorrect or incomplete, the notification is deemed filed only on the date when such information is completed upon the Competition Board's subsequent request for further data.

Once all the required information and documents are provided, it usually takes the Competition Board about 30 calendar days to render its decision on the transaction, following the filing of responses to any written questions the Turkish Competition Authority may have asked.

Neither the Competition Law nor the new Communiqué foresees a 'fast-track' procedure to speed up the clearance process.

16 What are the typical steps and different phases of the investigation?

Pursuant to article 10 of the Competition Law, if the Competition Board, upon its preliminary review of the notification within 15 days following the filing, decides to further investigate the transaction, it shall notify the parties within 30 days (from the filing) and the transaction will be suspended and additional precautionary actions deemed appropriate by the Competition Board may be taken until the final decision is rendered. Article 13(4) of the new Communiqué states that in such a case, provisions of article 40 to 59 of the Competition Law shall be applied to the extent they are compatible with the relevant situation. Regarding the procedure and steps of such an investigation, article 10 makes reference to sections IV (articles 40 to 55) and V (articles 56 to 59) of the Competition Law, which govern the investigation procedures and legal consequences of restriction of competition, respectively.

Substantive assessment

17 What is the substantive test for clearance?

The substantive test is a typical dominance test. According to article 7 of the Competition Law and article 13 of the new Communiqué, mergers and acquisitions that do not create or strengthen a dominant position and do not significantly lessen competition in a relevant product market within the whole or part of Turkey, shall be cleared by the Competition Board.

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.*

Market shares of about 40 per cent and higher are considered, along with other factors such as vertical foreclosure or barriers to entry, as an indicator of a dominant position in a relevant product market. However, a merger or acquisition can only be blocked when the concentration not only creates or strengthens a dominant position, but also significantly lessens the competition in the whole territory of Turkey or in a part of it, pursuant to article 7 of the Competition Law.

18 Is there a special substantive test for joint ventures?

The Competition Board evaluates joint-venture notifications according to three criteria: existence of joint control in the joint venture; the joint venture not having as its object or effect the restriction of competition among the parties or between the parties and the joint venture itself; and the joint venture being an independent economic entity (ie, having adequate capital, labour and an indefinite duration). In recent years, the Competition Board has consistently applied the test of 'full functioning' while determining whether the joint venture is an independent economic entity. If the transaction is found to bring about a full-function joint venture in view of the three criteria mentioned above, the standard dominance test is applied. Additionally under the new merger control regime, a specific section in the new notification form aims to collect information to assess whether the joint venture will lead to coordination.

19 What are the 'theories of harm' that the authorities will investigate?

Unilateral effects have been the predominant criteria in the Turkish Competition Authority's assessment of mergers and acquisitions in Turkey. That said, in recent years, there have been a couple of exceptional cases where the Competition Board discussed the coordinated effects under a 'joint dominance test', and rejected the transaction on those grounds (eg, the Competition Board's *Ladik* decision dated 20 December 2005 and numbered 05-86/1188-340). These cases related to the sale of certain cement factories by the Savings Deposit Insurance Fund. The Competition Board evaluated the coordinated effects of the mergers under a joint dominance test and blocked the transactions on the ground that the transactions would lead to joint dominance in the relevant market. The Competition Board took note of factors such as 'structural links between the undertakings in the market' and 'past coordinative behaviour', in addition to 'entry barriers', 'transparency of the market' and the 'structure of demand'. It concluded that certain factory sales would result in the establishment of joint dominance by certain players in the market whereby competition would be significantly lessened. Regarding one such decision, when an appeal was made before the Council of State it ruled by mentioning, inter alia, that the Competition Law prohibited only single dominance and therefore stayed the execution of the decision by the Competition Board, which was based on collective dominance. No transaction has been blocked on the grounds of 'vertical foreclosure' or 'conglomerate effects' yet. A few decisions discuss those theories of harm.

20 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

Mergers and acquisitions are assessed on the basis of competition criteria rather than public interest or industrial policies. In view of that, the Turkish Competition Authority has financial and administrative autonomy and is independent in carrying out its duties. Pursuant to article 20 of the Competition Law, no organ, authority, entity or person can give orders or directives to affect the final decisions of the Competition Board.

21 To what extent does the authority take into account economic efficiencies in the review process?

Although a significant portion of the experts working in the Turkish Competition Authority have an economic background, it is hard to ascertain from the published decisions of the Competition Board that economic efficiencies are decisively taken into account in the review process.

Remedies and ancillary restraints

22 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The powers of the Competition Board during the investigation stage are very broad.

Article 9 of the Competition Law provides that if the Competition Board establishes that article 4, 6 or 7 of the Competition Law is infringed, it may notify the undertaking or associations of undertakings concerned of a decision with regard to the actions to be taken or avoided so as to establish competition and maintain the situation before infringement and forward its opinion concerning how to terminate such infringement.

Mergers and acquisitions prohibited by the Competition Board are not legally valid and the transaction documents are not binding and enforceable even if the 'closing' is done prior to the clearance.

Pursuant to article 13(5) of the new Communiqué, authorisation granted by the Competition Board concerning the merger and acquisition shall also cover the limitations that are directly related and necessary to the implementation of the transaction. The principle is that transaction parties should determine whether the limitations introduced by the merger or acquisition exceed this framework. Furthermore, article 13(4) and article 14(2) of the new Communiqué stipulate that in its authorisation decision, the Competition Board may specify conditions and obligations aimed at ensuring that any such commitments are fulfilled.

The Competition Board may at any time re-examine a clearance decision and decide on prohibition and application of other sanctions for a merger or acquisition if clearance was granted based on incorrect or misleading information from one of the undertakings or the obligations foreseen in the decision are not complied with. In this case, the transaction shall be re-examined by the Competition Board which may decide on prohibition and application of the sanctions mentioned in question 8.

23 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Competition Board may grant conditional approvals to mergers and acquisitions, and such transactions may be implemented provided that measures deemed appropriate by the Competition Board are taken, and the parties comply with certain obligations. In addition, the parties may present some additional divestment, licensing or behavioural commitments to help resolve potential issues that may be raised by the Competition Board. These commitments are increasing in practice and may either be foreseen in the transaction documents or may be given during the review process or an investigation. The parties can complete the merger before the remedies have been complied with. However, the merger gains legal validity after the remedies have been complied with.

24 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Article 14 of the new Communiqué enables the parties to provide commitments to remedy substantive competition law issues of a concentration under article 7 of the Competition Law. The parties may submit to the Competition Board proposals for possible remedies either during the preliminary review or the investigation period. If the parties decide to submit the commitment during the preliminary review period, the notification is deemed filed only on the date of the submission of the commitment. The commitment can be also served together with the notification form. In such a case, a signed version of the commitment that contains detailed information on the context of the commitment should be attached to the notification form.

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

25 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There have been several cases where the Competition Board has accepted the remedies or commitments (such as divestments) proposed to, or imposed by, the European Commission as long as these remedies/commitments ease competition law concerns in Turkey (see, for example, *Cookson/Foseco* decision No. 08-25/254-83 of 20 March 2008).

26 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The conditions for successfully qualifying a restriction as an ancillary restraint are exactly the same as those applied in the EC competition law. Therefore, a restriction such as a non-competition obligation should be directly related and necessary to the concentration, should be restrictive only for the parties and proportionate. As a result, for instance, it may be said that a restriction will be viewed as ancillary as long as its nature, geographic scope, subject matter and duration is limited to what is necessary to protect the legitimate interests of the parties entering into the notified transaction. The Competition Board's approval decision will be deemed to also cover only the directly related and necessary extent of restraints in competition brought by the concentration (non-compete, non-solicitation, confidentiality, etc). This will allow the parties to engage in self-assessment, and the Competition Board will not have to devote a separate part of its decision to the ancillary status of all restraints brought with the transaction anymore. In the event the ancillary restrictions are not compliant, the parties may face an article 4, 5 and 6 examinations.

Involvement of other parties or authorities

27 Are customers and competitors involved in the review process and what rights do complainants have?

Pursuant to article 15 of the new Communiqué, the Competition Board may request information from third parties including the customers, competitors and suppliers of the parties, and other persons related to the merger or acquisition. According to article 11(2) of the new Communiqué, if the Turkish Competition Authority is required by legislation to ask for another public authority's opinion, this would cut the review period and restart it anew from day one.

Third parties, including the customers and competitors of the parties, and other persons related to the merger or acquisition may participate in a hearing held by the Competition Board during the investigation, provided that they prove their legitimate interest.

28 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The new Communiqué introduced a new mechanism in which the Turkish Competition Authority publishes the notified transactions on its official website (www.rekabet.gov.tr), including only the names of the undertakings concerned and their areas of commercial activity. Therefore, once notified to the Turkish Competition Authority, the existence of a transaction is no longer a confidential matter.

If the Competition Board decides to have a hearing during the investigation, hearings at the Turkish Competition Authority are, in principle, open to the public. The Competition Board may, on the grounds of protection of public morality or trade secrets, decide that the hearing shall be held in camera.

The main legislation that regulates the protection of commercial information is article 25(4) of the Competition Law and Communiqué No. 2010/3 on Regulation of Right to Access to File and Protection of Commercial Secrets (Communiqué 2010/3), which was enacted in April 2010. Communiqué No. 2010/3 puts the burden of identifying and justifying information or documents as commercial

Update and trends

As a key legislative development, the new Communiqué No. 2010/4 on Mergers and Acquisitions Subject to the Approval of the Turkish Competition Board was published on 7 October 2010, and with its entry into force as of 1 January 2011 it brings a new Turkish merger control regime into the Turkish competition law system. The Guideline on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions was published on 27 June 2011. The Turkish Competition Authority has recently launched public consultation on the Draft Guideline on the Remedies that would be Permitted by the Turkish Competition Authority in the Mergers and Acquisitions. We expect the finalisation of the public consultation and the conclusive form of the guideline soon. Both guidelines will provide detailed explanations in relation to the application of the new Communiqué. Furthermore, several decisions recently given by the Competition Board are also worth mentioning. In its *Vatan Gazetesi* decision dated 10 March 2008, numbered 08-23/237-75, the Competition Board delivered a decision of conditional approval for the acquisition of *Vatan* newspaper by the Dogan Group. However, this decision of the Competition Board was partially cancelled by the 13th Chamber of the Council of State's decision dated 15 March 2010 and numbered E 2008/13171, K 2010/2225 based on the fact that the conditions determined by the Competition Board are conditions that do not have any grounds in terms of the Competition Law and they are based on assumptions regarding the next two years that cannot be currently determined within the business life. Due to the fact that such determinations exceed the authority and competence of the Competition Board, the Council of State cancelled the conditions in the mentioned decision, while accepting failing firm defence and granting permission to the transaction. In its *Mey Içki* decision dated 16 September 2010, numbered 10-59/1203-M, the Competition Board evaluated the undertakings submitted by the parties with respect to the previous conditional approval decision of the Competition Board dated 8 July 2010 and numbered 10-49/900-314. In order to procure the protection of Burgaz's competitive value and provide the continuation of the supply, the Competition Board decided that the production may be made by *Mey Içki* provided that the independent Burgaz management supervises and informs the Competition Board in case of a significant decrease in the stocks during the divestiture period. Moreover, the Competition Board determined that in case the possible buyer cannot make a choice, the manufacturing facility and/or equipment of Burgaz may not be sold to the mentioned buyer and additionally, the facility and the equipment should be disposed of during the divestiture period.

secrets to the undertakings. Therefore, undertakings must request confidentiality from the Competition Board and justify their reasons for the confidential nature of the information or documents that are requested to be treated as commercial secrets. This request must be made in writing. While the Competition Board can also ex officio evaluate the information or documents, the general rule is that information or documents that are not requested to be treated as confidential are accepted as not confidential.

Lastly, the final decisions of the Competition Board are published on the website of the Turkish Competition Authority after confidential business information is taken out.

Under article 15(2) of the Communiqué 2010/3, the Turkish Competition Authority may not take into account confidentiality requests related to information and documents that are indispensable to be used as evidence for proving the infringement of competition. In such cases, the Turkish Competition Authority can disclose such information and documents that could be considered as trade secret, by taking into account the balance between public interest and private interest, and in accordance with the proportionality criterion.

29 Do the authorities cooperate with antitrust authorities in other jurisdictions?

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

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

30 Are there also rules on foreign investment, special sectors or other relevant approvals?

Article 9 of the new Communiqué, along with the general items to be taken into account in calculating the total turnover of the parties to the transaction, sets forth specific methods of turnover calculation for certain sectors. Such special methods of calculation apply to banks, special financial institutions, leasing companies, factoring companies, securities agents and insurance companies, etc.

Banking Law No. 5411 provides that the provisions of articles 7, 10 and 11 of the Competition Law shall not be applicable on the condition that the sectoral share of the total assets of the banks subject to merger or acquisition does not exceed 20 per cent. The competition legislation provides no special regulation applicable to foreign investments.

Judicial review

31 What are the opportunities for appeal or judicial review?

Final decisions of the Competition Board, including its decisions on interim measures and fines can be submitted for judicial review before the Council of State by filing an appeal case within 60 days upon receipt by the parties of the reasoned decision of the Competition Board. Decisions of the Competition Board are considered as administrative acts, and thus legal actions against them shall be taken in accordance with the Administrative Procedural Law. As per article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Competition Board. However, upon request of the plaintiff, the court, by providing its justifications, may decide the stay of the execution if the execution of the decision is likely to cause irreparable damages; and the decision is highly likely to be against the law.

32 What is the usual time frame for appeal or judicial review?

The time frame for appeal to the Council of State against final decisions of the Competition Board is 60 days starting from the receipt of the reasoned decision.

Enforcement practice and future developments

33 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

In 2004, 86 transactions of mergers and acquisitions were granted approval by the Competition Board, three transactions were granted conditional clearance and 33 transactions were considered as below the thresholds and out of the scope. Fifty-five of these were foreign-to-foreign transactions. In 2005, 130 transactions obtained clearance, six transactions were granted conditional clearance, and 33 were treated as out of the scope or under the thresholds and one of them was rejected. Sixty-two of these were foreign-to-foreign transactions. In 2006, 110 transactions obtained clearance, 25 were granted conditional clearance and 51 were treated as out of scope or under the thresholds. Seventy of these were foreign-to-foreign transactions. In 2007, 171 transactions were cleared, 17 cleared with conditions and 44 were found to be out of scope or under thresholds. Eighty-five of these were foreign-to-foreign transactions. In 2008, these figures were 175, 22 and 57 respectively. Sixty-nine of them were foreign-to-foreign transactions. In 2009, 110 transactions were cleared, one rejected, four transactions were cleared with conditions and 31 transactions were found to be out of scope or under thresholds. Finally in 2010, 177 transactions were cleared, nine transactions were cleared with conditions and 89 transactions were found to be out of scope or below the thresholds.

34 What are the current enforcement concerns of the authorities?

Generally, the Turkish Competition Authority pays special attention to those transactions in sectors where infringements of competition are frequently observed and the concentration level is high.

The Turkish Competition Authority handles transactions and possible concentrations in the Turkish cement and aviation sectors with special scrutiny. In addition to bringing more than 10 investigations in the Turkish cement sector, the Turkish Competition Authority also gave a number of rejection decisions in relation to contemplated sales of cement factories in the Turkish cement market. It would also be accurate to report that the Turkish Competition Authority has a special sensitivity in markets for construction materials. In addition to cement, markets for construction iron, aerated concrete blocks and ready-mixed blocks were investigated and the offenders were fined by the Turkish Competition Authority.

To the extent these decisions were also supported by worries over high levels of concentration, it would be prudent to anticipate that the Turkish Competition Authority will scrutinise notifications of transactions leading to a concentration in any one of the markets for construction materials.

35 Are there current proposals to change the legislation?

There is a current proposal to change the Competition Law, which was delivered to the Grand National Assembly of Turkey for its enactment. However, the question of when the relevant proposal will hit the agenda of the Grand National Assembly is still uncertain.

ELİG
Attorneys at Law

Gönenç Gürkaynak **gonenc.gurkaynak@elig.com**

Citlenbik Sokak No: 12, Yıldız Mah
Besiktas 34349
Istanbul
Turkey

Tel: +90 212 327 17 24
Fax: +90 212 327 17 25
www.elig.com

 ISSN 1365-7976