ICLG

The International Comparative Legal Guide to:

Merger Control 2017

13th Edition

A practical cross-border insight into merger control issues

Published by Global Legal Group, with contributions from:

A. A. Antoniou & Associates LLC
Accura Advokatpartnerselskab
Advokatfirmaet Wiersholm AS
AlixPartners UK LLP
Arthur Cox
Ashurst LLP
Asters
BEITEN BURKHARDT
Bergstein Abogados
Blake, Cassels & Graydon LLP
Boga & Associates
BRISDET
Dittmar & Indrenius
DLA Piper
Drew & Napier LLC
ELIG, Attorneys-at-Law
Ivanyan & Partners
Kastell Advokatbyrå AB
King & Wood Mallesons
Koep & Partners
Lakshmikumaran & Sridharan
Lee and Li, Attorneys-at-Law
Linklaters LLP
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Moravčević Vojnović and Partners
in cooperation with Schoenherr
Nagashima Ohno & Tsunematsu
OLIVARES
OmniCLES Competition Law Economic Services
PUNUKA Attorneys & Solicitors
Ropes & Gray LLP
Schellenberg Wittmer Ltd
Schoenherr
Schoenherr in cooperation with
Advokatsko druzhestvo Stoyanov & Tsekova
Schoenherr și Asociații SCA
Sidley Austin LLP
Skadden, Arps, Slate, Meagher & Flom LLP

glg
global legal group

global legal group

Contributing Editors
Nigel Parr and Catherine Hammon, Ashurst LLP

Sales Director
Florjan Osmani

Account Directors
Oliver Smith, Rory Smith

Sales Support Manager
Paul Mochalski

Sub Editor
Hannah Yip

Senior Editor
Rachel Williams

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

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

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
November 2016

ISBN 978-1-911367-22-2
ISSN 1745-347X

Strategic Partners

MIX
Paper from responsible sources
FSC® C011748

General Chapters:

Country Question and Answer Chapters:

Continued Overleaf →

global legal group

Country Question and Answer Chapters:

EDITORIAL

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

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

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

Country question and answer chapters. These provide a broad overview of common issues in merger control laws and regulations in 50 jurisdictions.

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

Special thanks are reserved for the contributing editors, Nigel Parr and Catherine Hammon of Ashurst LLP, for their invaluable assistance.

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

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

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Turkey

Gönenç Gürkaynak

ELIG, Attorneys-at-Law

Ayşe Güner

1 Relevant Authorities and Legislation

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

The National Competition Authority for enforcing the Law on the Protection of Competition No. 4054 (the "Competition Law") in Turkey is the Turkish Competition Authority (the "Authority"). The Authority consists of the Competition Board (the "Board"), Presidency and Main Service Units. In its capacity as the competent body of the Authority, the Board is responsible for, *inter alia*, reviewing and resolving merger control filings.

1.2 What is the merger legislation?

The principal legislation on merger control is the Competition Law and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (*Communiqué* No. 2010/4). In particular, Article 7 of the Competition Law governs mergers and acquisitions, and authorises the Board to regulate, through communiqués, which mergers and acquisitions require notification to the Authority to become legally valid. In accordance, *Communiqué* No. 2010/4 is the primary instrument in assessing merger cases in Turkey and sets forth the types of mergers and acquisitions which are subject to the Board's review and approval.

With a continued interest in the harmonisation of Turkish competition law with the European Union competition law, the Authority has published the following guidelines: (i) the Guideline on Cases Considered as Mergers and Acquisitions and the Concept of Control ("Guideline on the Concept of Control"); (ii) the Guideline on the Assessment of Horizontal Mergers and Acquisitions; (iii) the Guideline on the Assessment of Non-Horizontal Mergers and Acquisitions; (iv) the Guideline on Market Definition; (v) the Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions ("Guideline on Undertakings Concerned"); and (vi) the Guideline on Remedies Acceptable in Mergers and Acquisitions ("Remedy Guideline").

1.3 Is there any other relevant legislation for foreign mergers?

There is no legislation for foreign mergers in Turkey.

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

The Banking Law No. 5411 ("Banking Law") 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 Board distinguishes between transactions involving foreign acquiring banks with no operations in Turkey and those foreign acquiring banks already operating in Turkey while applying the exception rule in Banking Law. Therefore, while the Board applies Competition Law to mergers and acquisitions where the foreign acquiring bank does not have any operations in Turkey, it does not apply Competition Law if the foreign acquiring bank already has operations in Turkey under the exception rule in the Banking Law. The competition legislation provides no special regulation applicable to foreign investments. However, some special restrictions exist on foreign investment in other legislations, such as media.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

Communiqué No. 2010/4 defines the scope of the notifiable transactions in Article 5(1) as follows:

a. a merger of two or more undertakings; or

b. the acquisition of 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:

- the purchase of assets or a part or all of its shares;
- an agreement; or
- other instruments.

Concentrations that result in a change of control on a lasting basis are subject to the Board's approval, provided that they exceed the applicable thresholds. *Communiqué* No. 2010/4 and the Guideline on the Concept of Control provide a definition of "control" which

is similar to the definition of this term in Article 3 of the Council Regulation No. 139/2004. Article 5(2) of *Communiqué* No. 2010/4 stipulates the following:

> "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."

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Acquisition of a minority shareholding can amount to a merger, if and to the extent that it leads to a change in the control structure of the target entity. In other words, if minority interests acquired are granted certain veto rights that may influence the management of the company (e.g. 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. As specified under the Guideline on the Concept of Control, such veto rights must be related to strategic decisions on the business policy, and they must go beyond normal "minority rights", i.e. the veto rights normally accorded to minority shareholders to protect their financial interests.

2.3 Are joint ventures subject to merger control?

Turkish merger control rules applicable to joint ventures are akin to – if not the same as – the EU rules. If the turnover thresholds are triggered, the joint venture transaction would be notifiable so long as the joint venture is a full-function joint venture. To qualify as a concentration subject to merger control, a joint venture must be of a full-function character and satisfy two criteria: (i) existence of joint control in the joint venture; and (ii) the joint venture being an independent economic entity established on a lasting basis.

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

Under Article 7 of *Communiqué* No. 2010/4, the transaction would be notifiable in cases where one of the below turnover thresholds are triggered:

- the aggregate Turkish turnover of the transaction parties exceeding TL 100 million (approximately €33 million or US$ 37 million) and the Turkish turnover of at least two of the transaction parties each exceeding TL 30 million (approximately €10 million or US$ 11 million); or
- (i) the Turkish turnover of the transferred assets or businesses in acquisitions exceeding TL 30 million (approximately €10 million or US$ 11 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 500 million (approximately €166 million or US$ 184 million), or (ii) the Turkish turnover of any of the parties in mergers exceeding TL 30 million (approximately €10 million or US$ 11 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 500 million (approximately €166 million or US$ 184 million).

The thresholds above are reviewed by the Competition Board every two years. The next deadline for the Board to confirm or revise the thresholds is the beginning of 2017.

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

Yes. Article 7 of *Communiqué* No. 2010/4 provides turnover-based thresholds and no longer seeks the existence of an "affected market" in assessing whether a transaction triggers a notification requirement.

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

If the turnover thresholds are met, foreign-to-foreign transactions would trigger notification requirement so long as the joint venture is a full-function joint venture.

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

There is no such mechanism under the Turkish merger control regime.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

Article 5(4) of *Communiqué* No. 2010/4 provides that closely related transactions which are tied to conditions or transactions realised over a short period of time by way of expedited exchange of securities are treated as a single transaction.

In terms of turnover calculation, Article 8(5) of *Communiqué* No. 2010/4 provides that multiple transactions between the same persons or parties realised over a period of two years are deemed as a single transaction.

Accordingly, pursuant to the Guideline on the Concept of Control, two or more transactions constitute a single concentration provided that the transactions are interdependent (i.e. one transaction would not have been carried out without the other) and that the control is acquired by the same persons or undertaking(s). The conditionality of the transactions could be proven if the transactions are linked *de jure* (i.e. the agreements themselves are linked by mutual conditionality). *De facto* conditionality may also suffice if it can be satisfactorily demonstrated.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Once the thresholds are exceeded, there are no exceptions for filing a notification. There is no *de minimis* exception. There is no specific deadline for filing, but the filing should be made before the closing of the transaction. Under Article 10(7), a transaction is deemed "realised" on the date on which the change of control occurs.

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

Article 6 of *Communiqué* No. 2010/4 provides the cases that are not considered as a merger or an acquisition as (i) intra-group transactions and other transactions which do not lead to a change in control, (ii) operations of undertakings whose ordinary operations involve transactions with securities temporarily holding on to securities purchased for resale purposes, provided that the voting rights from those securities are not used to affect the competitive policies of the undertaking, (iii) acquisition of control by a public institution or organisation by operation of law, and (iv) mergers or acquisitions occurring as a result of inheritance.

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

Monetary fines for failure to notify or close before the Board's approval

In the event that the parties to a merger or an acquisition which requires the approval of the Board realise the transaction without the approval of the Board, a turnover-based monetary fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision would be imposed on the incumbent firms, regardless of the outcome of the Board's review of the transaction. The minimum amount of this fine is set at TL 17,700 (approximately €5,500 or US$ 6,000) for 2016, and is revised annually.

Invalidity of the transaction

A notifiable merger or acquisition which is not notified to (and approved by) the Board would be deemed as legally invalid with all of its legal consequences.

Termination of infringement and interim measures

Pursuant to Article 9(1) of the Competition Law, should the Board find any infringement of Article 7, it shall order the parties concerned, by a resolution, to take the necessary actions to restore the same status as before the completion of the transaction, and thereby restore the pre-transaction level of competition. Similarly, the Competition Law authorises the Board to take interim measures until the final resolution on the matter in cases where 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 Board decides that the transaction falls within the prohibition of Article 7, the undertakings could 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. Employees and managers (of the undertakings concerned) that had a determining effect on the creation of the violation may also be fined up to five per cent of the fine imposed on the undertakings as a result of implementing a problematic transaction without the Board's approval.

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

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

There is no normative regulation allowing or disallowing carve-out arrangements. Carve-out arrangements have been rejected by the Board so far arguing that a closing is sufficient for the suspension violation fine to be imposed and that a further analysis of whether a change in control actually took effect in Turkey is unwarranted. The wording of the Board's reasoned decisions does not analyse the merits of the carve-out arrangements, and takes the position that the "carve-out" concept is unconvincing.

Therefore, methods such as carve-out would not eliminate the filing requirement, and they cannot authoritatively be advised as safe for early closing mechanisms recognised by the Board.

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

Under a Phase I review, the transaction should be notified at least 40 to 45 calendar days before the projected closing.

As for privatisation tenders, according to Communiqué On The Procedures and Principles To Be Pursued In Pre-Notifications And Authorisation Applications To Be Filed With The Competition Authority In Order For Acquisitions Via Privatisation To Become Legally Valid (*Communiqué* No. 2013/2), it is mandatory to file a pre-notification before the public announcement of tender and receive the opinion of the Board in cases where the turnover of the undertaking or the asset or service production unit to be privatised exceeds TL 30 million. *Communiqué* No. 2013/2 promulgates that in order for the acquisitions through privatisation which require pre-notification to the Authority to become legally valid, it is also mandatory to get approval from the Board. The application should be filed by all winning bidders after the tender, but before the Privatisation Administration's decision on the final acquisition.

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

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The notification is deemed filed when received in complete form by the Authority. If the information requested in the notification form is incorrect or incomplete, the notification is deemed filed on the date on which such information is completed or corrected.

The Board, upon its preliminary review (i.e. Phase I), will decide either to approve or to investigate the transaction further (i.e. Phase II).

The Board notifies the parties of the outcome within 30 days following a complete filing. There is an implied approval mechanism where a tacit approval is deemed if the Board does not react within 30 calendar days upon a complete filing. In practice, the Board almost always reacts within the 30-calendar-day period by either sending a written request for information or – very rarely – by already rendering its decision within the original 30-calendar-day period.

The Authority can send written information requests to the parties, any other party relating to the transaction or third parties such as competitors, customers or suppliers.

Any written request by the Authority for missing information will cut the review period and restart the 30 calendar-day period from Day 1 as of the date on which the responses are submitted.

If a notification leads to an investigation (Phase II), it transforms into a fully-fledged investigation. The investigation (Phase II) takes about six months and, if deemed necessary, it may be extended only once for an additional period of up to six months.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

There is an explicit suspension requirement. If a transaction is closed before clearance, the substantive nature of the concentration plays a significant role in determining the consequences. If the 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, could be subject to the monetary fines and sanctions highlighted in question 3.3 above. In any case, the violation of the suspension requirement would trigger a turnover-based monetary penalty of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision.

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

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

Communiqué No. 2010/4 provides a complex notification form, which is similar to the Form CO of the European Commission. One hard copy and an electronic copy of the notification form and its annexes need to be submitted to the Board. Additional documents, such as the executed or current copies and sworn Turkish translations of the transaction documents, financial statements of the parties, and, if available, market research reports for the relevant market are also required. In addition, a signed, notarised and apostilled power of attorney is required to be able to represent the party before the Authority.

Unlike the EU regime, under the Turkish merger control regime, there is no pre-notification process. All of the transactions (that are subject to a mandatory filing) should be notified to the Authority by way of a uniformed notification form.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

There is a short-form notification (without a fast-track procedure) if: (i) one of the transaction parties will be acquiring the sole control of an undertaking over which it has joint control; or (ii) the total of the parties' respective market shares is less than 20 per cent in horizontally affected markets and each party's market share is less than 25 per cent in vertically affected markets. There are no informal ways to speed up the procedure.

3.10 Who is responsible for making the notification?

Persons or undertakings that are parties to the transaction or their authorised representatives can make the filing, jointly or severally. The filing party should notify the other party of the filing.

3.11 Are there any fees in relation to merger control?

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

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

In cases of a transaction which involves a target that is a listed company which will be acquired through a public offer, the Turkish merger control regime does not include a similar provision to Article 7(2) of the EC Merger Regulation (ECMR). Article 10(7) of *Communiqué* No. 2010/4 provides that in merger or acquisition transactions, a transaction is deemed "realised" on the date on which the change of control occurs. Nevertheless, the Board cited Article 7(2) of the ECMR in a decision, and implied that with respect to a target that is a listed company which will be acquired by way of a public tender offer, the filing must be made without any delay and, in any case, before the exercise of the voting rights attached to the shares (Camargo Corrêa S.A. 03.05.2012, 12-24/665-187).

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

3.13 Will the notification be published?

Once notified to the Authority, the "existence" of a transaction will no longer be a confidential matter. The Authority will publish the notified transactions on its official website with the names of the parties and their areas of commercial activity. Moreover, the reasoned decision of the Board is also published on the Authority's official website upon finalisation.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

A typical dominance test is used. As a matter of Article 7 of the Competition Law and Article 13 of *Communiqué* No. 2010/4, mergers and acquisitions which do not create or strengthen a dominant position and do not significantly impede effective competition in a relevant product market within the whole or part of Turkey, shall be cleared by the Board.

Article 3 of the Competition Law defines a dominant position as "any position enjoyed in a certain market by one or more undertakings, by virtue of which those undertakings have the power to act independently from their competitors and purchasers in determining economic parameters, such as the amount of production, distribution, price and supply". However, the substantive test is a two-prong test, and a merger or acquisition can only be blocked

when the concentration not only creates or strengthens a dominant position, but also significantly impedes the competition in the whole territory of Turkey or in a substantial part of it.

4.2 To what extent are efficiency considerations taken into account?

Efficiencies that result from a concentration may play a more important role in cases where the combined market shares of the parties exceed 20 per cent for horizontal overlaps and/or one of the parties' market share exceeds 25 per cent for vertical overlaps in the affected market(s). In cases where the market shares remain below these thresholds, the parties are at liberty to skip the relevant sections of the notification form concerning efficiencies. The Board may take into account efficiencies in reviewing a concentration to the extent that they operate as a positive factor in terms of better-quality production and/or cost-savings, such as reduced product development costs through integration, reduced procurement and production costs, etc.

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

The Board does not take non-competition issues into account in assessing the merger (such as public policy considerations, among others).

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

Pursuant to Article 15 of *Communiqué* No. 2010/4, the Board may request information from third parties including the customers, competitors and suppliers of the parties, and other persons related to the transaction. If the Authority asks for another public authority's opinion, this would cut the 30-day review period and restart it anew from Day 1.

While not common practice, it is possible for the third parties to submit complaints about a transaction during the review period.

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

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

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The main legislation that regulates the protection of commercial information is Communiqué No. 2010/3 on Regulation of Right to Access to File and Protection of Commercial Secrets (*Communiqué* No. 2010/3). *Communiqué* No. 2010/3 puts the burden of identifying and justifying information or documents as commercial secrets on the undertakings. Therefore, undertakings must request confidentiality from the Board in writing and justify their reasons for the confidential nature of the information or documents that are requested to be treated as commercial secrets. While the Board can also *ex officio* evaluate the information or documents, the general rule is that information or documents that are not requested to be treated as confidential are accepted as not confidential. The reasoned decisions of the Board are published on the website of the Authority after confidential business information is redacted.

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

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

5.1 How does the regulatory process end?

The Board may either render an approval or a prohibition decision concerning the proposed transaction. It may also give a conditional approval. The reasoned decisions of the Board are served on the representative(s) to the notifying party/parties, and are also published on the website of the Authority.

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

Article 14 of *Communiqué* No. 2010/4 enables the parties to provide commitments to remedy substantive competition law issues of a concentration under Article 7 of the Competition Law. Strategic thinking at the time of filing is somewhat discouraged through an explicit language confirming that the review periods will start only after the filing is made. The Board is now explicitly given the right to secure certain conditions and obligations to ensure the proper performance of commitments. As per the Remedy Guideline, it is at the parties' own discretion whether to submit a remedy. The Board will neither impose any remedies nor *ex parte* change the submitted remedy. In the event that the Board considers the submitted remedies insufficient, the Board may enable the parties to make further changes to the remedies. If the remedy is still insufficient to resolve the competition problems, the Board may not grant clearance.

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

As foreign-to-foreign mergers fall within the scope of the Turkish merger control regime to the extent that the turnover thresholds are triggered, remedies can also be submitted in foreign-to-foreign transactions by the parties, and thus the Remedy Guideline is also applicable in terms of foreign-to-foreign transactions.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

The parties may submit to the Board proposals for possible remedies either together with the notification document, 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 on the date of the submission of the commitment. In any case, a signed version of the commitment text that contains detailed information on the context of the commitment should be submitted to the Authority.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The form and content of the divestment remedies vary significantly in practice. Examples of the Board's pro-competitive divestment remedies include divestitures, ownership unbundling, legal separation, access to essential facilities, obligations to apply non-discriminatory terms, etc. As per the Remedy Guideline, the parties are required to submit detailed information regarding how the remedy would be applied and how it would resolve competition concerns. The Remedy Guideline states that the parties can submit behavioural or structural remedies. It explains acceptable remedies such as divestment, to cease all kinds of connection with the competitors, remedies that enable undertakings to access certain infrastructure (e.g. networks, intellectual properties, essential facilities) and remedies on amending the long-term exclusive agreement.

5.6 Can the parties complete the merger before the remedies have been complied with?

The Board conditions its clearance decision on the application of the remedies. Whether or not the parties may complete the merger before the remedies have been complied with depends on the nature of the remedies. Remedies may either be a condition precedent for the closing or may be designed as an obligation post-closing of the merger. The parties may complete the merger if the remedies are not designed as a condition precedent for the closing.

5.7 How are any negotiated remedies enforced?

As per the Remedy Guideline, in the case of a divestiture, a monitoring trustee is appointed by the parties to control the divestment process, and such an appointment must be approved by the Authority (e.g. AFM, 09.08.2012, 12-41/1164-M). In terms of behavioural remedies, the Board monitors the application of the behavioural commitments submitted to the Authority (e.g. Bekaert-Pirelli, 22.01.2015, 15-04/52-25 and Migros, 09.07.2015, 15-29/420-117).

5.8 Will a clearance decision cover ancillary restrictions?

Article 13(5) of *Communiqué* No. 2010/4 provides that the approval granted by the Board concerning the transaction would also cover those restraints which are directly related and necessary to the implementation of the transaction. The parties may engage in self-assessment as to whether a particular restriction could be deemed as ancillary. In cases where the transaction involves restraints with a novel aspect which have not been addressed in the Guideline on Undertakings Concerned and the Board's previous decisions, upon the parties' request, the Board may assess the restraints in question. In the event that the ancillary restrictions are not compliant, the parties may face an Article 4 investigation.

5.9 Can a decision on merger clearance be appealed?

Yes. As per Article 55 of the Competition Law, the administrative sanction decisions of the Board can be submitted to judicial review before the administrative courts in Ankara.

5.10 What is the time limit for any appeal?

The Board's administrative sanction decisions can be appealed before the administrative courts in Ankara by filing an appeal case within 60 days upon receipt by the parties of the reasoned decision of the Board.

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

If the parties to a notifiable transaction violate the suspension requirement, the statute of limitation regarding the sanctions for infringements is eight years pursuant to Article 20(3) of Law on Misdemeanours No. 5326.

6 Miscellaneous

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

The Authority is empowered to contact certain regulatory authorities around the world in order to exchange information, including the European Commission. In this respect, Article 43 of Decision No. 1/95 of the EC-Turkey Association Council (Decision No. 1/95) authorises the Authority to notify and request the European Commission (Competition Directorate-General) to apply relevant measures if the Board believes that transactions realised in the territory of the European Union adversely affect competition in Turkey. Such a provision grants reciprocal rights and obligations to the parties (EU-Turkey), and thus the European Commission has the authority to request the Board to apply relevant measures to restore competition in relevant markets.

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

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

Although a draft competition law, which was issued by the Turkish Competition Authority in 2013, was officially submitted to the Presidency of the Turkish Parliament on 23 January 2014, it is now null and void following the beginning of the new legislative year of the Turkish Parliament. The Draft Law aims to further comply with the EU competition law legislation on which it is closely modelled. It adds several new dimensions and changes which promise a procedure that is more efficient in terms of time and resource allocation.

The Draft Competition Law reforming the Turkish Competition Law is now null and void following the beginning of the new legislative year of the Turkish Parliament, and at this stage, it remains unknown as to whether the new Turkish Parliament or the government will renew the draft law. However, it could be anticipated that the main topics to be held in the discussions on the potential new draft competition law will not significantly differ from the changes that were introduced by the previous draft. Therefore, in this hypothetical scenario, the discus-sions are expected to focus principally on:

- compliance with EU competition law legislation;

- introduction of the EU's SIEC (significant impediment of effective competition) test instead of the current dominance test;
- adoption of the term of "concentration" as an umbrella term for mergers and acquisitions;
- elimination of the exemption of acquisition by inheritance;
- abandonment of the Phase II procedure (instead, introducing an extension of the review period with four months for cases that require an in-depth assessment);
- extension of the appraisal period for concentrations from the current 30-calendar-day period to 30 working days; and
- removal of the fixed turnover rates for certain procedural violations, including the failure to notify a concentration and hindering on-site inspections, setting upper limits for the monetary fines for these violations.

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

These answers are up to date as of 11 August 2016.

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

Tel: +90 212 327 17 24
Email: gonenc.gurkaynak@elig.com
URL: www.elig.com

Mr. Gönenç Gürkaynak is a founding partner and the managing partner of ELIG, Attorneys-at-Law. Mr. Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr. Gürkaynak received his LL.M. degree from Harvard Law School, and is qualified to practise in Istanbul, New York, Brussels and England & Wales (currently a non-practising solicitor). Before founding ELIG in 2005, Mr. Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Mr. Gürkaynak heads the competition law and regulatory department of ELIG, which currently consists of 36 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 18 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year, Mr. Gürkaynak represents multinational companies and large domestic clients in more than 20 written and oral defences in investigations of the Turkish Competition Authority, about a dozen antitrust appeal cases in the high administrative court, and over 45 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics.

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

Tel: +90 212 327 17 24
Email: ayse.guner@elig.com
URL: www.elig.com

Ms. Ayşe Güner is a counsel in the competition law and regulatory department of ELIG, Attorneys-at-Law. She received her Juris Doctorate in 2008 from the Southern Methodist University Dedman School of Law in Dallas, Texas, and her LL.M. degree from Maastricht University, in the Netherlands. She is qualified to practise in California. Ms. Güner has assisted Mr. Gürkaynak with numerous complex matters requiring counselling under the Turkish Competition Act and related laws, and she is particularly experienced in merger control matters. Ms. Güner has also published numerous articles in collaboration with Mr. Gürkaynak.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks

glg global legal group

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

www.iclg.co.uk