MERGER CONTROL

Turkey

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SECTION 1: Overview

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1.1 Please provide a brief overview of your jurisdiction's merger control legislative and regulatory framework.

Law 4054 on Protection of Competition dated December 13 1994 is the primary legislation. Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué 2010/4), published on October 7 2010, is the secondary legislation. The Competition Authority (Authority) is the enforcement authority and the Competition Board (Board) is the decision-making body.

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 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. Please see Question 3.1. for further details.

1.2 What have been the key recent trends and developments in merger control?

The Authority recently enacted amendments, new communiqués and draft guidelines to regulate and supplement the Turkish antitrust enforcement regime. These are as follows:

- Draft Guidelines on Vertical Agreements which aim to revise the

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About the author

Gönenç Gürkaynak is a founding partner and the managing partner of ELIG, Attorneys-at-Law, a leading law firm of 87 lawyers based in Istanbul, Turkey. Gürkaynak graduated from Ankara University's Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Gürkaynak received his LLM from Harvard Law School, and is qualified to practice in Istanbul, New York, Brussels and England and Wales (currently a non-practising solicitor). Before founding ELIG, Attorneys-at-Law in 2005, Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Gürkaynak heads the competition law and regulatory department of ELIG, Attorneys-at-Law, which currently consists of 45 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 20 years of competition law experience, starting with the establishment of the Turkish Competition Authority.

Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 150 articles in English and Turkish by various international and local publishers. He also holds teaching positions at undergraduate and graduate levels at two universities and give lectures in other universities in Turkey.

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Öznur İnanılır joined ELIG, Attorneys-at-Law in 2008. She graduated from Başkent University, Faculty of Law, in 2005 and following her practice at a reputable law firm in Ankara, she obtained her LLM in European Law from London Metropolitan University in 2008. She is a member of the Istanbul Bar. İnanılır became a partner in the competition law and regulatory department in 2016 and has extensive experience in all areas of competition law, in particular, compliance to competition law rules, defence in investigations alleging restrictive agreements, abuse of dominance cases and complex merger control matters. She has represented various multinational and national companies before the Turkish Competition Authority. İnanılır has authored and co-authored articles published internationally and locally in English and Turkish pertaining to her practice areas.

Block Exemption Communiqué on Vertical Agreements (Communiqué 2002/2) and the Guidelines on Vertical Agreements, made public on July 20 2017.

- Amendments to Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board through Communiqué 2017/2 published on the Official Gazette, issued on February 24 2017.
- Communiqué 2017/3 on Vertical Agreements in the Motor Vehicles Sector published on the Official Gazette, issued on February 24 2017.

In particular, the recent amendments brought by Communiqué 2017/2 are as follows;

- Article 2 of Communiqué 2017/2 modified article 8(5) of Communiqué 2010/4, aiming to revise the scope of the special regulation concerning staggered transactions. Accordingly, the required time period related to transactions between the same persons or parties that are considered as a single transaction for the calculation of turnover thresholds has been extended to three years instead of two. The amended provision also defines as a single transaction the previous transactions carried out by the same acquirer in the same relevant product market within a period of three years.
- In addition, article 7(2) of Communiqué 2010/4, which obliged the Turkish Competition Board to review the notification thresholds every two years, has been repealed by Communiqué 2017/2.
- Article 3 of Communiqué 2017/2 also introduced a new paragraph to be included to article 10 of Communiqué 2010/4. Another amendment is concerned with the exception to the stand-still obligation for series of transactions in securities (where control is acquired from various sellers in a stock exchange). Accordingly, such transactions could be notified before the Authority after their implementation/closing, provided that: a) the notification is submitted to the Board without delay and; b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation which would be granted by the Board.

1.3 Briefly, what is your outlook for merger control over the next 12 months, including any foreseeable legislative reform/revisions?

Amendments to the principal competition law have been on the agenda of the Grand National Assembly for three years. The draft law was prepared by the Ministry of Customs and Trade. The draft law is currently under review at the Turkish Parliament and will only take effect once the text has been approved and published in the Official Gazette. The timing of this contemplated enactment is currently unclear.

SECTION 2: JURISDICTION

2.1 What types of transactions are caught by the rules? What constitutes a merger and how is the concept of control defined?

A merger of two or more undertakings; or an acquisition of control by an entity or a person of another undertaking's assets or a part or all of its shares or instruments granting the management rights are notifiable, if they result in a permanent change of control.

Joint ventures (JVs) are deemed as acquisitions. To qualify as a concentration subject to merger control, a JV must be of a full-function character and satisfy two criteria: the existence of joint control in the JV, and the JV being an independent economic entity established on a lasting basis.

Pursuant to the presumption regulated under article 5(2) of Communiqué 2010/4; control may be acquired through rights, contracts or other instruments which, separately or together, allow *de facto* or *de jure* exercise of decisive influence over an undertaking. In particular, these instruments consist of ownership right or operating right over all or part of the assets of an undertaking, and those rights or contracts granting decisive influence over the structure or decisions of the bodies of an undertaking. Control may be acquired by right holders, or by those persons or undertakings who have been empowered to exercise such rights in accordance with a contract, or who, while lacking such rights and powers, have *de facto* strength to exercise such rights.

2.2 What are the jurisdictional thresholds for notification? Can the authorities investigate a merger falling below these thresholds?

A transaction is subject to the Board's approval if the aggregate Turkish turnover of the parties exceeds TRY100 million ($27.4 million) and the Turkish turnover of at least two of the parties each exceeds TRY30 million. The Board's approval is also needed in acquisition transactions where the Turkish turnover of the transferred assets or acquired businesses exceeds TRY30 million and the worldwide turnover of at least one of the other parties exceeds TRY500 million. In merger transactions, the Board needs to approve transactions where the Turkish turnover of any of the parties in the merger exceeds TRY30 million and the worldwide turnover of at least one of the other parties exceeds TRY500 million.

Article 7 of Law 4054 prohibits all concentrations leading to a dominant position and the significant lessening of competition in a product market. As a matter of fact, while the question on whether the transaction is subject to the Board's approval should be taken into consideration within the scope of secondary legislation (ie the notification thresholds specified under Communiqué 2010/4), the question on whether the same transaction creates competition law sensitivities should be assessed within the scope of the primary legislation (ie article 7 of Law 4054).

The assessment on whether a transaction creates competition law sensitivities is independent from the question on whether the transaction is subject to the Board's approval within the scope of article 7 of Communiqué 2010/4. As per the hierarchy of norms, the fact that a transaction is not subject to the Board's approval would not have an effect on the assessment of the same transaction in terms of its merits.

Under article 7 of Law 4054 regulating the control of mergers and acquisitions, any merger by one or more undertakings or acquisition by any undertaking from another undertaking, which creates a dominant position or strengthens a dominant position and which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country, are prohibited.

Therefore, Law 4054 deems mergers and acquisitions that would result in significant lessening of competition as illegal, regardless of the question of whether the relevant turnover thresholds have been exceeded. The jurisdictional threshold provided under Communiqué 2010/4 acts as a filter by excluding some transactions from the notification obligation; as such, transactions do not attain a certain economic size.

2.3 Are foreign-to-foreign transactions caught by the rules? Is a local effect required to give the authority jurisdiction to review it?

In terms of foreign-to-foreign transactions, there is no exemption granted under the Turkish merger control regime and in case one of the turnover thresholds is triggered, a foreign-to-foreign transaction will be notifiable as well. Law 4054 defines 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 relevant undertakings do not have local subsidiaries, branches, sales outlets, etc. in Turkey, the transaction could still be subject to merger control if the relevant undertakings have sales in Turkey and thus have effects on the relevant Turkish market.

SECTION 3: Notification

3.1 When the jurisdictional thresholds are met, is a filing mandatory or voluntary? What are the risks/sanctions for failing to notify a transaction and closing prior to clearance?

Filing is mandatory once the parties' turnovers exceed the thresholds. The existence of an affected market is not sought in assessing whether a transaction triggers a notification requirement.

If the parties violate the suspension requirement or do not notify the transaction, the Board imposes a turnover-based monetary fine. The minimum fine in 2018 is TRY 21,036.

If there is a risk that the transaction might be viewed as problematic under the dominance test and the transaction is closed before clearance, the Authority may launch an investigation. It may order structural or behavioural remedies to restore the situation as to before closing, and impose a fine up to 10% of the parties' annual turnover. Executive members who have a significant role in the infringement may also receive monetary fines of up to five percent of the fine imposed on the undertakings.

A notifiable concentration is invalid with

all its legal consequences, unless and until it is approved by the Board.

3.2 Who is responsible for filing? Do filing fees apply?

The filing can be made jointly or solely. There is no filing fee.

3.3 Is there a deadline for filing? What are the filing requirements and how onerous are they?

There is no specific deadline for filing. However, there is an explicit suspension requirement (ie the transaction cannot be closed before obtaining the approval of the Competition Board), which is set out under article 11(1)(a) of Law 4054 and article 10(5) of Communiqué 2010/4.

The notification form is similar to the European Commission's Form CO. Certain additional documents are also required (such as the transaction documents and their sworn Turkish translations and annual reports.)

3.4 Are pre-notification contacts available, encouraged or required? How long does this process take and what steps does it involve?

The Turkish merger control rules do not provide a pre-notification mechanism (ie submission of a draft notification form).

SECTION 4: Review process and timetables

4.1 What is the standard statutory timetable for clearance and is there a fast-track procedure? Can the authority extend or delay this process? What are the different steps and phases of the review process?

Upon its preliminary review of the notification, the Board decides either to approve or to investigate the transaction further (phase II). 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. 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 upon the Board's request for data. A phase II review takes about six months and may be extended only for an additional period of up to six months.

4.2 What is the substantive test for clearance? What are the theories of harm the authorities will investigate? To what extent does the authority consider efficiencies arguments?

The substantive test for clearance is the dominance test. Efficiencies may play a more important role in cases where the combined market shares of the parties exceed 20% for horizontal overlaps and the market share of either of the parties exceeds 25% for vertical overlaps. The Board may consider efficiencies to the extent they operate as a beneficial factor in terms of better quality production or cost-savings.

4.3 Are remedies available to address competition concerns? What are the conditions and timing issues applicable to remedies.

Parties can provide commitments to remedy substantive competition law issues in a concentration. 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 the Board considers the submitted remedies insufficient, the Board may enable the parties to make further changes on the remedies. If the remedy is still insufficient to resolve the competition problems, the Board may not grant clearance.

The parties can submit proposals for possible remedies either during the preliminary review (phase I) or the investigation period (phase II). While the parties can submit the commitments during Phase I, the notification is deemed filed only on the date of the submission of the commitments. 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 Authority. The Authority's Remedy Guidelines also provide a form that lists the necessary information and documents to be submitted in relation to the commitments.

SECTION 5: Judicial review

5.1 Please describe the parties' ability to appeal merger control decisions and the time-limits applicable. What is the typical time-frame for appeals.

The Board's final decisions can be submitted to judicial review before the administrative courts by filing a lawsuit within 60 days of the receipt by the parties of the Board's reasoned decision. Rights of judicial review are available only to the parties to the decision. Third parties can challenge the Board's decision before the competent judicial tribunal, provided that they prove their legitimate interest. The judicial review period before the administrative court usually takes about 24 to 30 months.