

# Merger Control in Turkey

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Legal

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## Legislation and Authority

### 1 What is the merger/acquisition legislation?

Turkish regulatory framework for merger control consists of:

- Law No. 4054 on Protection of Competition (“Law”); and
- Communiqué No. 2010/4 on Mergers and Acquisitions Calling for the Authorization of the Competition Board (“Merger Communiqué”).

### 2 Who is the relevant authority?

Turkish merger control regime is executed by the Turkish Competition Authority (“TCA”) in Ankara, Turkey.

### 3 Are there any recent material changes?

Merger Communiqué has been amended by Communiqué No. 2017/2

- repealing Article 7(2) of the Merger Communiqué which granted an exemption from the obligation to notify for transactions (other than joint ventures) without an affected market;
- permitting *ex post* notification of transactions leading to transfer of control, if conducted on stock exchanges and involving multiple sellers (conditional on prompt notification and refrain from exercise of voting rights without Board granted exemption); and
- extending from two years to three years, the period over which multiple transactions between the same parties or multiple transactions conducted in the same relevant product market by an undertaking constitute a single transaction with regard to turnover calculations relevant to the merger control framework.

## Notifiable Transactions

Turkish merger control regime opted for a pre-merger mandatory notification system. In this system, a transaction that meets certain criteria has to be reported to the competition authority before it is consummated and a transaction falling below the criteria will be considered *de minimis* and thus will not be subject to merger filing.

### 4 Which types of transactions trigger notification obligations?

Article 7 of the Law prohibits merger or acquisition transactions which establish or reinforce a dominant position resulting in significant reduction in competition in the market for some good or service in part or whole Turkey. The Article grants TCA authority to regulate which type of mergers and acquisitions should solicit the Competition Board’s approval. TCA characterises such transactions in the Merger Communiqué.

Articles 5(1) and 5(3) of the Merger Communiqué defines the cases considered as a merger or an acquisition. Accordingly, the following transactions will be considered as mergers and acquisitions, provided there is a permanent change in control:

- A merger of two or more undertakings;
- The acquisition of direct or 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 shares or assets,
  - a contract or
  - any other means.
- Formation of a joint venture that will fulfill all functionalities of an independent economic entity.

Under the European Union Merger Regime, concentration is defined as “*a merger of two or more previously independent undertakings (or parts of undertakings) or the acquisition of direct or indirect control of the whole or parts of another undertaking, which brings a durable change in the structure of the undertakings concerned*”. The cases defined as a merger or acquisition by TCA is in line with this definition.

For the parties to a merger or an acquisition to file notification with the Competition Board, the Board requires the satisfaction of the aforementioned definitions and meet the applicable turnover thresholds.

### 5 How is permanent change of control defined?

The definition of control under Turkish merger control regime is similar to that adopted under Article 3 of Regulation 139/2004 (EC Merger Regulation). Under Article 5(2) of the Merger Communiqué, control of an undertaking may be acquired through rights, contracts or other instruments, which, separately or jointly, allow *de facto* or *de jure*, possibility of exercising decisive influence over an undertaking.

In the wording of the Merger Communiqué, instruments that confer such powers can be:

- Instruments granting ownership or operating rights over all or part of the assets of an undertaking; and
- Those rights and contracts granting decisive influence over the structure or decisions of the bodies of an undertaking.

The same Article 5(2) also reads that control may be acquired *de jure* and *de facto*. When the right holders or those persons or undertakings are empowered to exercise such rights in accordance with a contract, there is *de jure control*. Whereas, the same persons who, while lacking such rights and powers, have in practice power to exercise such rights, there is *de facto control*. Therefore, when outright legal control is not acquired (e.g. through the acquisition of shares with the majority of the voting rights), then the Competition Board will consider whether the acquirer can still exercise *de facto control* over the undertaking through special rights attached to shares or contained in shareholder agreements, board representation, ownership and use of assets and related commercial issues. Consequently, in the case of *de facto control*, there is no precise shareholding or other test for decisive influence and each case is decided on its facts.

Given that Article 7 of the Law only covers transactions resulting in a lasting/permanent change in control, under the assumption that only such transactions would lead to a lasting change in the market structure, the Board requires the change of control to be permanent. However, the Board in the Guidelines notes that agreements made for a definite period of time may lead to a lasting change of control if they can be renewed. Similarly, if the period envisaged for the agreement is sufficiently long to lead to a lasting change in the control of an undertakings concerned, then the transaction may fall within the scope of Article 7 of the Law, even if the agreement has a clear expiry date.

So, only the concentrations that result in a permanent *de jure* or *de facto* change of control are subject to the Competition Board's approval, provided that they exceed the applicable thresholds as explained below.

### 6 Would the acquisition of a minority share be notifiable?

It follows that acquisition of minority shares, so long as they do not confer control, are not subject to notification. However, shareholders agreements of such acquisitions or master agreements of joint ventures should be carefully reviewed as to whether there are any provisions which may confer control to the minority shareholder.

Minority shares together with specific rights attached to those shares may confer *de jure* sole control. Also, preferential shares to which special rights enabling to determine strategic decisions such as power to appoint more than half of the members of the company board, may confer a sole control. Where the minority shareholders have rights, which allow them to veto essential decisions or strategic behaviours of the undertakings concerned, there can be a joint control enjoyed by them.

### 7 What are the applicable thresholds for notifiable mergers and acquisitions?

TCA aims to review only large-scale acquisitions, mergers and joint ventures. The thresholds are set out in the Communiqué, as amended by Communiqué No. 2012/3. According to Article 7 of the Merger Communiqué, a transaction may be subject to the Competition Board's approval if either:

- Total turnovers of the transaction parties in the Turkish market exceed TRY100 million and turnovers of at least two of the transaction parties separately exceed TRY 30 million in Turkey.
- The Turkish turnover of the asset(s) or undertaking to be acquired or one of the parties to the merger exceeds TRY30 million, and the global turnover of at least one of the other parties to the transaction exceeds TRY500 million.

Pursuant to Article 7(2) of the Communiqué, TCA has to review the notification thresholds biannually. In practice, TCA have reviewed but not revised the notification thresholds since Communiqué No. 2012/3. The main reason behind this is that TCA prefers the “catching net” created by the notification threshold to be rather wide in order to avoid that a transaction with a potential anti-competitive impact might escape notification.

See 11 for the methodology used to calculate turnover.

### 8 Are there circumstances in which transactions falling below these thresholds may be investigated?

Communiqué No. 2010/4 replaced the regime based on market share thresholds. The Competition Board argues that a turnover threshold system creates legal certainty for undertakings and is therefore preferable to a market share threshold system. Accordingly, market shares of the parties to the transaction will not be taken into account in the analysis of notification requirement.

As a result, there are no circumstances in which transactions falling below the thresholds may still be investigated under Article 7 of the Law.

### 9 Which types of joint ventures require authorization?

Under Article 5(3) of the Merger Communiqué, joint ventures (JVs) may also be subject to notification and approval of the Competition Board. Article 5(3) reads that formation of a JV which would “permanently fulfil” all of the functions of an “independent economic entity” will constitute an acquisition transaction falling within the scope of the Merger Communiqué. The relevant parties are the parents of the JV and not the JV itself, as the latter has no turnover. The Competition Board in its decisions related to the

JV notifications, considers the satisfaction of two criteria:

1. Is there an undertaking which is jointly controlled by the transaction parties?; and
2. Does the JV constitute a fully-functioning (*tam işlevsel*) independent/autonomous economic entity?

Thus considered an acquisition transaction, the creation of a “full-function” JV is caught by TCA if the relevant turnover thresholds are exceeded. Revenues accorded to any assets that may be transferred from a parent to the JV will be considered part of the revenue of that parent.

Consequently, if the JV is not full-function and takes the form of a partnership formalized by legal structure to a large extent dependent on its parents, such as strategic alliances and cooperative joint ventures, then such JVs will not be notified. However, TCA may review such JVs *ex post*, in light of Article 4 of the Law which prohibits anticompetitive agreements between undertakings. In this context, the parent companies creating a JV should determine whether their JV is compatible with competition law rules. However, TCA may review the JV agreement *ex officio* or upon the request of the parties and determine whether the restrictive provisions are in compliance with competition law rules.

### 10 Are there any exempt transactions not requiring notification?

Article 6 of the Merger Communiqué provides for a list of transactions which do not require authorization from the Competition Board. Accordingly, the exempt transactions are:

1. Intra-group transactions and other transactions which do not lead to a change in control;
2. In case of undertaking whose ordinary operations involve transactions with securities on their own behalf or on behalf of others; 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 which issued the securities in question;
3. Acquisition of control by a public institution or organization by operation of law and due to divestment, dissolution, insolvency, suspension of payment, bankruptcy, privatization or a similar reason; and

4. Occurrence of the situations listed in Article 5 of Merger Communiqué as a result of inheritance.

Transactions (other than JVs) without an affected market were exempted from the obligation to notify. However, this diminished the goal of legal certainty intended by replacing the market share system with a turnover threshold system and undertakings chose to notify the Board to avoid regulatory risk. Given the volume of unnecessary filings, the Board chose to repeal Article 7(2) of the Merger Communiqué.

### 11 How will turnover be calculated?

Under Article 8 of the Merger Communiqué, in the calculation of the turnover of each party, the turnovers of the following will be taken into account:

1. Turnover of the undertaking concerned,
2. Turnovers of the persons or economic units in which the undertaking concerned,
  - Holds more than half of the capital or commercial asserts, or
  - Holds the power to exercise more than half of the voting rights, or
  - Holds the power to appoint more than half of the members of the board of supervisors, board of directors or the bodies authorised to represent the undertaking, or
  - Holds the power to manage operations,
3. Turnovers of the persons or economic units which hold the rights and powers listed in (2) above over the undertaking concerned;
4. Turnovers of the persons or economic units over which those listed in (3) hold the rights and powers listed in (2); and
5. Turnovers of the persons or economic units over which those listed in (1-4) jointly hold the rights and powers listed in (2).

Pursuant to Article 8(6) of the Merger Communiqué, turnover will consist of the net sales generated as of the end of the financial year preceding the date of the notification. If this cannot be calculated, then the net sales generated as of the end of the financial year closest to the date of notification.

In the calculation of the turnover, the turnovers of persons or economic units listed

in Article 8(1) generated from sales made to each other will not be taken into account.

With respect to the turnovers of the financial institutions i.e. banks and participation banks; financial leasing and factoring companies; intermediary institutions and portfolio management companies; insurance, reinsurance and pension companies, the Competition Board provided a separate calculation methods under Article 9 of the Merger Communiqué.

Turnover generated in foreign currencies will be converted to TRY at the average buying rate of the Central Bank of Turkey for the year in which it was generated.

## Filing

### 12 What are the notification requirements for mergers and acquisitions? Is filing mandatory?

Under the Turkish merger control regime, notification is mandatory once the transaction falls within the ambit of the Merger Communiqué (see 4 above) and the thresholds are exceeded (see 7 above). There are no exceptions and the Merger Communiqué empowers the TCA to fine undertakings that fail to notify.

Notifications must be made to the TCA. Sector-specific units within TCA, which have integrated merger control competence, will review the notifications.

The notification form is similar to Form CO of the European Commission. One hard copy and an electronic copy of the merger notification form must be submitted to the Competition Board. Some additional documents that must be submitted to the Board are:

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

The Competition Board allows parties to submit a short-form notification omitting Articles 6 (additional information on the affected markets), 7 (market entry conditions and potential competition) and 8 (efficiency gains), for transactions satisfying either:

- A party with joint control in an undertaking acquires sole control of that undertaking;



- The total market shares of the parties is less than 20% in horizontally affected markets and one of the parties has market share less than 25% in vertically affected markets.

Nevertheless, when a short form is submitted, the Board may still demand that a standard notification be submitted, for transactions which are later discovered not to satisfy these conditions or exceptionally for the purposes of complete evaluation. In this case, the notification will be considered incomplete until the standard notification is filed and accordingly the application timeline for the evaluation by the Board will be started from the filing date of the standard notification.

### 13 Are there any deadlines for filing? Who is responsible for filing? Are there any filing fees?

The Merger Communiqué does not set forth any specific deadline for filing notification. However, under Article 10 of the Communiqué, a transaction is deemed closed on the date when the change of control occurs.

In the Turkish merger control regime, it is prohibited to close a notifiable transaction before Competition Board approval. If a merger or an acquisition subject to clearance is closed before having an approval, the substantive nature of the concentration plays a significant role in determining the consequences. If the Competition Board concludes that the transaction creates or strengthens a dominant position and significantly lessens competition in any relevant product market, the undertakings concerned (as well as their employees and managers that had a determining effect on the creation of the violation) are subject to more severe monetary fines and sanctions (see 19 for additional details).

The suspension requirement cannot be waived under any circumstances, as there is no specific regulation allowing or disallowing carve-out arrangements. Parties failing to notify the Competition Board will be subject to the penalties for failure to comply (see 19 below).

Under the same Article, notification can be made jointly by the parties or separately by any of the parties or their authorised representatives. The notifying party will be required to inform the other relevant party concerning the situation. There is no pre-notification and formal or informal guidance in relation to filing notifications. Joint notifications will be made with a single form.

Please note that there is no filing fee in Turkey.

### 14 What remedies may be proposed to address competition concerns?

Parties may propose remedial commitments (*şart/taahhüt*) to address substantive concerns of decreased competition in the market following the transaction, which is prohibited under Article 7 of the Law. Remedies should maintain market competition or restore it to levels prior to the transaction (*restitutio in integrum*). Article 14 of the Communiqué authorises the Board to stipulate conditions and remedial obligations (*yükümlülük*) to ensure the fulfilment of said commitments.

The Board will not *sua sponte* impose remedies or amend submitted remedies; the parties to the transaction have discretion to offer remedies to obtain clearance and may be allowed to amend their proposed remedies if not deemed sufficient. If remedies are still insufficient to address concerns, the Board will not grant clearance. When offering a remedy, the parties must provide application details and arguments on how competition concerns will be addressed. What remedies may be proposed and applicable procedure and conditions may be found in *Guidelines on Remedies That are Acceptable in Merger/Acquisition Transactions* (“Remedy Guidelines”). The Board has previously accepted behavioral remedies, however, only exceptionally, observing in the Remedy Guidelines “certain negative characteristics they have such as the difficulty of monitoring the behaviors of undertakings, the likelihood of acting contrary to the gist of the remedy in a way not infringing on the written commitments, and possible prevention of behaviors that may in fact be pro-competitive”. Hence, structural remedies of varied form and content are more important in practice.

Parties may submit their remedy proposals to the Board in either Phase I or Phase II. If submitting in Phase I, the notification itself will be considered complete only if the commitments are duly submitted - signed by an authorised person, including detailed contextual information sufficient to make an examination and a copy excluding business secrets, but allowing third parties to analyse workability and effectiveness of the remedy. Remedy Guidelines include a form, listing the information and documents required for the submission of commitments.

If the Board concludes that the transaction will not violate Article 7 of the Law without implementing the proposed remedies, the transaction will be approved unconditionally.

## 15 How are restrictive provisions cleared?

According to Article 13(5) of the Merger Communiqué, any restraints that are directly related and necessary to the implementation of a transaction and achievement of expected efficiencies (ancillary restraints) will be cleared if the transaction itself is approved by the Board.

Previously, the Board assessed whether restraints were indeed ancillary, however, currently parties are to self-assess their restraints. Ancillary restraints are exempt from Articles 4 and 6 of the Law, however, any other restraint may be subject to provisions of Articles 4, 5 and 6 of the Law. On request from the parties, the Board will assess restraints featuring novel aspects which are not addressed in the Guidelines or in previous Board decisions.

### *Acceptable non-compete obligations*

On sellers in acquisition transactions, non-compete obligations limited to geographies or markets for goods and services in which the entity to be acquired operated before the acquisition or limited to three years in term are generally considered acceptable according to the Guidelines. Non-compete obligations covering geographies where the seller has made significant investments to enter, or goods and services in late stages of development, or covering periods longer than three years when justified (due to customer tie-in or nature of transferred know-how) may also be accepted.

### *Acceptable non-solicitation and non-disclosure obligations*

Obligations to prevent the seller in an acquisition transaction from employing hiring the employees or disclosing or using trade secrets of the undertaking to be acquired are generally considered acceptable according to the Guidelines. Obligations of confidentiality may be considered ancillary only if the relevant information remains confidential.

## Assessment

## 16 What are the applicable procedures and timetable for notifications?

Under Article 13(4) of the Merger Communiqué, the Board takes each filing into a preliminary review during which the transaction may be approved or brought under full investigation.

Accordingly, once the notification is submitted, rest of the procedure may continue as follows:

### *Preliminary Review (Phase I):*

Under Article 10 of the Law, the Competition Board is allowed 15 days to either authorise the transaction or decide to proceed with investigation (Phase II), in which case the parties must be duly notified, including its preliminary objections and any provisional measures it deems appropriate. The notification is deemed filed only when duly completed; if incorrect or incomplete, the notification is deemed filed only on the date when this information is completed. If at the end of 30 days after the filing, the Competition Board fails to notify the parties of its decision, the decision is deemed to be an implicit approval.

### *Investigation (Phase II):*

If a notification is not approved in Phase I, it becomes subject to a full investigation. The concerned parties have the right to submit a written defence statement, which they may elect to waive. The parties are also allowed to propose remedies or amend any remedies proposed in Phase I. Under Article 43 of the Law, the Board is allowed up to six months, which can be extended once for an additional period of up to six months again, to complete Phase II from the date when an investigation is decided to be undertaken.

The Competition Authority may make requests in writing to the parties, other parties related to the transaction or third parties, including competitors, customers and suppliers at any stage.

In case the Competition Authority solicits the opinion of another public authority in relation to the transaction, the evaluation period recommences on the date when the solicited opinion is lodged with the Competition Authority.

## 17 How are the filings assessed by the Competition Board?

### *What is the substantive test used by TCA?*

The Competition Board, pursuant to Article 13(2) of the Merger Communiqué, will not clear mergers and acquisitions that lead to a significant decrease in competition in all or part of the country by means of creating or strengthening joint or sole dominant position. Given that TCA checks for a “significant decrease

in competition”, the substantive test used by the TCA is similar to the SIEC test formulated in the EU Merger Regulation adopted in 2004.

Therefore, the Competition Board will clear the mergers and acquisitions that do not establish or strengthen a dominant position, and do not significantly impede effective competition in a relevant product market within whole or part of Turkey.

### *How is dominant position defined?*

Typically, the Competition Board outlines the relevant geographic market and relevant product market and checks whether the undertaking concerned enjoys a dominant position in that market.

The concept of “dominant position” is defined in Article 3 of the Law. The Article defines a dominant position as the economic power enjoyed in a particular market by one or more undertakings to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently from their competitors and customers.

In the determination of a dominant position, the most important factor used by the Competition Board is market power. The Board in its various decisions, emphasized that there is no clear cut-off percentage for market power however, it underlined that a market share not exceeding 40% implies a high likelihood that the undertaking concerned does not enjoy a dominant position. In order to calculate concentration levels, the Competition Board uses four firm or five firm concentration ratios or other measures like Herfindahl-Hirschman Index (HHI).

In complex cases, where market share alone cannot be used as a clear indication of a dominant position, the Board relies on economic models i.e. sensitivity analysis typically measured by the rival’s price and quantity elasticity, evidencing that the undertaking concerned can or cannot behave independently to an appreciable extent.

### *What other factors are taken into account by the Competition Board in the assessments?*

Under the same Article, the Board will take into account the following factors in the assessment of mergers and acquisitions:

- Structure of the relevant market;
- Actual and potential competition among domestic and foreign based undertakings;

- Status of the undertakings within the market, their economic and financial power, their alternative sources of suppliers and customers, their ability to access sources of supply;
- Barriers to entry into market; and
- Supply and demand trends, customer interests, activities benefiting the customers and other issues.

Also, the Board can take into account efficiencies in reviewing a concentration provided they are verifiable. The main criterion in assessing efficiency gain claims is that consumers will not be in worse conditions as a result of the merger compared to pre-merger situation. To the extent that they operate as a beneficial factor in terms of better-quality production or marginal cost reductions in production or distribution, the Board considers the efficiency gains as a countervailing factor against anti-competitive effects.

### *Can the notifying parties invoke a failing firm defence before the Competition Board?*

The Competition Board may also accept the failing firm defence. Failing firm means that even where an approval is not granted to the transaction, the level of competition will still decrease given that the undertaking not acquired will still exit the market due to financial difficulties. The basic requirement for this defence is to prove that competition would be decreased in the absence of the merger at least as the same extent as when the merger is allowed.

The Guideline on Horizontal Mergers and Acquisitions (in paragraph 88) states that merging parties invoking the failing firm defence should prove the satisfaction of the following three criteria:

- The allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking;
- There is no less anti-competitive alternative way than the merger under examination; and
- If the merger is not cleared, assets of the allegedly failing firm would inevitably exit the market.

### *What is the Competition Board's position in relation to non-horizontal mergers and acquisitions?*

Non-horizontal mergers usually mean vertical mergers which refer to transactions implemented between undertakings operating at different levels of supply chain. The Competition Board recognizes that when compared to horizontal mergers, non-horizontal mergers are (for several reasons e.g. elimination of double marginalization, decreasing transaction costs) generally less likely to significantly decrease competition by creating or strengthening a dominant position. It is for this reason that TCA, with certain reservations, sets a higher market share threshold of 25% (instead of 20%) for the presumption that the vertical merger's negative effects on competition are not so significant.

However, the Board considers that non-horizontal mergers usually have two types of negative effects on competition which are (i) unilateral effects and (ii) coordinated effects. Unilateral effects basically emerge when non-horizontal mergers may cause *foreclosure*, which refers to instances where actual or potential rivals' access to supplies (*input foreclosure*) or markets (*customer foreclosure*) is hampered or eliminated as a result of merger. Coordinated effects refers to the case where undertakings operating without harmonizing their behaviour before the merger, are significantly more likely, post-merger, to raise prices or reduce competition through coordination.

Consequently, in the assessment of non-horizontal mergers, the Board weighs the positive effects stemming from the efficiencies caused by the merger and the negative effects and comes up with a positive or negative clearance.

### **18 Can the notifying parties protect their confidential and commercially sensitive information disclosed during filing?**

#### *Confidentiality from public disclosure*

Turkish Competition Authority in practice effectively uses its official website and publishes decisions in relation to merger filings. The announcements usually contain the names of the parties and the area of commercial activity. Once the final reasoned decision relating to the notification is made by the Competition Board, then the full text of the analysis and decision is published after confidential commercial

information, that is requested to be kept secret, is redacted.

TCA under Article 53 of the Law is under the duty not to disclose commercially sensitive information provided as part of the filing. The last paragraph of the same reads that "*decisions of the Board are published on the website of the Authority in such a way not to disclose the trade secrets of the parties.*" With a view to ensuring that the commercially sensitive information is kept secret and not shared with the public once the final decision is announced, TCA published Communiqué No. 2010/3 on Regulation of Right to Access File and Protection of Commercial Secrets). Article 5 of this Communiqué places the duty to submit a written confidentiality request to the Competition Board on the parties and require them to justify their reasons as to why the information should not be disclosed.

Although, the Board may *ex officio* sanitize the published decision, the general rule is that the information or documents that are not requested to be treated as confidential are accepted as non-confidential. Therefore, the parties requesting confidentiality should determine the scope of information to be redacted.

### *Duty of confidentiality of Competition Board members and staff*

Article 25 of the Law prohibits the members and staff of the Board from disclosing and using the confidential information and trade secrets of undertakings learned during their time at the Authority in their own or others' interests. The duty to protect confidential information continues even after they have left their office.

## Penalties

### **19 What penalties may be imposed for violations of merger control rules?**

The Law establishes two types of fines under Article 16 and 17. Article 16 specifies one time fines for committing various wrongful acts, whereas Article 17 provides daily accumulating fines for ongoing violations. Mandatory minimum levels for the fines are adjusted annually for inflation. The Law does not provide any criminal penalties for competition related violations, and no such penalty exists elsewhere in Turkish law.



### *Implementation before clearance or when prohibited*

A notifiable transaction is legally invalid unless its duly notified to and approved by the Board. If the transaction is implemented before clearance is obtained, under Article 16(b) the Board imposes a monetary fine equal to 0.1% of the turnover of the fiscal year preceding the fine (an annually determined minimum level applies, which is set at TRY 18,377 for 2017). If this amount cannot be calculated, the fine is based on the turnover of the nearest fiscal year. Under the same Article, in case the illegally implemented transaction creates or strengthens a dominant position and significantly impedes competition in a relevant product market in part or whole of Turkey (i.e. violates Article 7 of the Law), the Board may impose a fine up to 10% of the annual turnover of the violator in the preceding fiscal year.

### *Failure to notify correctly*

If information provided in the notification is incorrect or incomplete, the notification will be deemed filed only when the error or omission is remedied.

For providing incorrect or misleading information in a notification, the Authority may impose a monetary fine equal to 0.1% of the turnover of the fiscal year preceding the fine (an annually determined minimum level applies). In case this cannot be calculated, the fine is based on the turnover of the nearest fiscal year. This fine can be imposed upon natural and legal persons, the latter of which may be undertakings, associations of undertakings or members thereof. Natural persons who are executives or employees of fined undertakings or associations of undertakings may be fined up to 5% of the fine imposed upon their organization. For mergers, merging parties and for acquisitions, the acquirer(s) will be liable.

### *Failure to comply*

An approval will become invalid if a party fails to comply with a remedy. If the transaction is already closed, the Board may impose monetary fines under Article 16(b) of the Law, on grounds of implementation without approval (see above) and will reopen the investigation.

Under Article 17 of the Law, in addition to above fines, for cases of

- failure to comply with preliminary injunctions or final decisions or remedial obligations (*yükümlülük*) imposed by the Authority,
- failure to comply with remedial commitments (*şart/taahhüt*) made to the Authority,
- failure to respond timely to requests of information or to provide requested documents,
- obstruction or prevention of spot inspections,

the Board may impose upon undertakings, associations of undertakings or members thereof periodic fines of 0.05% of the turnover of the fiscal year preceding the fine for each day of noncompliance. In case this amount cannot be calculated, the fine is based on the turnover of the nearest fiscal year.

## Challenging Board Decisions

Parties to the transaction have the right to judicial review of the Board's final decision. Following their reception of the Board's reasoned decision, the parties have 60 days to file a lawsuit before administrative courts in Ankara, which have become the court of first instance for review of Board decisions following Law 6352, in lieu of the Council of State. Council of State remains the appellate court for Board decisions as the highest administrative court.

Board decisions subject to review include *among others* those that determine legal violations; assess fines; impose interim measures; issue or withdraw individual exemptions, block exemptions and negative clearances; and reject complaints. Third parties proving legitimate interest may challenge the Board's decisions before the administrative courts in Ankara.

The judicial review process typically takes three to four years to complete. Most of the Board's decisions imposing significant fines have been appealed and most appeals raise both procedural and substantive issues.

## Contributing Partners

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He is an attorney-at-law, licensed to practice in Istanbul, London and New York. Starting with Clifford Chance Istanbul office in 2010, he has worked for Verdi and Herguner law firms between 2012-2016. Before moving to New York, he also worked as a summer associate at Latham & Watkins and Linklaters London offices in 2013. While in the US, he worked in the project jointly carried out by NYU and Cornerstone Research on the analysis of US Securities Exchange Commissions enforcement actions, including FCPA allegations filed against public companies traded on major U.S. exchanges.

During his career, he has been involved in domestic and cross-border M&A, finance and capital markets transactions. He also has had in-house experience as an interim country counsel at HP Turkey for six months during their global separation and orchestrated legal needs of the company.

His education in law and economics at graduate levels and understanding of different legal regimes allows him to bring a novel perspective on complicated legal matters. His commitment to excellence and dedication to deliver the best will assure you of receiving tailor-made legal solutions meeting highest standards of professional services.

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Eren Gunay is an economic theorist specialized in microeconomics, industrial organization and regulation theories. During his PhD studies in France, he has worked under the supervision of Prof. David Martimort and authored papers on regulation of monopolies and collusion. As visiting lecturer he has instructed several courses at Bosphorus University.

With interests in corporate strategy and innovation, he has advised companies on their investments and business plans. Prior to academia, he has worked in the financial services industry in the United States.

He has been partner in the field of competition and regulation since the start of the firm. He offers comprehensive expert advice to companies active in the regulated sectors relating to merger notifications, filings and competition investigations.

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This information is intended to provide a general guide to the subject matter. For expert advice about your specific circumstances, please contact us at:

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