TerraLex

Pre-Merger Notification Guide

Turkey

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Merger notification requirements

Is there a mandatory merger notification regime?	Yes. Pursuant to Article 7 of the Law on the Protection of Competition numbered 4054 (“Competition Law”), there is a mandatory merger notification regime for the concentrations that result a permanent change in control and exceed the thresholds stated under Article 7 of the Communiqué on Mergers and Acquisitions Subject to Approval of the Competition Board (“Communiqué”).
Is there a voluntary merger notification mechanism, and if so, what advantages does it offer?	There is no voluntary merger notification mechanism. Pursuant to Article 7 of the Communiqué, the transactions that result a permanent change in control and exceed the determined thresholds are subject to the Board’s approval in order to gain legal validity. The transactions which do not exceed these thresholds are not required to be notified. Even if there will be a voluntary notification, the Board’s current practice is to return such voluntary application by saying that the transaction is not subject to notification. Nevertheless, according to Article 8 of the Competition Law parties to an agreement, decision, act or a merger or acquisition may apply to the Board in order to obtain a negative clearance certificate. By way of obtaining this approval parties may provide a certain level of security for their transaction, against future objections or challenges.

Covered transactions

If there is a mandatory notification system, what types of transactions are caught?	Pursuant to Article 5 of the Communiqué, (i) the merger of the two or more undertakings, or (ii) the acquisition of direct or indirect control over the whole or part of one or more undertakings by one or more undertakings or one or more persons who currently control at least one undertaking, by way of purchasing shares or assets, through a contract or through any other means shall be considered a merger or acquisition transaction, provided that there is a permanent change in control. The 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.

Thresholds and jurisdiction

If there is a mandatory notification system, what are the threshold tests, above which a notification is required and below which it is not?	Pursuant to Article 7 of the Communiqué, approval of the Board is required in order to gain legal validity, in case: • Total turnovers of the transaction parties in Turkey exceed 750 million Turkish Liras[1], and turnovers of at least two of the transaction parties in Turkey each exceed 250 million Turkish Liras[2], or • The asset or activity subject to acquisition in acquisition transactions, and at least one of the parties of the transaction in merger transactions have a turnover in Turkey exceeding 250 million Turkish Liras[3] and the other party of the transactions has a global turnover exceeding 3 billion Turkish Liras[4].[5] However, the above-mentioned 250 million TL turnover thresholds are not required for the transactions concerning the acquisition of technology undertakings[6] operating or having R&D activities in the Turkish geographical market or providing services to users in Turkey. [1] Approximately USD 22.9 million [2] Approximately USD 7.6 million [3] Approximately USD 7.6 million [4] Approximately USD 91.6 million [5] The turnover calculation shall be based on Turkish Central Bank's average yearly rate in the year in which the turnover was generated (Article 8/7 of the Communiqué). For the purposes of a notifiability analysis, the turnover of the transaction parties generated as of the end of the financial year preceding the date of the notification should be taken into consideration, or, if this cannot be calculated, of the turnover generated as of the end of the financial year closest to the date of notification. For instance, the turnover figures for 2024 shall be taken into consideration for a notification to be realised in 2025. In this respect, for the purposes of the calculation of the aforementioned turnover thresholds, amounts in US$ for the calendar year 2024 are converted at the exchange rate 1 USD = 32,78 TL in accordance with the applicable Turkish Central Bank average rate for 2024. [6] Pursuant to Article 4/1/e of the Communiqué, Technology undertakings means undertakings or related assets operating in the fields of digital platforms, software and game software, financial technologies, biotechnologies, pharmacology, agrochemicals and health.
If there is a mandatory notification system, under which circumstances are joint ventures caught?	Provided that the turnover thresholds are triggered, to qualify as a concentration subject to merger control, a joint venture must be of a full-function character. Therefore, the joint venture should be jointly controlled and it has to be an independent economic entity established on a lasting basis (i.e. having adequate capital, labour and an indefinite duration). The fact that the joint venture's products/services will not be offered in Turkey would not change the merger control requirement, and thus would not be possible to avoid a notification in Turkey on that basis. Legal consequences of violation of suspension requirement are also applicable for foreign- to-foreign joint venture transactions. Notably, according to the Communiqué, full-func-

	tion joint ventures are deemed as acquisition transactions and all parties are deemed as acquirers in that sense.
What is the necessary nexus with the jurisdiction to require a filing?	Article 2 of the Competition Law provides an effect-based approach. That said all transactions are subject to the notification requirement, as long as they affect the relevant markets in Turkey. Therefore, even if the transaction parties do not have subsidiaries in Turkey, a notification would be required provided that they exceed the thresholds defined in Article 7 of the Communique. As a result, the relevant transactions shall be notified to the Competition Authority.

Required information

What sort of information is required in a merger notification, and how long does it typically take to compile such information?	According to the notification form the information regarding the scope of the transaction (including the turnover figures), parties, the structure of control, the market definitions, market shares and affected markets (including the entry conditions, the potential competition, efficiency gains, consumer benefits), and joint ventures and relevant contact information shall be submitted. The necessary annexes of the notification form are as follows: (i) the final or current version of the agreement regarding the transaction, (ii) a copy of other documents related to the transaction, (iii) the officially approved documents that show the latest accounts of the undertakings, (iv) market study reports (if available), (v) a signed commitment text (if applicable), (vi) documents showing that the notifying person is authorized (for example, the PoA). The documents' sworn Turkish translations shall be submitted as well. Although the compiling period of such information changes case by case, based on our experiences this period does not exceed a one-month period.
Are there ways to minimize the required information filing?	The information regarding the affected markets, market entry conditions, consumer benefits, potential competition, efficiency gains and parent undertakings operating in the same, downstream, or upstream market with the joint venture are not required in the below stated cases: • When one of transaction parties shall acquire full control over an undertaking in which it had joint control or • If there is no affected market in Turkey. Nevertheless, it is crucial to note that in exceptional circumstances the Competition Authority may require parties to submit all the required information for the purposes of a complete examination of competitive concerns even when these conditions are met.

Fees

Are there fees with respect to merger notification?	There are no stipulated filing fees in Turkish merger notification proceedings.

Deadlines

Is there any deadline within which a notification must be filed, and what is the earliest time a filing may be effected?	Article 7 of the Communiqué sets forth the transactions that are subject to notification to obtain legal validity upon the Board's approval. The Competition Law does not set forth a specific

	deadline for the filing. Nevertheless, considering the possible sanctions that parties may face (treated under question 12), the transaction shall not be closed before the filing. Based on our previous experiences, it is recommendable to file approximately 90 days before the closing of the transaction.

Waiting period

If there is a mandatory notification system, are the parties required to wait a certain period of time before completing the transaction, or can the transaction proceed without a waiting period?	The transactions obtain legal validity upon the Board's approval decision and there are penalties for failing to notify. Therefore, the parties are required to wait the clearance decision to complete the transaction.

Time frame

What are both the statutory and the practical time periods necessary in order to "clear" a transaction?	The Board may either clear the transaction or may notify the parties that the related transaction will be further investigated in 30 days from the filing. In the event that the Board doesn't give response to the notification or take any action, the transactions shall obtain legal validity through entering into force after 30 days from the date of notification. If the Board makes the decision of conducting an investigation, the investigation shall be concluded in 6 months. If it deems necessary, the Board can give 6 months of additional time for once only. Any written request of the Board for missing information will cut the statutory period and make it start from the beginning upon the submission of the requested information or documents. In practice, the investigated transactions are exceptional cases. Therefore, depending on the characteristics of the filing, an ordinary transaction usually obtains an approval decision within 90 days from the complete filing.

Sanctions

What are the consequences of failing to notify if a transaction is in excess of the relevant thresholds, or closing a transaction without notification, or before the expiry of the waiting period?	Pursuant to Article 11 of the Competition Law in "failure to notify" cases, the Board initiates an examination with regard to the transaction, ex officio. As a result of its examination, if the Board determines that the related transaction does not fall under Article 7 of the Competition Law it approves the transaction. However, in such case a monetary fine shall be imposed to those concerned due to their failure to notify. The monetary fine for failure to notify is the 0.1% of the turnover generated in the preceding financial year on the concerned undertakings (acquirer(s) in the case of an acquisition; both merging parties in the case of a merger). As a result of its examination if the Board finds that the transaction shall not be cleared, it decides that the transaction must be terminated; that all de facto situations committed contrary to the law must be eliminated; that any shares or assets acquired must be returned, if possible, to their former owners, within those terms and duration as determined by the Board, or if not possible, these must be assigned and transferred to third parties; that the acquiring persons may by no means participate in the management of undertakings acquired until these are assigned to their former owners or third parties, and that other measures deemed necessary by it must be taken. In such case the undertakings could be subject to fines of up to 10% of their turnover generated in the financial year preceding the date of the fining decision. In case the Board determines a determining influence of the managers and employees of these undertakings to the infringement, it may also impose 5% of this fine to the certain employees.

Post-closing challenges

If the statutory waiting period expires without a challenge, is there any possibility of post-closing challenge?	Yes, pursuant to Article 16 of the Communiqué, the Board is authorized to re-examine the merger or acquisition in case (i) the approval decision is taken hinging upon false or misleading information provided by parties or (ii) the parties do not fulfill the obligations or conditions brought by the decision.
Are there ways to protect a transaction from post-closing challenge?	Parties can protect their transaction from post-closing challenge by way of providing the Board with the updated information required and determined in the notification form, which is stipulated under the Communiqué. In addition, if there are obligations or conditions brought by the approval decision, the parties shall compete with those to avoid any post-closing challenge.

Competent agency

What is the nature of the Agency which reviews merger transactions, and what are its powers to move against anti-competitive transactions?	Turkish Competition Authority, a legal entity that holds financial and administrative autonomy, reviews and decides on the merger or acquisitions in Turkey. The associated ministry is the Ministry of Customs and Trade. Nevertheless, the Competition Authority is independent while exercising its duty. Therefore, no organ, authority, or person can give comments or instructions to influence its decisions. The Competition Authority consists of the Board, presidency, and service departments. The Board reviews and decides on mergers and acquisitions. The Board is authorized to impose administrative monetary fines and decide on the termination of the operation concerning the anti-competitive transaction; the restoration of all actual circumstances which unlawfully occurred; and in accordance with the conditions and timetable to be defined by the Board, the return of all shares and assets, if possible, to the ex-owners and where this is not possible, the transfer or assignment to third parties, and until these are transferred to the ex-owners or to third parties, the acquiring persons shall not be entitled to participate in the management of the acquired enterprise and the Board also decide on all other measures which are considered to be appropriate. The Board also has the power to request information from institutions and make on-the-spot examinations. In this context, it may examine any kind of document, demand copies and require parties to give written or oral explanations. Moreover, the Board may revoke the exemption or the negative clearance decisions in the event that parties give false and misleading information regarding a transaction, do not fulfill the obligations and conditions that are linked to the Board's decision or in case a fundamental alteration occurs regarding an element of a transaction which is determinative on the Board's decision.

Confidentiality

What level of confidentiality does a merger notification filing enjoy?	Firstly, the Competition Authority publishes the notified transaction on its website in a format which discloses the undertakings concerned and their practice areas. The confidentiality issue is regulated under the Communiqué on the Regulation of Right to Access to File and Protection of Trade Secrets numbered 2010/3 ("Communique No. 2010/3"). According to Communique No. 2010/3, the parties shall request confidentiality and identify the confidential information (trade secrets) and provide the request's grounds. If the Board accepts the parties' confidentiality assessments it shall not make

	it public. The Board may not accept the confidentiality requests of the parties, if the use of the information and documents are inevitable in order to prove the infringement. Also, the Board may regard some information confidential at its own initiative. Decisions of the Board are taken as a result of confidential meetings and are communicated publicly. On the other hand, the Board decisions are published on the internet page of the Competition Authority in such a way not to disclose the trade secrets of the parties. Therefore, pursuant to the annex of the Communiqué, the parties shall indicate the trade secrets included in the notification form, by marking them in red, in order to avoid the publication of the confidential information in the reasoned decision related to the transaction, to be published by the Competition Authority's website.

Substantive appraisal

Are there any rules of thumb or general guidance as to when mergers are likely to face challenge?	The substantive test for the clearance evaluates whether the mergers and acquisitions result in a significant impediment of effective competition in the whole or part of the country, especially by creating a dominant position or strengthening an existing dominant position. The Competition Law defines the dominant position as the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers. In the context of the substantive test, the following factors are taken into account: the structure of the relevant market, the de facto and potential competition of the enterprises that are situated in the country and abroad, status of the enterprises in the market, their economic and financial power, their alternatives to find providers and clients, the opportunity to reach supply resources, the entry barriers to the markets, the tendencies of supply and demand, the interests of the consumers, the efficiency for the benefit of the consumers and the other factors. Therefore, while filing a merger the transaction parties should consider the substantive test the above-mentioned criteria to assess the possibility of a challenge.

Practical recommendations

What is the typical or recommended approach in dealing with the reviewing agency?	To eliminate the risk of receiving information requests, it is recommended to provide detailed information regarding the relevant market. That being said, the parties shall provide complete information in their notification forms. Furthermore, it would be beneficial to indicate the relevant sources that Competition Board can gather information about the relevant market.

Other notifications

Other than antitrust/competition review, are there other investment controls or similar regimes to be aware of?	With regard to the post-closing period, there are some registry requirements set forth under Turkish Commercial Code (TCC). In addition, if the transaction is in regulated sectors (such as energy or telecommunications sector) there may be some special approval requirements other than antitrust/competition review.