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Merger Control 2021

Turkey
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TURKEY

Law and Practice

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

Law No 7246, the amendment to Law No 4054 on the Protection of Competition, was published in the Official Gazette and entered into force on 24 June 2020 (the "Amendment Law").

Article 7 of Law No 4054 on Protection of Competition (Competition Law) governs mergers and acquisitions in particular, and mandates the Competition Board (Board) to regulate and establish a merger control regime. Accordingly, certain mergers and acquisitions are subject to the Turkish Competition Authority's (TCA) review and approval in order to gain validity. Furthermore, Communiqué No 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board (Communiqué No 2010/4) is the primary legal instrument that establishes the Turkish merger control regime, and introduces a notification system.

Other guidelines adopted by the TCA on merger control matters are:

- the Guideline on Cases Considered as Mergers and Acquisitions and the Concept of Control (Guideline on the Concept of Control);
- the Guideline on the Assessment of Horizontal Mergers and Acquisitions;
- the Guideline on the Assessment of Non-Horizontal Mergers and Acquisitions;
- the Guideline on Market Definition;
- the Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions (Guideline on Undertakings Concerned); and
- the Guideline on Remedies Acceptable in Mergers and Acquisitions (Remedy Guideline).

1.2 Legislation Relating to Particular Sectors

No other legislation is applicable to foreign transactions or investment in Turkey, as far as the merger control rules are concerned, although there are specific merger control rules for mergers concerning banks, privatisation tenders and certain other sectors.

Banks

Banking Law No 5411 provides that mergers in the banking industry fall outside of the merger control regime, subject to the condition that the sectoral share of the total assets of the banks does not exceed 20%. The Competition Law does not apply to foreign acquiring banks already operating in Turkey, if the conditions for the application of the Banking Law exception are fulfilled.

Privatisation Tenders

Communiqué No 2013/2 prescribes an additional pre-notification process that applies to privatisations in which the turnover of the undertaking, asset or unit intended for the production of goods or services to be privatised exceeds TRY30 million. Statutory sales to public institutions and organisations, including local governments, are excluded for the purposes of this calculation. If the threshold is met, a pre-notification should be filed with the TCA before the public announcement of the tender specifications.

The Board will issue an opinion that will serve as the basis for the preparation of the tender specifications. This opinion does not mean that the transaction will be cleared. Following the tender, the winning bidder will still have to make a merger filing and obtain clearance before the Privatisation Administration's decision on the final acquisition.

Other Sector-Specific Rules

There are various sector-specific rules alongside the merger control rules for sectors such as media, telecommunications, energy and petrochemicals. For example, in the energy sector, approval from the relevant authority is required for share transfers of more than 10% (5% in case of publicly traded company shares) in an electricity or natural gas company, and in the broadcasting sector, Law No 6112 states that a transfer of shares of a joint stock company holding a broadcasting licence should be notified to the Turkish Radio and Television Supreme Council.

1.3 Enforcement Authorities

The relevant legislation is enforced by the TCA, a legal entity with administrative and financial autonomy, which consists of the Board, the Presidency and service departments. The Board is the competent decision-making body of the TCA and is responsible for, inter alia, reviewing and resolving merger and acquisition notifications. The Board consists of seven members and is located in Ankara.

The Main Services Unit consists of:

- six supervision and enforcement departments;
- a department of decisions;
- an economic analysis and research department;
- an information management department;
- an external relations, training and competition advocacy department;
- a strategy development, regulation and budget department;
- a press department; and
- a cartel on-the-spot inspections support division.

There is a "sectoral" job definition of each supervision and enforcement department.

Other authorities may get involved in the review of mergers in certain sectors: the TCA is statutorily required to get the opinion of the Turkish Information Technologies Authority for mergers concerning the telecommunication sector and of the Turkish Energy Markets Regulatory Authority in energy mergers.

2. JURISDICTION

2.1 Notification

Notification is compulsory if the following applicable turnover thresholds are exceeded:

- the aggregate Turkish turnover of the transaction parties exceeds TRY100 million and the Turkish turnover of at least two of the transaction parties each exceeds TRY30 million; or
- the Turkish turnover of the transferred assets or businesses in acquisitions exceeds TRY30 million and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY500 million; or
- the Turkish turnover of any of the parties in mergers exceeds TRY30 million and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY500 million.

Communiqué No 2017/2 Amending Communiqué 2010/4 abolished Article 7(2) of Communiqué No 2010/4 propounding that "The thresholds […] are re-determined by the Board biannually". The Board no longer bears the duty to re-establish turnover thresholds for concentrations every two years.

Once the above-mentioned thresholds are exceeded, the parties are obliged to notify the transaction. There is no de minimis exception or other exceptions under the Turkish merger control regime, except for certain mergers in the banking sector.

The following transactions are not subject to the approval of the Board:

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

2.2 Failure to Notify

Competition Law

The Competition Law introduces penalties for failing to notify, or for closing the transaction before clearance. Where the parties to a merger or acquisition that requires the Board's approval close the transaction without or before obtaining the Board's approval, the Board imposes a turnover-based monetary fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision on the relevant undertaking(s); in acquisitions, the fine is levied on the acquirer, whereas in mergers it is levied on all merging parties. This monetary fine does not depend on whether or not the TCA ultimately clears the transaction.

The minimum amount of this fine is set at TRY34,809 (approximately EUR3,400 and USD4,150) for the year 2021, and is revised each year.

Article 7 Violations

If the parties close a transaction that violates Article 7 (ie, those that significantly impede competition especially by creating a dominant position or strengthening an existing dominant position), the Board will impose a turnover-based monetary fine of up to 10% of the parties' turnovers generated in the financial year preceding the date of the fining decision. Employees and managers that had a determining effect on the creation of the violation may also be fined up to 5% of the fine imposed on the undertakings.

If the parties close a notifiable merger or acquisition without or before the approval of the Board, the transaction will be deemed legally invalid with all attendant legal consequences in Turkey, pending clearance.

If the Board finds that the transaction violates Article 7, it shall order the parties concerned, by a resolution, the behaviours which should be followed or avoided in order to establish competition, and the structural remedies such as transfer of certain activities or shareholdings. However, the relevant amendment introduces "first behavioural, then structural remedy" rule for Article 7 violations; therefore, in cases where behavioural remedies are ultimately considered to be ineffective, the Board will order structural remedies. Undertakings shall comply with the structural remedies in minimum of six months. If there is a possibility of serious and irreparable damages occurring, the Board is authorised to take interim measures until the final resolution on the matter. There have been many cases where companies have been fined for failing to file a notifiable transaction (A-Tex Holding/Labelon Group, 16-42/693-311, 6 December 2016; Tekno İnşaat, 12-08/224-55, 23 February 2012; Zhejiang/Kiri, 11-33/723-226, 2 June 2011, etc).

The penalties are made public as they are announced via the Board's reasoned decisions,

which are published on the TCA's official website.

2.3 Types of Transactions

Notifiable transactions are as follows:

- a merger of two or more undertakings;
- the acquisition of direct/indirect control on a lasting basis 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; and
- the formation of a full-function joint venture.

These transactions are caught if they exceed the applicable thresholds (see **2.1 Notification**).

Operations that do not involve the transfer of shares or assets can be caught if they result in a change of control and the parties' turnovers surpass the applicable thresholds.

2.4 Definition of "Control"

Communiqué No 2010/4 provides the definition of "control" which is akin to the definition in Article 3 of Council Regulation No 139/2004.

According to Article 5(2) of Communiqué No 2010/4, control can be constituted by rights, agreements or any other means that – either separately or jointly, de facto or de jure – confer the possibility of exercising a decisive influence on an undertaking, particularly by ownership or the right to use all or part of the assets of an undertaking, or by rights or agreements that confer decisive influence on the composition or decisions of the organs of an undertaking.

Acquisitions of minority or other interests that do not lead to a change of control on a lasting basis are not subject to notification. However, where acquired minority interests are granted certain veto rights that may influence the strategic management of the company (eg, privileged shares conferring management powers), then the nature of control could be deemed as changed (from sole to joint control) and the transaction could be subject to filing.

2.5 Jurisdictional Thresholds

Please see **2.1 Notification** for the jurisdictional thresholds.

The Turkish merger control regime does not introduce any sector-specific thresholds, so the thresholds apply to all sectors.

2.6 Calculations of Jurisdictional Thresholds

Communiqué No 2010/4 sets out detailed rules for turnover calculation. The calculation methods can be summarised as follows:

- the turnover of the entire economic group will be taken into account, including that of the undertakings controlling the undertaking concerned and that of all undertakings controlled by the undertaking concerned;
- when calculating turnover in an acquisition transaction, only the turnover of the acquired part will be taken into account with respect to the seller;
- the turnover of jointly controlled undertakings (including joint ventures) will be divided equally by the number of controlling undertakings; and
- two or more transactions carried out by the same parties within a two-year period will be considered as one transaction for the purpose of turnover calculation.

However, there are certain special turnover calculation methods for entities such as banks, financial institutions, leasing companies, factoring companies, securities agents, insurance companies, etc.

Regarding financial institutions, the turnover considered in the special turnover calculation method consists of the sum of the following:

Banks and Participation Banks

As included within the income statement requested under the Communiqué Concerning the Financial Tables to be Disclosed to the Public by Banks, and Related Explanations and Footnotes (Banking Regulatory and Supervisory Agency, 10/2/2007, 26430): interest and profit sharing income, collected fees and commissions, dividend income, commercial profits/losses (net), and other operational income.

Financial Leasing, Factoring and Funding Companies

As included within the income statement requested under the Communiqué Concerning the Uniform Accounting Plan to be Implemented by Financial Leasing, Factoring and Funding Companies and the Explanation Note Thereof, and Concerning the Format and Content of the Financial Tables to be Disclosed to the Public (the Banking Regulatory and Supervisory Agency, 17/5/2007, 26525): real operating income and other operating income.

Intermediary Institutions and Portfolio Management Companies

As included within the detailed income statement requested under the Communiqué Concerning the Principles on Financial Reporting within the Capital Market (the Banking Regulatory and Supervisory Agency, 9/4/2008, 26842): sales income, interests, fees, premiums, commissions and other income, other operating income, shares in the profits/losses of the investments valued via the equity method, and financial income other than operating income.

Insurance, Reassurance and Pension Companies

In accordance with the last financial statements or data either published by the Undersecretariat of the Treasury, the Association of Insurance and Reinsurance Companies of Turkey or the Pension Monitoring Centre, or disclosed to the public by the companies related to the merger or acquisition, to be confirmed by the Undersecretariat of Treasury: domestic direct premium production for insurance companies (gross), domestic direct premium production for reassurance companies (gross), the total amount of contributions and the total amount of funds in pension companies, as well as domestic direct premium production (gross) for those pension companies that also operate in life insurance.

Other Financial Institutions

Interest and similar income, income generated from securities, commissions, net profit generated from financial activities, and other operation income.

Sales and assets that are booked in a foreign currency should be converted into Turkish lira by using the average exchange buying rate of the Central Bank of Turkey for the financial year in which the sales or assets are generated.

Turnover-based thresholds are used in the Turkish merger control regime; therefore, the regime does not deal with asset-based thresholds.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

See **2.6 Calculations of Jurisdictional Thresholds**.

The seller's turnover is only included in exceptional situations. It is included in joint-venture transactions if the seller remains a controlling party of the joint-ventures post-transaction (ie,

both the seller and the buyer would be considered as buyers in cases where the buyer and the seller form a joint venture).

During the reference period, the Board will only consider the changes if they are reflected in the relevant balance sheets of the businesses in question.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control if the turnover thresholds are triggered. The Competition Law states that the criterion to apply is whether or not 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 can still be subject to merger control if the relevant undertakings have sales in Turkey and thus have effects on the relevant Turkish market.

The likelihood of the Board discovering a transaction is relatively high, as it closely follows mergers and acquisitions in the local and international press, and also the case practice of the European Commission (the "Commission") and other important competition authorities. It may also examine the notifiability of past transactions in the context of a new notification.

If a target has no sales and/or assets in Turkey, the transaction would not, in principle, trigger the turnover thresholds since Communiqué No 2010/4 requires the Turkish turnover of the transferred assets or businesses in acquisitions to exceed TRY30 million in order for the transaction to be notifiable. However, the transaction could trigger a mandatory merger control filing requirement if it concerns the formation of a joint venture that will not be active in Turkey in the foreseeable future, to the extent the parents trigger the applicable thresholds.

Board Decisions

There have been some cases where the Board has cleared decisions regarding joint ventures that do not involve sales in Turkey and considered them notifiable (most recently, TFS/SMMAF, 19-23/359-162, 27 June 2019; Leoni/Hengtong, 19-08/93-38, 21 February 2019; DENSO/Aisin Seiki, 19-04/32-13, 17 January 2019).

For example, in ADPM/Vinci Airports/Astaldi (15-34/509-157, 1 September 2015), which concerns the formation of a greenfield JV regarding the management of Santiago Airport in Chile, the Board decided that the transaction is subject to merger control filing in Turkey as the jurisdictional turnover thresholds were exceeded by the parent companies even though the JV will not be operating in Turkey, and will execute all its economic activities on the management of Santiago Airport in Chile. In Daimler/Volkswagen-MT Holding (19-06/61-25, 7 February 2019), which concerns the acquisition of joint control over a JV that provides an online platform for sales and purchases of high quality used cars to dealers and consumers in Germany, the Board decided that the transaction is subject to merger control filing in Turkey.

2.9 Market Share Jurisdictional Threshold

Article 7 of Communiqué No 2010/4 provides turnover-based thresholds and does not seek a market share threshold when assessing whether or not a notification is required for a transaction.

2.10 Joint Ventures

To the extent that the joint venture is full-function, the transaction is subject to merger control once the turnover thresholds are exceeded. To qualify as full-function, there must be joint control over the joint venture, and the joint venture must be an independent economic entity established on a lasting basis.

The Guideline on the Concept of Control explains the concept of full-functionality. The following elements should be considered:

- sufficient resources to operate independently;
- activities that go beyond one specific function for the parents;
- independence from the parents in sale and purchase activities; and
- operations on a lasting basis.

See **2.8 Foreign-to-Foreign Transactions** for the Board's approach regarding joint venture cases.

2.11 Power of Authorities to Investigate a Transaction

If a transaction raises substantive competition law concerns and is viewed as problematic under the SIEC test, the TCA may still investigate the transaction, even if it does not meet the jurisdictional thresholds, either upon complaint or on its own initiative. The applicable limitation period is eight years, pursuant to Article 20(3) of the Law on Misdemeanours No 5326.

2.12 Requirement for Clearance before Implementation

The Turkish competition law regime features a suspension requirement, whereby implementation of a notifiable concentration is prohibited until approval by the Board (Sections 7, 10, 11 and 16 of the Competition Law). See **2.13 Penalties for the Implementation of a Transaction before Clearance**. The implementation of a notifiable transaction is suspended until clearance by the Board is obtained. Therefore, a notifiable merger or acquisition shall not be legally valid until the approval of the Board is received, and such notifiable transaction cannot be closed in Turkey before the clearance of the Board.

2.13 Penalties for the Implementation of a Transaction before Clearance

Pursuant to Article 16 of the Competition Law, if the parties to a notifiable transaction violate the suspension requirement, a turnover-based monetary fine (based on the local turnover generated in the financial year preceding the date of the fining decision at a rate of 0.1%) will be imposed on the incumbent firms (the acquirer(s) in the case of an acquisition, or both merging parties in the case of a merger). A monetary fine imposed as a result of a violation of the suspension requirement will be no less than TRY34,809 (approximately EUR3,400 and USD4,150) for 2021. The wording of Article 16 does not give the Board discretion on whether or not to impose a monetary fine in case of a violation of the suspension requirement; once the violation of the suspension requirement is detected, the monetary fine will be imposed automatically.

These penalties are applied frequently in practice, see:

- BMW/Daimler/Ford/Porsche/Ionity, 20-36/483-211, 28 July 2020;
- Brookfield, 20-21/278-132, 30 April 2020;
- A-Tex Holding/Labelon Group, 16-42/693-311, 6 December 2016;
- Tekno İnşaat, 12-08/224-55, 23 February 2012; Zhejiang/Kiri, 11-33/723-226, 2 June 2011; and
- Ajans Press-İnterpress Medya/Mustafa Emrah Fandaklı/Ziya Açıkça, 10-66/1402-523, 21 October 2010.

2.14 Exceptions to Suspensive Effect

If the control is acquired from various sellers through a series of securities transactions in the stock exchange, the concentration could be notified to the Board after the transaction is realised, provided that the following conditions are satisfied:

- the concentration is notified to the Board without delay; and
- the voting rights attached to the acquired securities are not exercised or the voting rights are exercised only upon an exception provided by the Board, which ensures that the full value of the investment is protected.

Other than this, there are no general exceptions to the suspensive effect and it is not possible to seek a waiver or obtain derogation from the suspensive effect.

2.15 Circumstances Where Implementation before Clearance is Permitted

The Board would not permit closing before the clearance decision. There is no specific regulation allowing or disallowing carve-out or hold-separate arrangements, but the Board has so far consistently rejected all carve-out or hold separate arrangements proposed by undertakings (eg, Total SA, 20 December 2006, 06-92/1186-355; CVR Inc-Inco Limited, 1 February 2007, 07-11/71-23). The Board argued that a closing is sufficient for it to impose a suspension violation fine, and an analysis of whether change in control actually took effect in Turkey is unwarranted. The Board therefore considers the "carve-out" concept to be unconvincing.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

There is no specific deadline for filing in Turkey. However, the filing should be made and approval should be obtained before the closing. In practice, it is recommendable to file the transaction at least 45 to 50 calendar days before the projected closing.

See **2.13 Penalties for the Implementation of a Transaction before Clearance**.

3.2 Type of Agreement Required Prior to Notification

A binding agreement is not required prior to notification: parties can file on the basis of a less formal agreement, such as a letter of intent, a memorandum of understanding or a non-binding term sheet. There are some cases where the parties merely enclosed a letter of intent and/or a memorandum of understanding (Opel-Saft, 20-08/78-45, 6 February 2020; Greenbriar/BDP, 18-43/680-333, 15 November 2018; JIM/Terratec, 18-31/529-260, 12 September 2018 and Jihong/Grammer AG, 17-35/541-232, 26 October 2017). However, Communiqué No 2010/4 requires the submission of a written document prior to notification – ie, a filing cannot be made where there is nothing in writing (eg, based on a good-faith intention to reach an agreement).

3.3 Filing Fees

No filing fees are required under the Turkish merger control regime.

3.4 Parties Responsible for Filing

Pursuant to Article 10 of Communiqué No 2010/4, a filing can be made solely by one of the parties or jointly by some or all of the parties. The filing can be submitted by the parties' authorised representatives. In the event of filing by just one of the parties, the filing party should notify the other party.

3.5 Information Included in a Filing

The notification form is similar to Form CO. The Board requires one hard copy and an electronic copy of the notification form in Turkish to be submitted.

Additional documents are also required, such as the executed or current copies and sworn Turkish translations of the transaction document(s)

that brings about the transaction, financial statements, including the balance sheets of the parties, and, if available, market research reports for the relevant market. A signed and notarised (and apostilled, if applicable) power of attorney is also required.

3.6 Penalties/Consequences of Incomplete Notification

The TCA considers a notification to be complete when it receives the notification in its complete form. The parties are obliged to file correct and complete information with the TCA. If the parties provide incomplete information, the Board would request further data regarding the missing information. The Board deems notification to be complete on the date when the submitted information is complete.

In practice, the Board sends written information requests when there is information missing. The TCA's written information requests will cut the review period and restart the 30 calendar-day period as of the date on which the responses are submitted.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The TCA imposes a turnover-based monetary fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision) in case incorrect or misleading information is provided by the parties (Brookfield, 20-21/278-132, 30 April 2020; Akzo Nobel, 10- 24/339-123, 18 March 2010).

3.8 Review Process

Upon its preliminary review (Phase I) of the notification, the Board will decide either to approve or to investigate the transaction further (Phase II).

The Board notifies the parties of the outcome within 30 calendar 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. However, in practice, the Board almost always reacts within the 30-day period, either by sending a written request for information or – very rarely – by rendering its decision within the original 30-day period. In addition, the TCA frequently asks formal questions and adds more time to the review process, as it is advisable to notify the filing at least 45 to 50 calendar days before the projected closing.

If a notification leads to an investigation (Phase II), it turns into a full-fledged investigation, which, under Turkish law, takes about six months. If deemed necessary, this period may be extended only once, for an additional period of up to six months.

3.9 Pre-notification Discussions with Authorities

Other than privatization tenders, the Turkish merger control rules do not have a pre-notification mechanism. Also, in practice, a filing is seen as a one-sided review by the TCA, once a formal one-shot notification is made. The TCA may issue various information requests, but it will only do so after the notification is made, see **3.6 Penalties/Consequences of Incomplete Notification** and **3.8 Review Process**.

3.10 Requests for Information during Review Process

It is common practice for the TCA to send written requests to the parties of the transaction, to any other party related to the transaction, or to third parties such as competitors, customers or suppliers.

The TCA's written information requests will cut the review period and restart the 30-day period

as of the date on which the responses are submitted.

3.11 Accelerated Procedure

There is a short-form notification (without a fast-track procedure) on the condition that one of the transaction parties will be acquiring sole control of an undertaking over which it has joint control, or that the total of the parties' respective market shares is less than 20% in horizontally affected markets and each party's market share is less than 25% in vertically affected markets.

Turkish merger control regime does not include a fast-track procedure to speed up the clearance process. Apart from close follow-up with the case-handlers reviewing the transaction, the parties have no other possible way to speed up the review process.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The substantive test is a SIEC test with the Amendment Law, similar to the approach under ECMR. Hereby, the TCA will be able to prohibit not only transactions that may create a dominant position or strengthen an existing dominant position, but also those that could significantly impede competition. There is no case law or secondary legislation, as of the time of writing, regarding how SIEC test will be applied.

In terms of creating or strengthening a dominant position, Article 3 of the Competition Law defines dominant position as: "any position enjoyed in a certain market by one or more undertakings by virtue of which those undertakings have the power to act independently from their competitors and purchasers in determining economic parameters such as the amount of production, distribution, price and supply". Market shares of about 40% and higher are considered, along with other factors such as vertical foreclosure or barriers to entry, as an indication of a dominant position in a relevant product market.

4.2 Markets Affected by a Transaction

Pursuant to Communiqué No 2010/4, the relevant product markets are those that might be affected by the notified transaction where two or more of the parties are commercially active in the same product market (horizontal relationship), or where at least one of the parties is commercially active in the downstream or upstream market of any product market in which another party operates (vertical relationship). There is no de minimis or other exception under the Turkish merger control regime, except for certain mergers in the banking sector.

4.3 Reliance on Case Law

The TCA closely follows the Commission decisions (eg, L'Oréal SA v The Body Shop, 06-41/515-136, 7 June 2006; IBM Danmark v Maersk Data, 04-69/983-239, 27 October 2004; Flir Systems v Raymarine, 10-44/762-246, 17 June 2010; Efes Pazarlama, 05-48/696-184, 21 July 2005) as well as the CJEU's precedents, and regularly incorporates them into its decisions.

The Board has also referred to the US Federal Trade Commission decisions (eg, Google, 16-39/638-284, 16 November 2016), as well as the French and German competition authorities' precedents (eg, BSH Ev Aletleri, 17-27/454-195, 22 August 2017; Yemeksepeti, 16-20/347-156, 9 June 2016).

4.4 Competition Concerns

The TCA primarily focuses on unilateral effects, and may also consider co-ordinated effects (Ladik, 20 December 2005, 05-86/1188-340) and vertical effects (Migros, 9 July 2015, 15-29/420-117 – the transaction was conditionally cleared).

However, the TCA has not yet prohibited a transaction on the grounds of "conglomerate effects".

4.5 Economic Efficiencies

The Board considers economic efficiencies to the extent that they operate as a beneficial factor in terms of better-quality production or cost-savings such as reduced product development costs through the integration, reduced procurement and production costs, etc.

Efficiencies that result from a concentration may play a more important role in cases where the combined market shares of the parties exceed 20% for horizontal overlaps, and where the market share of both parties exceeds 25% for vertical overlaps. In cases where the market shares remain below these thresholds, the parties are at liberty to skip the relevant sections of the notification form on efficiencies.

4.6 Non-competition Issues

The TCA does not take non-competition issues such as industrial policies, national security, foreign investment, employment or other public interest issues into account when assessing a merger. Therefore, the TCA is independent while carrying out its duties. Article 20 of the Competition Law implies that no organ, authority, entity or person can give orders or directives to affect the final decisions of the Board.

4.7 Special Consideration for Joint Ventures

Special consideration is given to joint ventures under the Turkish merger control regime. A joint venture must not have the object or effect of restricting competition between the parties and itself. Article 5 of the Competition Law defines that the parties may notify the non-full-function joint venture to the Board for individual exemption. Communiqué No 2010/4 provides individual exemption for full-function joint ventures if the joint venture has the object or effect of restricting competition between the parties and the joint venture.

The standard SIEC test applies to the full-function joint venture. In addition, the notification form includes a certain section that is aimed at collecting information to assess whether the joint venture will lead to co-ordination. Article 13/3 of Communiqué No 2010/4 provides that the Board would carry out an individual exemption review on notified joint ventures that emerge as an independent economic unit on a lasting basis, but have as their object or effect the restriction of competition among the parties or between the parties and the joint venture itself. The wording of the standard notification form also allows for such a review.

Non-full-function joint ventures are not subject to merger control but may fall under Article 4, which prohibits restrictive agreements. The parties may conduct a self-assessment to see if the non-full-function joint venture fulfils the conditions of individual exemption.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere with Transactions

The Board may render either a clearance or a prohibition decision; it may also decide to give a conditional approval.

The Board has broad powers during the investigation stage. If it determines that the transaction may violate the Competition Law, the Board may notify the undertaking or associations of undertakings concerned of a decision regarding the actions to be taken or avoided so as to establish competition and maintain the situation before

infringement, and forward its opinion on how to terminate such infringement.

The Board may re-examine a clearance decision at any time, and decide on prohibition and the application of other sanctions for a merger or acquisition if the clearance was granted based on incorrect or misleading information from one of the undertakings or if the obligations provided in the decision are not complied with.

In order for there to be a prohibition decision, the Board must show that the transaction could significantly impede competition. In cases of conditional clearance, the Board must show that the transaction would have produced these effects, absent the relevant structural and/or behavioural remedies.

With the Amendment Law, Article 9(1) of the Competition Law now states that, in case of an infringement of Article 7, the Board shall order the parties concerned, by a resolution, the behaviours which should be followed or avoided in order to establish competition, and the structural remedies such as transfer of certain activities or shareholdings. However, the relevant amendment introduces "first behavioural, then structural remedy" rule for Article 7 violations; therefore, in cases where the behavioural remedies are ultimately considered to be ineffective, the Board will order structural remedies. Undertakings shall comply with the structural remedies in a minimum of six months.

5.2 Parties' Ability to Negotiate Remedies

The parties are able to negotiate remedies according to Article 14 of Communiqué No 2010/4, which enables the parties to provide commitments to remedy substantive competition law issues of a concentration under Article 7.

The Remedy Guideline requires that the parties should submit detailed information on how the remedy would be applied and how it would resolve the competition concerns. It states that the parties can submit behavioural or structural remedies, and explains the acceptable remedies, such as divestment in order to cease all kinds of connection with the competitors, remedies that enable undertakings to access certain infrastructure issues (eg, networks, intellectual property, essential facilities) and remedies on concluding/amending long-term exclusive agreements.

5.3 Legal Standard

Pursuant to the Remedy Guideline, the parties must take the following principles into consideration when submitting proposed remedies:

- parties must base their remedies on the legal and economic principles specific to the transaction at hand – solutions must aim to protect the market from the potential effects of the transaction through the protection of the market's competitive structure;
- the main expectation from a remedy is to protect the pre-transaction level of competition;
- the remedy must protect competition not the competitors; and
- the conditions of the remedy must be clear and feasible.

The Board should only accept remedies that have been proven to be sufficient in eliminating the problem of significant reducing competition. In addition, the Remedy Guideline requires the remedies to be capable of being implemented effectively as soon as possible, as market conditions may not stay the same until the implementation of the proposed remedy.

5.4 Typical Remedies

The number of cases in which the Board has requested divestment or licensing commitments

or other structural or behavioural remedies has increased dramatically in the last few years. In practice, the Board is inclined to apply different types of divestment remedies. 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.

The Remedy Guideline

The Remedy Guideline includes all steps and conditions for the enforcement of remedies. The jurisdiction of the TCA is limited to competition-related matters, so remedies that do not concern competition-related matters fall outside of the Turkish antitrust enforcement. However, the secondary legislation is not yet revised as per the Amendment Law.

The intended effect of the divestiture will take place only if the divestment business is assigned to a suitable purchaser that is capable of creating an effective competitive power in the market. To make sure that the business will be divested to a suitable purchaser, the proposed remedy must include the elements that define the suitability of the purchaser.

The approval of a possible purchaser by the Board is dependent on the following requirements:

- the purchaser must be independent of and not connected to the parties;
- the purchaser must have the financial resources, business experience and ability to become an effective competitor in the market through the divestment business;
- the transfer transaction to be carried out with the purchaser must not cause a new competitive problem – in the event that such a problem exists, a new remedy proposal will not be accepted; and
- the transfer to the purchaser must not cause a risk of delay in the implementation of the commitments – the purchaser must be capable of obtaining all the necessary authorisations from the relevant regulatory authorities concerning the transfer of the divestment business.

The conditions may be revised on a case-by-case basis. For instance, in some cases, an obligation may be imposed such that the purchaser is not the one that seeks financial investment but the one that is active in the sector.

As per the Remedy Guideline, there are two methods that are accepted by the Board. The first is for a purchaser fulfilling the aforementioned conditions to acquire the divested business, within a period of time following the authorisation decision and upon the approval of the Board. The second is the signing of a sales contract with a suitable purchaser before the authorisation decision ("fix-it-first").

5.5 Negotiating Remedies with Authorities

The parties may submit proposals for possible remedies during either the preliminary review or the investigation process. If the parties submit the commitment during the preliminary review period, the date of the submission of the commitment is considered the notification date, and the review process begins on that date. If the parties decide to serve the commitment together with the notification form, the parties should attach a signed version of the commitment to the notification form.

There have been several cases where the Board has accepted remedies or commitments (such as divestments) proposed to or imposed by the Commission, as long as these remedies or commitments ease competition law concerns in Turkey (eg, Bayer/Monsanto, 18-14/261-126, 8

March 2018; Nidec/Embraco, 19-16/231-103, 18 April 2019; Synthomer plc/OMNOVA Solutions, 20-08/90-55, 6 February 2020).

See **5.1 Authorities' Ability to Prohibit or Interfere with Transactions**.

5.6 Conditions and Timing for Divestitures

The Board may condition its approval decision on the observance of the remedies. The characteristics of the remedies are important when determining whether the parties may complete the transaction before the remedies are complied with. The remedies have different natures – some a condition precedent for the closing, some an obligation that could only be complied with after closure – and the parties cannot complete the transaction before the remedies are complied with before the closing.

The TCA imposes a turnover-based monetary fine of 0.05% of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be used) if the parties do not comply with the remedies.

5.7 Issuance of Decisions

The Board serves the final decisions to the representative(s) of the notifying party/parties, and also publishes final decisions on the website of the TCA after any confidential business information is taken out.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

In an example of a recent conditional clearance case (Synthomer plc/OMNOVA Solution, 20-08/90-55, 6 February 2020), the Board granted its conditional approval to the transaction based on the commitments provided by the parties to Commission during its Phase II review. Moreover, in Nidec/Embraco (19-16/231-103, 18 April 2019), Bayer Aktiengesellschaft (18-14/261-126, 8 May 2018) and in NV Bekaert (15-04/52-25, 22 January 2015), the Board granted its conditional approval to the transactions based on the commitments provided by the parties during its Phase II review. The Board also prohibited the acquisition by Setur (a subsidiary of Koç Holding, Turkey's largest industrial conglomerate) of Beta Marina and Pendik Turizm.

Whilst there are few decisions where behavioural remedies were recognised (eg, Bekaert/Pirelli, 22 January 2015, 15-04/52-25; Migros/Anadolu, 9 July 2015, 29/420-117), the great majority of conditional clearance decisions rely on structural remedies (eg, Harris Corporation/L3 Technologies, 20 June 2019, 19-22/327-145; Nidec/Embraco, 18 April 2019, 19-16/231-103).

In some of these cases (eg, Cadbury/Schweppes, 07-67/836-314, 23 August 2007), the parties initially proposed purely behavioural remedies, which ultimately failed. However, in Luxoticca/Essilor (1 October 2018, 18-36/585-286), certain structural and behavioural remedies were submitted to the TCA and the Board approved the transaction.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

The Board's approval of the transaction shall also cover the restraints that are directly related and necessary to enforce the transaction (Article 13(5) of Communiqué No 2010/4). Therefore, a restraint shall be covered to the extent that its nature, subject-matter, geographic scope and duration are limited to what is necessary to enforce the transaction.

General rules on ancillary restraints are defined in the Guideline on Undertakings Concerned. The parties make a self-assessment as to whether a certain restriction could be deemed as ancillary, therefore, the Board will not allocate a separate part in its decision to explaining about the ancillary status of all the restraints. Should a transaction contains uncommon restraints that have not been included in the Guideline on Undertakings Concerned and the Board's early decisions, the Board may review the restraints per the parties' request, and may launch an Article 4 investigation if the ancillary restrictions are not compliant with the merger control regulation.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

The Board is authorised to request information from third parties such as customers, competitors, complainants, and other persons related to the transaction. During the review process, third parties may submit complaints about a transaction and request a hearing from the Board, provided that they prove their legitimate interest to do so. They may also challenge the Board's decision regarding the transaction before the competent judicial tribunal, again provided that they prove their legitimate interest.

If the legislation requires the TCA to ask for another public authority's opinion, this would cut the review period, which would start when the Board receives the public authority's opinion.

7.2 Contacting Third Parties

The Board frequently contacts third parties as part of its review process, where needed, usually in a written form; oral communication with third parties is of an exceptional nature. There are a limited number of decisions where the Board has applied an economic test on the proposed remedies (eg, Mars Sinema v AFM, 11-57/1473-539, 17 November 2011). Although the Board does not tend to conduct a proper economic analysis, it does, however, make a comprehensive assessment on the content of the proposed remedies (eg, Anadolu v Moonlight Capital, 15-29/420-117, 9 July 2015).

7.3 Confidentiality

Communiqué No 2010/4 introduces a mechanism that requires the TCA to publish notified transactions on its official website, including only the names of the undertakings concerned and their areas of commercial activity. Once the parties have notified a transaction to the TCA, the existence of a transaction is no longer a confidential matter. Communiqué No 2010/3 on the Regulation of Right to Access to File and Protection of Commercial Secrets (Communiqué No 2010/3) is the main legislation that regulates the protection of commercial information, pursuant to which undertakings must identify and justify information or documents as commercial secrets.

It is the undertakings' obligation to request confidentiality from the Board in writing, and to justify their reasons for the confidential treatment of the information or documents. The general rule is that if confidentiality is not requested, then the information and documents are accepted as non-confidential.

The reasoned decisions of the Board are published on the website of the Authority after confidential business information has been removed. Article 25 of the Competition Law requires that the Board and personnel of the TCA are bound by a legal obligation not to disclose any trade secrets or confidential information they have acknowledged during the course of their work.

In the event that the Board decides to have a hearing during the investigation, hearings at the TCA are, in principle, open to the public, although the Board may decide that the hearing shall be held in camera, in order to protect public morality or trade secrets. Article 15(2) of Communiqué No 2010/3 implies that the TCA may not take into account confidentiality requests related to information and documents that are necessary evidence to prove the infringement of competition. In such cases, the TCA can disclose such information and documents that could be considered trade secrets by taking into account the balance between public interest and private interest, and in accordance with the proportionality criterion.

7.4 Co-operation with Other Jurisdictions

The TCA is authorised to contact certain regulatory authorities around the world, including the Commission, in order to exchange information. Article 43 of Decision No 1/95 of the EC-Turkey Association Council (Decision No 1/95) empowers the TCA to notify and request the 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 provision grants reciprocal rights and obligations to the parties (EU-Turkey) and, thus, the Commission has the authority to request the Board to apply relevant measures to restore competition in the relevant markets.

In addition, TCA's research department makes periodical consultations with relevant domestic and foreign institutions and organisations.

In the past, the Commission has been reluctant to share any evidence or arguments that the TCA had explicitly requested on a limited number of occasions.

Authorities are not obliged to seek the parties' permission to share information with each other.

Nonetheless, the TCA co-operates with several national competition authorities of various jurisdictions, and also develops training programmes for co-operation purposes. In recent years, programmes have been organised for the board members of the Pakistani Competition Authority, the top managers of the National Agency of the Kyrgyz Republic for Anti-monopoly Policy and Development of Competition, the members of the Mongolian Agency for Fair Competition and Consumer Protection, and the board members of the Turkish Republic of Northern Cyprus's Competition Authority. Similar programmes have also been developed in co-operation with the Azerbaijan State Service for Anti-monopoly Policy and Consumers' Rights Protection, the State Committee of the Republic of Uzbekistan on De-monopolisation, and the Ukrainian Anti-monopoly Committee.

These programmes were held according to bilateral co-operation agreements.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Parties can appeal the Board's final decisions before the administrative courts of Ankara, including decisions on interim measures and fines. Third parties can also challenge a Board decision before the competent administrative courts, provided that they have a legitimate interest. Decisions of the Board are considered as administrative acts, thus legal actions against them shall be pursued in accordance with the Turkish Administrative Procedural Law. The judicial review comprises both procedural and substantive review.

As per Article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Board. However, at the request of the plaintiff, the court – by providing its justifications – may decide on a stay of execution if the execution of the decision is likely to cause serious and irreparable damages, and if the decision is highly likely to be against the law (ie, showing of a prima facie case).

Judicial Review Period

The decisions of the Ankara administrative courts of first instance are subject to appeal before the regional courts (appellate courts) and the High State Court.

Administrative litigation cases are subject to judicial review before the regional courts. This creates a three-level appellate court system consisting of administrative courts, regional courts and the High State Court.

Regional Courts

The regional courts will go through the case file, on both procedural and substantive grounds, and investigate the case file and make their decision considering the merits of the case. The regional courts' decisions will be considered as final in nature. The decision of the regional court will be subject to the High State Court's review in exceptional circumstances under Article 46 of the Administrative Procedure Law.

In such a case, the High State Court may decide to uphold or reverse the regional courts' decision. If the decision is reversed by the High State Court, it will be remanded back to the deciding regional court, which will in turn issue a new decision that takes the High State Court's decision into account. The appeal period before the High State Court usually takes about 24 to 36 months. Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts 24 to 30 months.

8.2 Typical Timeline for Appeals

The parties should file an appeal case within 60 calendar days of receiving the reasoned decision of the Board. The judicial review period before the Ankara administrative courts of first instance usually takes about 12 to 24 months, but may take longer to finalise due to the characteristics and complexities of the case and, in particular, the workload of the court.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties can challenge a Board decision before the competent administrative courts provided they have a legitimate interest.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

The Amendment Law has finally been approved by the Turkish parliament on 16 June 2020, and entered into force on 24 June 2020.

Below are the amendments concerning the Turkish merger control regime.

The SIEC Test

In line with the EU law, the Amendment Law replaces the current dominance test with the "significant impediment of effective competition" (SIEC) test. This amendment aims to allow a more reliable assessment for the unilateral and co-operation effects that might arise as a result of mergers or acquisitions. Accordingly, the Board will be able to prohibit not only transactions that may result in creating a dominant position or strengthening an existing dominant

position, but also those that can significantly impede competition. SIEC test may also reduce over-enforcement as it focuses more on whether and how much the competition is impeded as a result of a transaction. Thus, pro-competitive mergers and acquisitions might benefit from the test even though a transaction leads to significant market power based on, for instance, major efficiencies. Likewise, dominant undertakings contemplating transactions with de minimis impact may also benefit from the new approach.

Anti-competitive Conduct

Moreover, the Amendment Law aims to grant the Board the power to order structural remedies for anti-competitive conduct infringing Articles 4, 6 and 7 of the Competition Law, provided that behavioural remedies are first applied and failed. Further, if the Board determines with a final decision that behavioural remedies have failed, undertakings or association of undertakings will be granted at least six months to comply with structural remedies. Both behavioural and structural remedies should be proportionate to and necessary to end the infringement effectively. This amendment is in line with the EC Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, but takes a step further to provide assurance to the companies that structural remedies for competition law infringements will only be applied when behavioural remedies have first been tried but proved to be ineffective.

Remedy Provision

A curious point as to this remedy provision added to Article 9 is its potential implications for Article 11 of the Competition Law, which also concerns the Board's power to impose remedies for gun-jumping in mergers (that results in an infringement of Article 7 concerning mandatory notification of mergers exceeding jurisdictional thresholds). Article 11 allows the Board to dissolve a notifiable merger that has been realised without the Board's approval through several methods including divestitures, and there is no precondition of trying out behavioural remedies first. With the Amendment Law, however, Article 9 now introduces "first behavioural, then structural remedy" rule also for Article 7 violations. How the Board will reconcile these two provisions in practice remains to be seen.

Investigation Periods

Finally, according to the Amendment Law, the time period for the service of the Authority's additional opinion (currently 15 days) during the investigation (Phase II review) can be doubled once.

9.2 Recent Enforcement Record

Enforcement actions by the Board are very frequent in the merger control field. There are several cases where the Board levied monetary fines against the parties for failing to notify in foreign-to-foreign transactions. The same is true for conditional clearances. So far, only a few transactions have been blocked altogether (eg, Setur, 15-29/421-118, 9 July 2015).

9.3 Current Competition Concerns

The Board adopted many significant decisions in the past year.

A notable transaction in 2020 was Fiat/Peugeot transaction concerning the combination of two automotive companies Fiat Chrysler Automobiles N.V. and Peugeot S.A., through the merger of Peugeot S.A. with and into Fiat had been taken to Phase-II. Pursuant to Article 7, the transaction would result in the significant impediment of effective competition in the market for manufacturing and sales of light commercial vehicles up to the gross weight of 3.5 tonnes. The transaction has been approved within the scope of the commitments submitted by Fiat and Koç Holding A.Ş. (20-57/794-354, 30 December 2020).

In another Phase-II decision related to the transaction concerning the acquisition of sole control over Gülçiçek Kimya ve Uçan Yağlar Sanayi ve Ticaret A.Ş. by Fragar (Europe) SA. The Board determined that the parties' activities horizontally overlap with respect to the sale and production of fragrances, and vertically overlap with respect to the sale and production of fragrances and aromatic chemicals. Even though the combination of the undertakings would give rise to significant market power in Turkey, the Board cleared the transaction within the scope of the Phase-II review by condiering the parties' and their competitors' Turkish and global market shares and the competitive dynamics of the market both globally and in Turkey (20-31/388-174, 25 June 2020).

The Board's eagerness shows that it will not hesitate to go into Phase II review if it finds the review to be necessary on the basis of potential competition law concerns. In 2020, the Board assessed 220 transactions and took six transactions into Phase II review.

ELIG Gürkaynak Attorneys-at-Law is a leading law firm of 90 lawyers based in Istanbul. Founded in 2005, the firm combines a solid knowledge of Turkish law with a business-minded approach to developing legal solutions that meet the ever-changing needs of its clients in their international and domestic operations. The competition law and regulatory department contains four partners, four counsel and 40 associates. In addition to its unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience of defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases, leniency handlings, and before courts on issues of private enforcement of competition law, along with appeals of the administrative decisions of the Turkish Competition Authority. ELIG Gürkaynak represents multinational corporations, business associations, investment banks, partnerships and individuals in the widest variety of competition law matters, while also collaborating with many international law firms.

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