# THE Merger Control Review

Twelfth Edition

**Editor**
Ilene Knable Gotts

THE LAWREVIEWS

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# PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, such as Malaysia, are currently considering imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). Also, the book includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals and media, as well as a chapter on merger remedies, to provide a more in-depth discussion of recent developments. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is, therefore, imperative that counsel develop a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 28 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency in 2018. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has amended its law to ensure that it has the opportunity to review transactions in which the parties' turnovers do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). The focus on 'killer acquisitions' (i.e., acquisitions by a dominant company of a nascent competitor), particularly involving digital or platform offerings, has been a driver in the expansion of jurisdiction and focus of investigations. Newly adopted laws have tried to vest jurisdiction on these transactions by focusing on the 'value of the consideration' rather than turnover for acquisitions of nascent firms, particularly in the digital economy (e.g., in Austria and Germany). Some jurisdictions have also adopted a process to 'call in' transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability of reviewing and taking action in non-reportable transactions (see discussion of *Google/Fitbit* in the Japan chapter), and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time. To provide the ability to review acquisitions of nascent but potentially important rivals, the European Commission (EC) has recently adopted the potentially most significant change in its rules: to use the referral process from Member States to vest jurisdiction in transactions that fall below its thresholds but that could have Community-wide significance. Two recent referrals should provide significant guidance regarding the impact of this new referral process.

There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there is similarly no 'local' effect required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

Covid-19 and the current economic environment have provided new challenges to companies and enforcement agencies. Many jurisdictions have extended the review times to account for covid-19 disruptions at the agencies. At the same time, some of the transactions are distress situations, in which timing is key to avoid the exit of the operations and termination of employees. Regardless of the speed at which the economic recovery occurs, it is very likely that for the next couple of years the agencies will be faced with reviews of companies in financial distress, if not at the point of failure. Some jurisdictions exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing company defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed due to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the EC both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as 'gun-jumping', even fining companies that are found to be in violation. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice. Other jurisdictions have more recently been aggressive. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. In addition, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, the EC fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the JFTC announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Even within the EC, there remain some jurisdictions that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm, in large cross-border transactions raising competition concerns, for the US, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's competition authority, which, in turn, has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the EC in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including, most recently, Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the US Federal Trade Commission and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute, to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, Japan, the Netherlands, Norway, South Africa, Ukraine, Vietnam and the United States). This is particularly the case when non-compete or exclusive dealing relationships raise concerns (e.g., in Mexico and the United States). Some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata* and France's decision in the *Numericable/SFR* transaction).

We are at a potentially transformational point in competition policy enforcement. This book should, however, provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

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Wachtell, Lipton, Rosen & Katz
New York
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# Part II

# Jurisdictions

Chapter 28

# TURKEY

*Gönenç Gürkaynak and K Korhan Yıldırım*[1]

## I INTRODUCTION

The national competition agency for enforcing merger control rules in Turkey is the Turkish Competition Authority (the Authority), a legal entity with administrative and financial autonomy. The Authority consists of the Competition Board (the Board), the Presidency, Service Departments and the Advisory Department. As the competent decision-making body of the Authority, the Board is responsible for, inter alia, reviewing and resolving merger and acquisition notifications. The Board consists of seven members and is based in Ankara. The Service Departments consist of six technical units: one research unit, one decisions unit, one information management unit, one external relations unit, one management services unit and one strategy development unit. There is a 'sectoral' job definition for each technical unit.

The relevant legislation on merger control is Law No. 4054 on Protection of Competition dated 13 December 1994, which was amended on 24 June 2020 (the Amendment Law), and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board, published on 7 October 2010. Communiqué No. 2010/4 entered into force on 1 January 2011 and was amended on 1 February 2013.

A major development in the Turkish competition law regime is the Amendment Law, which changes the substantive test by replacing the dominance test with the significant impediment of effective competition (SIEC) test. The secondary legislation, which should provide further insight into the application of the new SIEC test, is yet to change.

The Authority has also issued many guidelines to supplement and provide guidance on the enforcement of Turkish merger control rules:

*a* the Guideline on Market Definition, which applies, inter alia, to merger control matters, was issued in 2008, and is closely modelled on the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law;[2]

*b* the Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions covers certain topics and questions about the concepts of undertakings concerned, turnover calculations and ancillary restraints. It is closely modelled on Council Regulation (EC) No. 139/2004 on the Control of Concentrations between Undertakings;

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2 97/C372/03.

*c* the Guideline on Remedies Acceptable to the Turkish Competition Authority in Mergers and Acquisitions (the Guidelines on Remedies), which is an almost exact Turkish translation of the Commission Notice on Remedies Acceptable Under Council Regulation (EC) No. 139/2004 and Under Commission Regulation (EC) No. 802/2004; and

*d* the Guidelines on Horizontal Mergers and Acquisitions (the Horizontal Guidelines) and the Guidelines on Non-Horizontal Mergers and Acquisitions (the Non-Horizontal Guidelines), which are in line with EU competition law regulations and seek to retain harmony between EU and Turkish competition law instruments.

The Board also released the Guidelines on Merger and Acquisition Transactions and the Concept of Control, also closely modelled on the respective EC guidelines.

Turkey is a jurisdiction with a suspensory pre-merger notification and approval requirement. Much like the EC regime, concentrations that result in a change of control on a lasting basis are subject to the Board's approval, provided that they reach the applicable turnover thresholds. 'Control' is defined as the right to exercise decisive influence over day-to-day management or on long-term strategic business decisions of a company, and it can be exercised *de jure* or *de facto*.

The Authority has introduced Communiqué No. 2017/2 Amending Communiqué No. 2010/4. One of the amendments introduced in Communiqué No. 2017/2 (Article 1) abolished Article 7(2) of Communiqué No. 2010/4, which had required that 'The thresholds . . . are re-determined by the Competition Board biannually'. Through this amendment, the Board no longer has the duty to re-establish turnover thresholds for concentrations every two years. As a result, there is no specific timeline for the review of the relevant turnover thresholds set forth by Article 7(1) of Communiqué No. 2010/4. Article 2 of Communiqué No. 2017/2 modified Article 8(5) of Communiqué No. 2010/4. With this amendment, the Board is now in a position to evaluate the transactions realised by the same undertaking concerned in the same relevant product market within three years as a single transaction, as well as two transactions carried out between the same persons or parties within a three-year period. Finally, Communiqué No. 2017/2 introduced a new regulation concerning public bids and series of transactions in securities. This provision is similar to Article 7(2) of the European Merger Regulation. It provides that the applicable suspension requirement will not prevent the implementation of a public bid or of a series of transactions in securities on the conditions that (1) the transaction is notified to the Authority without delay, and (2) the acquirer does not exercise the voting rights or does so only to maintain the full value of the investment based on a derogation granted by the Board. The Board may condition the derogation upon certain remedies to maintain effective competition.

Before this amendment, there was no specific regulation on the implementation of public bids and series of transactions. There were, however, certain precedents that laid down the same principles as the new regulation.

**Thresholds**

Article 7 of Communiqué No. 2010/4 provides for the following thresholds:

*a* the total turnover of the parties to a concentration in Turkey exceeds 100 million lira and the respective Turkish turnover of at least two of the parties individually exceed 30 million lira; or *b* the Turkish turnover of the transferred assets or businesses in acquisitions exceeds 30 million lira, or the Turkish turnover of any of the parties in mergers exceeds 30 million lira; and the worldwide turnover of at least one of the other parties to the transaction exceeds 500 million lira.

Communiqué No. 2010/4 no longer seeks the existence of an 'affected market' in assessing whether a transaction triggers a notification requirement. The existence of an affected market is not a condition to triggering a merger control filing requirement.

The Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions has also been amended in line with the changes in the jurisdictional thresholds. Before the amendments, a horizontal or vertical overlap between the worldwide activities of the transaction parties was sufficient to infer the existence of an affected market, provided that one of the transaction parties was active in such an overlapping segment in Turkey. Following the amendments, existence of an affected market is no longer a requirement for a merger filing to the Authority, and all discussions and explanations on the concept of affected market have been removed from the Guideline altogether.

Foreign-to-foreign transactions are caught if they exceed the applicable thresholds.

Acquisition of a minority shareholding can constitute a notifiable merger if and to the extent that it leads to a change in the control structure of the target entity. Joint ventures that emerge as independent economic entities possessing assets and labour to achieve their objectives are subject to notification to, and the approval of, the Board. As per Article 13 of Communiqué No. 2010/4, cooperative joint ventures will also be subject to a merger control notification and analysis on top of an individual exemption analysis, if warranted.

The implementing regulations provide for important exemptions and special rules. In particular:

*a* Article 19 of Banking Law No. 5411 provides an exception from the application of merger control rules for mergers and acquisitions of banks. The exemption is subject to the condition that the market share of the total assets of the relevant banks does not exceed 20 per cent;

*b* mandatory acquisitions by public institutions as a result of financial distress, concordat, liquidation, etc., do not require a pre-merger notification;

*c* intra-corporate transactions that do not lead to a change in control are not notifiable;

*d* acquisitions by inheritance are not subject to merger control;

*e* acquisitions made by financial securities companies solely for investment purposes do not require a notification, subject to the condition that the securities company does not exercise control over the target entity in a manner that influences its competitive behaviour; and

*f* two or more transactions carried out between the same persons or parties or within the same relevant product market by the same undertaking concerned within a period of three years are deemed a single transaction for turnover calculation purposes following the amendments brought by Communiqué No. 2017/2. They warrant separate notifications if their cumulative effect exceeds the thresholds, regardless of whether the transactions are in the same market or sector, or whether they were notified before.

There are also specific methods of turnover calculation for certain sectors. These special methods apply to banks, special financial institutions, leasing companies, factoring companies, securities agents, insurance companies and pension companies. The Turkish merger control regime does not, however, recognise any *de minimis* exceptions.

Failing to file or closing the transaction before the Board's approval can result in a turnover-based monetary fine. The fine is calculated according to the annual local Turkish turnover of the acquirer generated in the financial year preceding the fining decision at a rate of 0.1 per cent. It will be imposed on the acquiring party. In the case of mergers, it will apply to both merging parties. The monetary fine will, in any event, be no less than 34,809 lira for 2021. This monetary fine does not depend on whether the Authority will ultimately clear the transaction.

If, however, there truly is a risk that the transaction is problematic under the SIEC test applicable in Turkey, the Authority may *ex officio* launch an investigation into the transaction; order structural and behavioural remedies to restore the situation as before the closing (*restitutio in integrum*); and impose a turnover-based fine of up to 10 per cent of the parties' annual turnover. Executive members and employees of the undertakings concerned who are determined to have played a significant role in the violation (failing to file or closing before the approval) may also receive monetary fines of up to 5 per cent of the fine imposed on the undertakings. The transaction will also be invalid and unenforceable in Turkey.

The Board has so far consistently rejected all carve-out or hold-separate arrangements proposed by merging undertakings. Communiqué No. 2010/4 provides that a transaction is deemed to be 'realised' (i.e., closed) 'on the date when the change in control occurs'. While the wording allows some room to speculate that carve-out or hold-separate arrangements are now allowed, it remains to be seen if the Authority will interpret this provision in such a way. This has so far been consistently rejected by the Board, which argues that a closing is sufficient for the suspension violation fine to be imposed, and that a further analysis of whether change in control actually took effect in Turkey is unwarranted.

## II YEAR IN REVIEW

Pursuant to the Merger and Acquisition Insight Report of the Authority (the Report) for 2020, the Board reviewed a total of 220 transactions in 2020 including: 190 mergers and acquisitions that were approved unconditionally; one decision that was approved conditionally; and one decision that was not approved. Twenty-eight were out of the scope of merger control (i.e., they either did not meet the turnover thresholds or fell outside the scope of the merger control system due to lack of change in control). The consolidated statistics regarding merger cases in 2020 show that the transactions in the chemical and mining sector took the lead with 39 notifications, followed by the vehicle and transportation sector with 28 notifications.

The Board's most important merger control decisions in 2020 were as follows.

The *Fiat/Peugeot* transaction concerning the combination of two automotive companies, Fiat Chrysler Automobiles NV (Fiat) and Peugeot SA, through the merger of Peugeot SA with and into Fiat, had been taken to Phase II.[3] The short-form decision indicates that the notified transaction would not result in the significant impediment of effective competition in the market for manufacturing and sales of passenger cars and the market for manufacturing and

3 17 July 2020, 20-34/441-M.

sales of light commercial vehicles with a gross weight of between 3.5 tonnes and 6 tonnes. However, pursuant to Article 7 of Law No. 4054, the notified transaction would result in the significant impediment of effective competition in the market for manufacturing and sales of light commercial vehicles up to a gross weight of 3.5 tonnes. Accordingly, the transaction has been approved within the scope of the commitments submitted to the Authority by Fiat and Koç Holding AŞ.[4] The reasoned decision has not yet been published.

Another Phase II decision relates to the transaction concerning the acquisition of sole control over Gülçiçek Kimya ve Uçan Yağlar Sanayi ve Ticaret AŞ by Fragar (Europe) SA. The unconditional approval decision rendered in this regard is prominent in the sense that even though the combination of the undertakings in question would give rise to significant market power in Turkey, the Board cleared the transaction by taking into account the parties' and their competitors' Turkish and global market shares and the competitive dynamics of the market both globally and in Turkey.[5] The Board determined that the parties' activities (1) horizontally overlap with respect to the sale and production of fragrances, and (2) vertically overlap with respect to the sale and production of fragrances and aromatic chemicals. In terms of the assessment of other players within the market, the Board found that there are many global competitors that are active in the Turkish markets via imports. Therefore, the Board decided that these players and the global market conditions should also be taken into consideration for the assessment of the transaction. Upon its assessment of the parties' Turkish and global market shares and the global market dynamics, the Board found that the parties' competitors hold significant market power in Turkey. The Board has also assessed that the 'aroma chemicals' product used as an input for the perfume market where Gülçiçek operates globally and in Turkey, is sold to customers in Turkey by Firmenich through its affiliate. Ultimately, the Board decided that the transaction would not give rise to anticompetitive effects due to the: (1) dynamic nature of the market; (2) homogenous structure of the retail level; (3) lack of or very limited entry barriers; (4) existence of and the switching ease between local and global suppliers; and (5) level of countervailing buyer power. Therefore, the Board unconditionally cleared the transaction within the scope of the Phase II review.

Another interesting decision rendered in 2020 was the acquisition of sole control over the business solutions branch of Johnson Controls International plc by Brookfield Asset Management Inc (Brookfield).[6] In this decision, the Board imposed two separate administrative fines on Brookfield after finding that (1) Brookfield closed the acquisition of the power solutions business of Johnson Controls International plc without notifying the Board and waiting for its approval, and (2) Brookfield submitted false and misleading information regarding its Turkish turnover. In its assessment of violation of the suspension requirement, the Board compared the closing and the notification dates and consequently found that Brookfield notified the transaction approximately five months after its closing. The Board also acknowledged that the contemplated transaction was notified before the Commission and was unconditionally approved on 14 February 2019. As a result, while the Board ultimately approved the transaction, it imposed an administrative monetary fine of 0.1 per cent of Brookfield's annual turnover for gun-jumping. Furthermore, the Board imposed a separate monetary fine due to misleading information, as Brookfield provided its Turkish turnover without including the turnover of one of its recently acquired subsidiaries.

4 30 December 2020, 20-57/794-354.

5 25 June 2020, 20-31/388-174.

6 30 April 2020, 20-21/278-132.

The approach of the Board to market shares and concentration levels is similar to that of the European Commission, and in line with the approach enumerated in the Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings.[7] The first factor discussed under the Horizontal Guidelines is that market shares above 50 per cent can be considered an indication of a dominant position, while a market share of the combined entity remaining below 20 per cent would not require further inquiry into the likelihood of harmful effects resulting from the combined entity. Although a brief mention of the Board's approach to market shares and the Herfindahl–Hirschman Index (HHI) levels is provided, the Horizontal Guidelines' emphasis on an effects-based analysis (coordinated and uncoordinated effects) without further discussion of the criteria to be used in evaluating the presence of a dominant position indicates that the dominant position analysis still remains subject to Article 7 of Law No. 4054. Other than market share and concentration level considerations, the Horizontal Guidelines cover the following main topics:

*a* the anticompetitive effects that a merger would have in the relevant markets;
*b* the buyer power as a countervailing factor to anticompetitive effects resulting from the merger;
*c* the role of entry in maintaining effective competition in the relevant markets;
*d* efficiencies as a factor counteracting the harmful effects on competition that might otherwise result from the merger; and
*e* the conditions of a failing company defence.

The Horizontal Guidelines also discuss coordinated effects that might arise from a merger of competitors. They confirm that coordinated effects may increase the concentration levels and may even lead to collective dominance. As regards efficiencies, the Horizontal Guidelines indicate that efficiencies should be verifiable and that the passing-on effect should be evident.

The Non-Horizontal Guidelines confirm that non-horizontal mergers in which the post-merger market share of the new entity in each of the markets concerned is below 25 per cent and the post-merger HHI is below 2,500 (except where special circumstances are present) are unlikely to raise competition law concerns, similar to the Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings.[8] Other than the Board's approach to market shares and concentration levels, the other two factors covered in the Non-Horizontal Guidelines include the effects arising from vertical mergers and the effects of conglomerate mergers. The Non-Horizontal Guidelines also outline certain other topics, such as customer restraints, general restrictive effects on competition in the market and restriction of access to the downstream market.

The Authority is expected to retain its well-established practice of paying close attention to developments in EU competition law and seeking to retain harmony between EU and Turkish competition law instruments.

Another significant development in competition law enforcement was the change in the competent body for appeals against the Board's decisions. The legislation has created a three-level appellate court system consisting of administrative courts, regional courts (appellate courts) and the High State Court. The regional courts will (1) go through the case

7 2004/C 31/03.
8 2008/C 265/07.

file both on procedural and substantive grounds and (2) investigate the case file and make their decision considering the merits of the case. The decision of the regional court will be subject to the High State Court's review in exceptional circumstances, which are set forth in Article 46 of the Administrative Procedure Law.

Recent indications in practice show that remedies and conditional clearances are becoming increasingly important in Turkish merger control enforcement. The number of cases in which the Board decided on divestment or licensing commitments or other structural or behavioural remedies has increased dramatically over recent years. Examples include some of the most important decisions in the history of Turkish merger control enforcement.[9]

In line with this trend, the Authority issued the Guidelines on Remedies. The Guidelines on Remedies aim to provide guidance on remedies that can be offered to dismiss competition law concerns regarding a particular concentration that may otherwise be deemed as problematic under the SIEC test. The Guidelines on Remedies set out the general principles applicable to the remedies acceptable to the Board, the main types of commitments that may be accepted by the Board, the specific requirements that commitment proposals need to fulfil and the main mechanisms for the implementation of such commitments.

## III THE MERGER CONTROL REGIME

There is no specific deadline for making a notification in Turkey. There is, however, a suspension requirement (i.e., a mandatory waiting period): a notifiable transaction (whether or not it is problematic under the applicable SIEC test) is invalid, with all the ensuing legal consequences, unless and until the Authority approves it.

The notification is deemed filed when the Authority receives it in its complete form. If the information provided to the Board is incorrect or incomplete, the notification is deemed filed only on the date when such information is completed upon the Board's subsequent request for further data. The notification is submitted in Turkish. Transaction parties are required to provide a sworn Turkish translation of the final, executed or current version of the transaction agreement.

The Board, upon its preliminary review of the notification (i.e., Phase I), will decide either to approve or to investigate the transaction further (i.e., Phase II). It notifies the parties of the outcome within 30 calendar days of a complete filing. In the absence of any such notification, the decision is deemed to be an 'approval' through an implied approval mechanism introduced with the relevant legislation. While the wording of the law implies that the Board should decide within 15 calendar days whether to proceed with Phase II, the Board generally takes more than 15 calendar days to form its opinion concerning the substance of a notification. It is more sensitive to the 30-calendar-day deadline on announcement. Moreover, any written request by the Board for missing information will stop the review process and restart the 30-calendar-day period at the date of provision of such

9 *Bekaert/Pirelli*, 22 January 2015, 15-04/52-25; *Migros/Anadolu*, 9 July 2015, 29/420-117; *Luxottica/Essilor*, 1 October 2018, 18-36/585-286; *AFM/Mars*, 17 November 2011, 11-57/1473-539; *Vatan/Doğan*, 10 March 2008, 08-23/237-75; *ÇimSA/Bilecik*, 2 June 2008, 08-36/481-169; *OYAK/Lafarge*, 18 November 2009, 09-56/1338-341; *THY/HAVAS*, 27 August 2009, 09-40/986-248; *Burgaz/Mey Ickı*, 8 July 2010, 10-49/900-314.

information. In practice, the Authority is quite keen on asking formal questions and adding more time to the review process. Therefore, it is recommendable that the filing be done at least 40 to 45 calendar days before the projected closing.

If a notification leads to a Phase II review, it turns into a fully fledged investigation. Under Turkish law, the Phase II investigation takes about six months. If necessary, the Board may extend this period only once, for an additional period of up to six months. In practice, only extremely exceptional cases require a Phase II review, and most notifications obtain a decision within 40 to 45 days of the original date of notification.

The filing process differs for privatisation tenders. Communiqué No. 2013/2 provides that a pre-notification is conducted before the public announcement of tender specifications. In the case of a public bid, the merger control filing can be performed when the documentation adequately proves the irreversible intention to finalise the contemplated transaction.

There is no special rule for hostile takeovers; the Board treats notifications for hostile transactions in the same manner as other notifications. If the target does not cooperate, and if there is a genuine inability to provide information because of the one-sided nature of the transaction, the Authority tends to use most of its powers of investigation or information request under Articles 14 and 15 of Law No. 4054.

Aside from close follow-up with the case handlers reviewing the transaction, the parties have no available means to speed up the review process.

The Board may request information from third parties, including the customers, competitors and suppliers of the parties, and other persons related to the merger or acquisition. The Board uses this power especially to define the market and determine the market shares of the parties. Third parties, including the customers and competitors of the parties, and other persons related to the merger or acquisition, may request a hearing from the Board during the investigation, subject to the condition that they prove their legitimate interest. They may also challenge the Board's decision on the transaction before the competent judicial tribunal, again subject to the condition that they prove their legitimate interest.

The Board may grant conditional clearance and make the clearance subject to the parties observing certain structural or behavioural remedies, such as divestiture, ownership unbundling, account separation and right of access. The number of conditional clearances has increased significantly in recent years.

Final decisions of the Board, including its decisions on interim measures and fines, can be submitted for judicial review before administrative courts. The appellants may make a submission by filing an appeal within 60 days of the parties' receipt of the Board's reasoned decision. Decisions of the Board are considered as administrative acts. Filing an appeal does not automatically stay the execution of the Board's decision. However, upon request of the plaintiff, the Court may decide to stay the execution. The Court will stay the execution of the challenged act only if execution of the decision is likely to cause irreparable damages, and there is a prima facie reason to believe that the decision is highly likely to violate the law.

The appeal process may take two and a half years or more.

## IV OTHER STRATEGIC CONSIDERATIONS

With the recent changes in Law No. 4054, the Board has geared up for a merger control regime focusing much more on deterrents. As part of that trend, monetary fines have increased significantly for not filing or for closing a transaction without the Board's approval. It is now even more advisable for the transaction parties to observe the notification and suspension requirements and avoid potential violations. This is particularly important when transaction parties intend to put in place carve-out or hold-separate measures to override the operation of the notification and suspension requirements in foreign-to-foreign mergers. The Board is currently rather dismissive of carve-out and hold-separate arrangements, even though the wording of the new regulation allows some room to speculate that carve-out or hold-separate arrangements are now allowed. Because the position the Authority will take in interpreting this provision is not yet clear, such arrangements cannot be considered as safe early closing mechanisms recognised by the Board.

Many cross-border transactions meeting the jurisdictional thresholds of Communiqué No. 2010/4 will also require merger control approval in a number of other jurisdictions. Current indications in practice suggest that the Board is willing to cooperate more with other jurisdictions in reviewing cross-border transactions.[10] Article 43 of Decision No. 1/95 of the EC–Turkey Association Council authorises the Authority to notify and request the European Commission (the Competition Directorate-General) to apply relevant measures.

The Turkish merger control regime currently utilises an SIEC test in the evaluation of concentrations. In line with EU law, the Amendment Law has replaced the dominance test with the SIEC test. Based on the new substantive test, mergers and acquisitions that do not significantly impede effective competition in a relevant product market within the whole or part of Turkey would be cleared by the Board. This amendment aims to allow a more reliable assessment of the unilateral and cooperation effects that might arise as a result of mergers or acquisitions. The Board will be able to prohibit not only transactions that may result in the creation of a dominant position or strengthen an existing dominant position, but also those that can significantly impede effective competition.

On the other hand, the SIEC test may also reduce over-enforcement as it focuses more on whether and how much competition is impeded as a result of a transaction. Thus, pro-competitive mergers and acquisitions may 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 this new approach.

The amendments to Law No. 4054 have only recently come into force, and, although the Board has started to apply the relevant SIEC test in its decisions, it has not published detailed assessments pertaining to the implementation of this test. However, as the guidelines and secondary legislation have not been revised and new guidelines have not been introduced as a result of the changes in the primary legislation, how the SIEC test will be incorporated remains unclear.

Article 3 of Law No. 4054 defines a 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'. The Horizontal Guidelines state that market shares higher than 50 per cent may be used as an indicator of a dominant position, whereas aggregate market shares below 25 per cent may be used as a presumption that the transaction does not pose competition law concerns. In practice, market shares of about 40 per cent and higher are generally considered, along with other factors such as vertical foreclosure or barriers to entry, as an indicator of

10 The trend for more zealous inter-agency cooperation is even more apparent in leniency procedures for international cartels.

a dominant position in a relevant market. However, a merger or acquisition can only be blocked when it significantly impedes competition in the whole territory of Turkey or in a substantial part of it, pursuant to Article 7 of Law No. 4054.

There were exceptional cases in which the Board used a joint dominance test to discuss the coordinated effects arising out of transactions. In this regard, transactions concerning the sale of certain cement factories by the Savings Deposit Insurance Fund were rejected by the Board on the grounds that the relevant transactions would lead to joint dominance of the market. In its analysis, the Board considered factors such as 'structural links between the undertakings in the market', 'past coordinative behaviour', 'entry barriers', 'transparency of the market' and the 'structure of demand'.

Economic analysis and econometric modelling have also been seen more often in recent years. For example, in *AFM/Mars Cinema*, the Board employed the ordinary, least-squared and the two-staged, least-squared estimation models to determine price increases that would be expected as a result of the transaction. The Board also used the Breusch–Pagan, Breusch–Pagan/Godfrey/Cook–Weisberg and White/Koenker NR2 tests and the Arellano–Bond test on the simulation model. Such economic analyses are rare, but increasing in practice. Economic analyses that are used more often are the HHI and concentration ratio indices to analyse concentration levels. In 2019, the Board also published the *Handbook on Economic Analyses Used in Board Decisions*, which outlines the most prominent methods utilised by the Authority (e.g., correlation analysis, the small but significant and non-transitory increase in price test and the Elzinga–Hogarty test).

## V OUTLOOK AND CONCLUSIONS

The proposal for an amendment to Law No. 4054 was finally approved by the Turkish parliament, the Grand National Assembly of Turkey, on 17 June 2020. The Amendment Law, which has been published in the Official Gazette and entered into force on 24 June 2020, essentially: clarifies certain mechanisms in Law No. 4054 that might have led to legal uncertainty in practice to a certain extent, and introduces new mechanisms as to the selection of cases for the Authority to focus on, such as: the *de minimis* principle for agreements; concerted practices or decisions of associations of undertakings (except hardcore violations); SIEC test for merger and acquisitions; behavioural and structural remedies for anticompetitive conduct; commitments and settlement mechanisms; clarification on the powers of the Authority in on-site inspections; and clarification on the self-assessment procedure in individual exemptions. The amendments that directly relate to merger control constitute the SIEC test and the Board's power to apply behavioural and structural remedies for anticompetitive conduct.

On 8 October 2020, the Authority published its Guidelines on Examination of Digital Data during On-site Inspections, which set forth the general principles with respect to the examination, processing and storage of data and documents held in electronic media and information systems, during on-site inspections. Furthermore, the secondary legislation regarding the commitment and *de minimis* mechanisms[11] came into force on 16 March 2021.

11 Communiqué No. 2021/2 on Remedies for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position; and Communiqué No. 2021/3 on De Minimis Applications for Agreements, Concerted Practices and Decisions of Associations of Undertakings.

**Appendix 1**

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Gönenç Gürkaynak is a founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 90 lawyers based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr Gürkaynak received his LLM degree from Harvard Law School, and is qualified to practise in Istanbul, New York, Brussels, and England and Wales (currently a non-practising solicitor). Before founding ELIG Gürkaynak Attorneys-at-Law in 2005, Mr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Mr Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 45 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 20 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year Mr Gürkaynak represents multinational companies and large domestic clients in more than 35 written and oral defences in investigations of the Turkish Competition Authority, about 15 antitrust appeal cases in the high administrative court, and over 85 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics.

Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 200 articles in English and Turkish by various international and local publishers. Mr Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.

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