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Practical cross-border insights into merger control issues

Merger Control 2022

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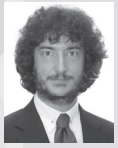
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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The national competition authority for enforcing the Law on the Protection of Competition No. 4054 ("Competition Law") in Turkey is the Turkish Competition Authority ("Authority"). The Authority consists of the Competition Board ("Board"), Presidency, Main Service Units, Auxiliary Service Units and Advisory Units. In its capacity as the competent body of the Authority, the Board is responsible for, *inter alia*, reviewing and resolving merger control filings.

1.2 What is the merger legislation?

The principal legislation on merger control is the Competition Law and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board ("Communiqué No. 2010/4"). In particular, Article 7 of the Competition Law governs mergers and acquisitions, and authorises the Board to regulate, through communiqués, which mergers and acquisitions require notification to the Authority in order to become legally valid. In accordance, Communiqué No. 2010/4 is the primary instrument in assessing merger cases in Turkey and sets forth the types of mergers and acquisitions which are subject to the Board's review and approval. Recently, the Law No. 7246 on the Amendment to the Law No. 4054 on Protection of Competition ("Amendment Law") was published in the Official Gazette and entered into force on 24 June 2020.

Moreover, on 4 March 2022, the Authority published the Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 ("Amendment Communiqué"). The Amendment Communiqué introduced new rules concerning the Turkish merger control regime that fundamentally affect merger control notifications submitted to the Authority. Pursuant to Article 7 of the Amendment Communiqué, the changes introduced by the Amendment Communiqué became effective as of 4 May 2022. The most significant developments that the Amendment Communiqué entails are the increase of the applicable turnover thresholds for concentrations that require mandatory merger control filing before the Authority and the introduction of threshold exemptions for undertakings that are active in certain markets or sectors.

With a continued interest in the harmonisation of Turkish competition law with EU competition law, the Authority also has published the following guidelines: (i) the Guideline on Cases Considered as Mergers and Acquisitions and the Concept of Control ("Guideline on the Concept of Control"); (ii) the Guideline on the Assessment of Horizontal Mergers and Acquisitions ("Horizontal Guidelines"); (iii) the Guideline on the Assessment of Non-Horizontal Mergers and Acquisitions ("Non-Horizontal Guidelines"); (iv) the Guideline on Market Definition; (v) the Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions ("Guideline on Undertakings Concerned"); and (vi) the Guideline on Remedies Acceptable in Mergers and Acquisitions ("Remedy Guideline").

1.3 Is there any other relevant legislation for foreign mergers?

There is no legislation for foreign mergers in terms of competition law in Turkey.

1.4 Is there any other relevant legislation for mergers in particular sectors?

The Banking Law No. 5411 ("Banking Law") provides that the provisions of Articles 7, 10 and 11 of the Competition Law shall not be applicable on the condition that the sectorial share of the total assets of the banks subject to merger or acquisition does not exceed 20 per cent. The Board distinguishes between transactions involving foreign acquiring banks with no operations in Turkey and those foreign acquiring banks already operating in Turkey while applying the exception rule in the Banking Law. Therefore, while the Board applies the Competition Law to mergers and acquisitions where the foreign acquiring bank does not have any operations in Turkey, it does not apply the Competition Law if the foreign acquiring bank already has operations in Turkey under the exception rule in the Banking Law.

The competition legislation provides no special regulation applicable to foreign investments. However, some special restrictions exist on foreign investments in other legislations, such as media.

Moreover, as per the Amendment Communiqué, special notifiability thresholds apply to the undertakings that are active in certain markets or sectors as explained under question 2.4.

1.5 Is there any other relevant legislation for mergers which might not be in the national interest?

There is no other relevant legislation in terms of competition law for mergers which might not be in the national interest other than the legislation regarding the Banking Law as explained under question 1.4.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

Communiqué No. 2010/4 defines the scope of the notifiable transactions in Article 5(1) as follows:

a. a merger of two or more undertakings; or
b. the acquisition of direct/indirect control over all or part of one or more undertakings by one or more undertakings or persons, who currently control at least one undertaking, through:
   - the purchase of assets or a part or all of its shares;
   - an agreement; or
   - other instruments.

Concentrations that result in a change of control on a lasting basis are subject to the Board's approval, provided they exceed the applicable thresholds. Communiqué No. 2010/4 and the Guideline on the Concept of Control provide a definition of "control" which is similar to the definition of this term in Article 3 of European Council Regulation No. 139/2004 ("EC Merger Regulation"). Article 5(2) of Communiqué No. 2010/4 reads as follows:

> "*Control can be constituted by rights, agreements or any other means which, either separately or jointly, de facto or de jure, confer the possibility of exercising decisive influence on an undertaking. These rights or agreements are instruments which confer decisive influence; in particular, by ownership or right to use all or part of the assets of an undertaking, or by rights or agreements which confer decisive influence on the composition or decisions of the organs of an undertaking.*"

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Acquisition of a minority shareholding can amount to a merger, if and to the extent that it leads to a change in the control structure of the target entity. In other words, if minority interests acquired are granted certain veto rights that may influence the management of the company (e.g. privileged shares conferring management powers), then the nature of control could be deemed changed (from sole to joint control) and the transaction could be subject to filing. As specified under the Guideline on the Concept of Control, such veto rights must be related to strategic decisions on the business policy, and they must go beyond normal "minority rights", i.e. the veto rights normally accorded to minority shareholders to protect their financial interests.

2.3 Are joint ventures subject to merger control?

Turkish merger control rules applicable to joint ventures are akin to – if not the same as – the EU rules. If the turnover thresholds are triggered, the joint venture transaction would be notifiable provided the joint venture is a full-function joint venture. In order to qualify as a concentration subject to merger control, a joint venture must be of a full-function nature and satisfy two criteria: (i) the existence of joint control in the joint venture; and (ii) the joint venture being an independent economic entity established on a lasting basis.

2.4 What are the jurisdictional thresholds for application of merger control?

According to the Amendment Communiqué, a transaction would be notifiable in Turkey if one of the following alternative turnover thresholds is triggered:

(a) (i) the total turnover in Turkey of the parties to a concentration exceeds TL 750 million (approximately EUR 71.9 million for consideration of 2021 turnovers); **AND**
(ii) the Turkish turnover of at least two parties each exceeds TL 250 million (approximately EUR 23.9 million for consideration of 2021 turnovers); **OR**
(b) (i) the Turkish turnover of the transferred assets or businesses **in acquisitions** (as well as joint ventures) exceeds TL 250 million (approximately EUR 23.9 million for consideration of 2021 turnovers) **AND** the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (approximately EUR 287.9 million for consideration of 2021 turnovers); **OR**
(ii) the Turkish turnover of any of the parties **in mergers** exceeds TL 250 million (approximately EUR 23.9 million for consideration of 2021 turnovers) **AND** the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (approximately EUR 287.9 million for consideration of 2021 turnovers).

As seen above, the tests provided under Article 7(b) include two separate tests; Article 7(b)(i) is applicable only in cases of acquisition transactions (as well as joint ventures) while Article 7(b)(ii) is applicable only in cases of merger transactions.

Furthermore, the Amendment Communiqué introduced a threshold exemption for the undertakings active in certain markets/sectors. Pursuant to the Amendment Communiqué, "the TL 250 million Turkish turnover thresholds" mentioned above will not be sought for the acquired undertakings active in or assets related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies ("Target Company(ies)"), if they (i) operate in the Turkish geographical market, (ii) conduct research and development activities in the Turkish geographical market, or (iii) provide services to the users in the Turkish geographical market.

It is also noteworthy that the Amendment Communiqué does not seek a Turkish nexus in terms of the activities which render the threshold exemption. In other words, it would be sufficient for the Target Company to be active in the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies anywhere in the world for the threshold exemption to become applicable, provided that the Target Company (a) generates revenue from customers located in Turkey, (b) conducts R&D activities in Turkey, or (c) provides services to the Turkish users in any fields other than the abovementioned ones. Accordingly, the Amendment Communiqué does not require (a) generating revenue from customers located in Turkey, (b) conducting R&D activities in Turkey, or (c) providing services to the Turkish users concerning the fields listed above for the exemption on the local turnover thresholds to become applicable.

To clarify the meaning and the scope of these sectors exempted from the use of local turnover thresholds, a non-exhaustive list of activities which correspond to the sectors referred to in the definition of the Amendment Communiqué is provided below. The below list reflects a mere effort to provide insight and guidance in identifying this scope, thus the list is not exhaustive:

a. Digital platforms: Digital platforms are systems and interfaces that form a commercial network or market facilitating

business-to-business (B2B), business-to-customer (B2C) or even customer-to-customer (C2C) transactions. Digital platforms include but are not limited to social media platforms, knowledge sharing platforms, media sharing platforms, service-oriented platforms, online marketplaces and digital content aggregators.

b. Software and gaming software: Software relates to a set of instructions, data or programs used to operate computers and execute specific tasks, while gaming software concerns software customised for gaming. Software and gaming software include but are not limited to the activities below:
   i. writing and publishing of software and gaming software (including publishing of computer games) (NACE Rev. 2: 58.2);
   ii. wholesale, retail sale, distribution and marketing of software (both customised and non-customised) and gaming software (NACE Rev. 2: 46.51, 47.41);
   iii. reproduction from master copies of software (NACE Rev. 2: 18.2);
   iv. manufacture of electronic games with fixed (non-replaceable) software (NACE Rev. 2: 32.40);
   v. translation or adaptation of software and gaming software (NACE Rev. 2: 58.29);
   vi. computer programming activities (designing the structure and content of, and/or writing the computer code necessary to create and implement systems software (including updates and patches), software applications (including updates and patches), databases, web pages, customising of software (NACE Rev. 2: 62.01); and
   vii. software installation services (NACE Rev. 2: 62.09).

c. Financial technologies: Financial technologies refer to technology-enabled innovation in financial services. Undertakings which sit at the crossroads of financial services and technology fall into the scope of this definition. In brief, the term "financial technologies" is used to define software and other technology aiming to modify, enhance or automate financial services for businesses or consumers. Financial technologies include but are not limited to technologies and software developed for the following fields:
   i. financial services activities (monetary intermediation, financial leasing, other credit granting) (NACE Rev. 2: 64.1, 64.9);
   ii. insurance, reinsurance, pension funding (NACE Rev. 2: 65);
   iii. activities auxiliary to financial services, insurance and pension funding (administration of financial markets (futures commodity contracts exchanges, securities exchanges, stock exchanges, stock or commodity options exchanges), security and commodity contracts brokerage (dealing in financial markets on behalf of others (e.g. stock broking) and related activities, securities brokerage, commodity contracts brokerage, activities of bureaux de change etc.), risk and damage evaluation, activities of insurance agents and brokers, fund management activities, financial transaction processing and settlement, investment advisory activities, activities of mortgage advisers and brokers (NACE Rev. 2: 66);
   iv. accounting, bookkeeping and auditing activities, tax consultancy (recording of commercial transactions from businesses or others, preparation or auditing of financial accounts, examination of accounts and certification of their accuracy, preparation of personal and business income tax returns, advisory activities and representation on behalf of clients before tax authorities) (NACE Rev. 2: 69.2); and
   v. digital lending, payments, block chain and digital wealth management.

- Biotechnology: Biotechnology refers to the technology that utilises biological systems, living organisms or parts of this to develop or create different products. The sector includes but is not limited to the activities below:
   i. research and experimental development on biotechnology (NACE Rev. 2: 72.11):
      - DNA/RNA (genomics, pharmacogenomics, gene probes, genetic engineering, DNA/RNA sequencing/synthesis/amplification, gene expression profiling, and use of antisense technology);
      - proteins and other molecules (sequencing/synthesis/engineering of proteins and peptides (including large molecule hormones); improved delivery methods for large molecule drugs; and proteomics, protein isolation and purification, signalling, identification of cell receptors);
      - cell and tissue culture and engineering (cell/tissue culture, tissue engineering (including tissue scaffolds and biomedical engineering), cellular fusion, vaccine/immune stimulants, embryo manipulation;
      - process biotechnology techniques (fermentation using bioreactors, bioprocessing, bioleaching, biopulping, biobleaching, biodesulphurisation, bioremediation, biofiltration and phytoremediation gene and RNA vectors: gene therapy, viral vectors);
      - bioinformatics (construction of databases on genomes, protein sequences, modelling complex biological processes, including systems biology); and
      - nanobiotechnology (applies the tools and processes of nano/microfabrication to build devices for studying biosystems and applications in drug delivery, diagnostics etc.); and
   ii. manufacture of biotech pharmaceuticals such as plasma derivatives (NACE Rev. 2: 21.20).

e. Pharmacology: Pharmacology, a biomedical science, deals with the research, discovery, and characterisation of chemicals which show biological effects and the elucidation of cellular and organismal function in relation to these chemicals. In other words, pharmacology refers to the science of how drugs act on biological systems and how the body responds to the drug. The study of pharmacology encompasses the sources, chemical properties, biological effects and therapeutic uses of drugs. Pharmacology includes but is not limited to the biomedical studies and R&D activities conducted in the areas below:
   i. Pharmacodynamics (relationship of drug concentration and the biologic effect (physiological or biochemical).
   ii. Pharmacokinetics (interrelationship of the absorption, distribution, binding, biotransformation, and excretion of a drug and its concentration at its locus of action).
   iii. Clinical Pharmacology and Therapeutics (understanding what a drug is doing to the body, what happens to a drug in the body, and how drugs work in terms of treating a particular disease).
   iv. Pharmacotherapy (treatment of a disorder or disease with medication).
   v. Neuropharmacology (understanding how drugs affect cellular function in the nervous system).
   vi. Pyschopharmacology (use of medications in treating mental disorders).
   vii. Cardiovascular pharmacology (understanding how drugs influence the heart and vascular system).
   viii. Molecular pharmacology (investigates the molecular mode of action of drugs, among others using genetic and molecular biology methods).

ix. Radiopharmacology (study and preparation of radioactive pharmaceuticals).
x. Manufacture and R&D of pharmaceuticals (antisera and other blood fractions, vaccines, diverse medicaments, including homeopathic preparations), pharmaceutical preparations and medicinal chemicals (manufacture of medicinal active substances to be used for their pharmacological properties in the manufacture of medicaments: antibiotics, basic vitamins, salicylic and O-acetylsalicylic acids etc.); wholesale, retail sale, distribution and marketing of pharmaceuticals, pharmaceutical preparations and medicinal chemicals; and growing of drug and narcotic crops (NACE Rev. 2: 21.1 and 21.2).

f. Agricultural chemicals: Agricultural chemicals refer to chemicals used in agriculture to control pests and disease or control and promote growth, such as pesticides, herbicides, fungicides, insecticides, and fertilisers. The sector includes but is not limited to the activities below:
i. mining of chemical and fertiliser minerals (NACE Rev. 2: 08.91);
ii. support activities for other mining and quarrying (where it relates to agricultural chemicals and fertilisers) (NACE Rev. 2: 09.90);
iii. manufacture of fertilisers (straight or complex nitrogenous, phosphatic or potassic fertilisers; urea, crude natural phosphates and crude natural potassium salts), nitrogen compounds (nitric and sulphonitric acids, ammonia, ammonium chloride, ammonium carbonate, nitrites and nitrates of potassium) (NACE Rev. 2: 20.15);
iv. manufacture of organic and inorganic basic chemicals (where it relates to agricultural chemicals and fertilisers) (NACE Rev. 2: 20.13, 20.14);
v. manufacture of pesticides and other agrochemical products (manufacture of insecticides, rodenticides, fungicides, herbicides, acaricides, molluscicides, biocides, manufacture of anti-sprouting products, plant growth regulators, manufacture of disinfectants (for agricultural and other use) (NACE Rev. 2: 20.2); and
vi. wholesale, retail sale, distribution and marketing of fertilisers and agrochemical products (NACE Rev. 2: 46.75).

g. Health technologies: Health technologies are the application of organised knowledge and skills in the form of medicines, medical devices, vaccines, procedures and systems developed to solve a health problem and improve quality of life. They refer to any technology, including medical devices, IT systems, algorithms, artificial intelligence (AI), cloud and block chain, designed to support healthcare organisations and patients. Health technologies include but are not limited to technologies and software developed or being developed for the following fields:
i. human health activities (hospital activities, medical (medical consultation and treatment) and dental practice activities (dentistry, endodontic and paediatric dentistry; oral pathology, orthodontic activities)) (NACE Rev. 2: 86);
ii. residential healthcare activities (residential nursing care activities, residential care activities for mental retardation, mental health and substance abuse, residential care activities for the elderly and disabled) (NACE Rev. 2: 87); and
iii. manufacture of medical and dental instruments (e.g. operating tables, examination tables, hospital beds with mechanical fittings, dentists' chairs, surgical appliances) (NACE Rev. 2: 32.5).

If the Target Company's activities fall into the above markets/sectors, the thresholds that would be applicable would be: "The aggregate Turkish turnover of the transaction parties exceeding TL 750 million (approx. EUR 71.9 million or USD 84.9 million)" or "the worldwide turnover of at least one of the other parties to the transaction exceeding TL 3 billion (approx. EUR 287.9 million or USD 339.7 million)." Accordingly, when an undertaking that falls within the definition and criteria above is being acquired, the transaction would be notifiable if the aggregate Turkish turnover of the Target Company and the acquirer exceeds TL 750 million or the worldwide turnover of the acquirer exceeds TL 3 billion.

2.5 Does merger control apply in the absence of a substantive overlap?

Yes. Article 7 of Communiqué No. 2010/4 provides turnover-based thresholds and does not seek the existence of an "affected market" in assessing whether a transaction triggers a notification requirement.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

If the turnover thresholds are met, foreign-to-foreign transactions would trigger a notification requirement, provided the joint venture is a full-function joint venture.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

There is no such mechanism under the Turkish merger control regime.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

Article 5(4) of Communiqué No. 2010/4 provides that closely related transactions which are tied to conditions or transactions realised over a short period of time by way of expedited exchange of securities are treated as a single transaction.

In terms of turnover calculation, together with the amendment through Article 2 of Communiqué No. 2017/2, Article 8(5) of Communiqué No. 2010/4 provides that the Board would be 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.

Accordingly, pursuant to the Guideline on the Concept of Control, two or more transactions constitute a single concentration provided that the transactions are interdependent (i.e. one transaction would not have been carried out without the other) and that the control is acquired by the same persons or undertaking(s). The conditionality of the transactions could be proven if the transactions are linked *de jure* (i.e. the agreements themselves are linked by mutual conditionality). *De facto* conditionality may also suffice if it can be satisfactorily demonstrated.

Lastly, Article 3 of Communiqué No. 2017/2 introduced a new paragraph to be included in Article 10 of Communiqué No. 2010/4. This provision by Article 3 of Communiqué No. 2017/2 is similar to Article 7(2) of the EC Merger Regulation. At any rate, while there was no similar specific statutory rule in Turkey on this matter, the case law of the Board has shed light on this matter.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Once the thresholds are exceeded, there are no exceptions for filing a notification. There is no *de minimis* exception in terms of Turkish merger control rules. There is no specific deadline for filing; however, the filing should be made before the closing of the transaction. Under Article 10(8) of Communiqué No. 2010/4, a transaction is deemed "realised" on the date on which the change of control occurs.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Article 6 of Communiqué No. 2010/4 provides that cases that are not considered mergers or acquisitions include: (i) intra-group transactions and other transactions which do not lead to a change in control; (ii) operations of undertakings whose ordinary operations involve transactions with securities temporarily holding on to securities purchased for resale purposes, provided that the voting rights from those securities are not used to affect the competitive policies of the undertaking; (iii) acquisition of control by a public institution or organisation by operation of law; and (iv) mergers or acquisitions occurring as a result of inheritance.

Also, under the Banking Law, the provisions of Articles 7, 10 and 11 of the Competition Law shall not be applicable on the condition that the sectorial share of the total assets of the banks subject to merger or acquisition does not exceed 20 per cent.

Another exception pertains to the Turkish Wealth Fund, which was incorporated as a national wealth and investment fund company with Law No. 6741. Transactions performed by the Turkish Wealth Fund and/or companies established by the Turkish Wealth Fund are not subject to merger control rules.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

If the parties to a notifiable transaction violate the suspension requirement (i.e. (i) close a notifiable transaction without the approval of the Board, or (ii) do not notify the notifiable transaction at all) and such violation of the suspension requirement is detected, the Authority is obliged to enforce the sanctions and legal consequences set forth under Turkish merger control regime. In the event that the parties to a merger or an acquisition which requires the approval of the Board realise the transaction without the approval of the Board, a turnover-based monetary fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision would be imposed on the incumbent firms, regardless of the outcome of the Board's review of the transaction. The minimum amount of this fine is set at TL 47,409 (approximately EUR 2,716 or USD 2,897 at the time of writing) for 2022 and is revised annually.

Invalidity of the transaction

A notifiable merger or acquisition which is not notified to (and approved by) the Board would be deemed legally invalid with all of its legal consequences.

Termination of infringement and interim measures

Pursuant to Article 9(1) of the Competition Law, should the Board find any infringement of Article 7, it shall order the parties concerned, by a resolution, to take the necessary actions to restore the same status as before the completion of the transaction, and thereby restore the pre-transaction level of competition. Similarly, the Competition Law authorises the Board to take interim measures until the final resolution on the matter in cases where there is a possibility for serious and irreparable damages to occur.

Termination of the transaction and turnover-based monetary fines

If, at the end of its review of a notifiable transaction that was not notified, the Board decides that the transaction falls within the prohibition of Article 7, the undertakings could be subject to fines of up to 10 per cent of their turnover generated in the financial year preceding the date of the fining decision. Employees and managers (of the undertakings concerned) that had a determining effect on the creation of the violation may also be fined up to five per cent of the fine imposed on the undertakings as a result of implementing a problematic transaction without the Board's approval.

In addition to the monetary sanction, the Board is authorised to take all necessary measures to terminate the transaction, remove all *de facto* legal consequences of every action that has been taken unlawfully, return all shares and assets (if possible) to the places or persons which owned these shares or assets before the transaction or, if such measure is not possible, assign them to third parties; and, meanwhile, to forbid participation in control of these undertakings until this assignment takes place and to take all other necessary measures.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

There is no normative regulation permitting or prohibiting carve-out arrangements. Carve-out arrangements have been rejected by the Board so far, who have argued that a closing is sufficient for the suspension violation fine to be imposed and that a further analysis of whether a change in control actually took effect in Turkey is unwarranted. The wording of the Board's reasoned decisions does not analyse the merits of the carve-out arrangements and takes the position that the "carve-out" concept is unconvincing.

Therefore, such carve-out methods would not eliminate the filing requirement, and they cannot authoritatively be advised as safe for early closing mechanisms recognised by the Board.

3.5 At what stage in the transaction timetable can the notification be filed?

Under a Phase I review, the transaction should be notified at least 60 calendar days before the projected closing.

As for privatisation tenders, according to the Communiqué on the Procedures and Principles to be Pursued in Pre-Notifications and Authorisation Applications to be Filed with the Authority in Order for Acquisitions Via Privatisation to Become Legally Valid ("Communiqué No. 2013/2"), it is mandatory to file a

pre-notification before the public announcement of tender and receive the opinion of the Board in cases where the turnover of the undertaking or the asset or service production unit to be privatised exceeds certain thresholds. Communiqué No. 2013/2 promulgates that in order for the acquisitions through privatisation which require pre-notification to the Authority to become legally valid, it is also mandatory to get approval from the Board. The application should be filed by all winning bidders after the tender, but before the Privatisation Administration's decision on the final acquisition.

In cases of a public bid, filing can be performed at a stage where the documentation at hand adequately proves the irreversible intention to finalise the contemplated transaction.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The notification is deemed filed when received in complete form by the Authority. If the information requested in the notification form is incorrect or incomplete, the notification is deemed filed on the date on which such information is completed or corrected.

The Board, upon its preliminary review (i.e. Phase I), will decide either to approve or to investigate the transaction further (i.e. Phase II).

The Board notifies the parties of the outcome within 30 days following a complete filing. There is an implied approval mechanism where a tacit approval is assumed if the Board does not react within 30 calendar days upon a complete filing. In practice, the Board almost always reacts within the 30-calendar-day period by either sending a written request for information or – very rarely – by already rendering its decision within the original 30-calendar-day period.

The Authority can send written information requests to the parties, any other party relating to the transaction or third parties such as competitors, customers or suppliers.

Any written request by the Authority for missing information will cut the review period and restart the 30-calendar-day period from the first day as of the date on which the responses are submitted.

If a notification leads to an investigation (Phase II), it transforms into a fully fledged investigation. The investigation (Phase II) takes approximately six months and, if deemed necessary, it may be extended only once for an additional period of up to six months.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

There is an explicit suspension requirement. If a transaction is closed before clearance, the substantive nature of the concentration plays a significant role in determining the consequences. If the Board concludes that the transaction creates or strengthens a dominant position and significantly impedes effective competition in any relevant product market, the undertakings concerned, as well as their employees and managers that had a determining effect on the creation of the violation, could be subject to the monetary fines and sanctions highlighted in question 3.3 above. In any case, the violation of the suspension requirement would trigger a turnover-based monetary penalty of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision.

In addition, a notifiable merger or acquisition, not notified to, or approved by, the Board, shall be deemed legally invalid, with all of the legal consequences of this decision.

3.8 Where notification is required, is there a prescribed format?

The notification must be submitted based on the sample notification form, which is attached to Communiqué No. 2010/4 as amended by the Amendment Communiqué. The information requested in the amended form includes globally relevant product markets that the parties operate in, globally overlapping markets and market share data regarding such globally overlapping activities, data with respect to supply and demand structure, imports, potential competition and expected efficiencies, etc. Some additional documents such as the executed or current copies and sworn Turkish translations of some of the transaction documents, balance sheets of the parties, detailed organisational structure charts and, if available, market research reports for the relevant market are also required. In addition, a signed, notarised and apostilled power of attorney is required to be able to represent the party before the Authority.

Additionally, the Amendment Communiqué regulates the electronic submission system, which has already been utilised by the Authority since the beginning of the COVID-19 pandemic and allows the notifying parties to submit the notification form via an elaborate system of web-based services, including electronic submission.

Bearing in mind that each subsequent request by the Board for incorrect or incomplete information will prolong the waiting period, detailed and justified answers and information to be provided in the notification form is to the advantage of the parties.

Unlike the EU regime, under the Turkish merger control regime, there is no pre-notification process. All of the transactions (that are subject to a mandatory filing) should be notified to the Authority by way of a uniformed notification form.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

There is a short-form notification (without a fast-track procedure) if: one of the transaction

parties will be acquiring the sole control of an undertaking over which it has joint control; or (ii) there is no affected market in Turkey. There are no informal ways to speed up the procedure.

3.10 Who is responsible for making the notification?

Persons or undertakings that are parties to the transaction or their authorised representatives can make the filing, jointly or severally. The filing party should notify the other party of the filing.

3.11 Are there any fees in relation to merger control?

There are no filing fees under the Turkish merger control regime.

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

Article 3 of Communiqué No. 2017/2 introduced a paragraph to be included in Article 10 of Communiqué No. 2010/4, which

reads as follows: if the control is acquired from various sellers by way of a series of transactions in terms of securities within the stock exchange, the concentration could be notified to the Board after the realisation of the transaction provided that the following conditions are satisfied: (a) the concentration should be notified to the Board without delay; and (b) the voting rights attached to the acquired securities are not exercised or exercised solely to maintain the full value of its investments based on a derogation granted by the Turkish Competition Board. For the sake of completeness, the Board may impose conditions and obligations in terms of such derogation in order to ensure conditions of effective competition.

This provision by Article 3 of Communiqué No. 2017/2 is similar to Article 7(2) of the EC Merger Regulation. At any rate, although there was no similar specific statutory rule in Turkey on this matter, even before the promulgation of Communiqué No. 2017/2, the case law of the Board was shedding light on this matter. In the *Camargo* decision (*Camargo Corrêa S.A.* decision, 12-24/665-187, 3 May 2012), the Board recognised that the parties could close a public bid on a listed company before the Turkish Competition Board's approval, subject to the condition that: (i) the transaction is notified to the Board without any delay; and (ii) the acquirer does not exercise the control over the target pending the Turkish Competition Board's approval decision.

3.13 Will the notification be published?

Once notified to the Authority, the "existence" of a transaction will no longer be a confidential matter. The Authority will publish the notified transactions on its official website with the names of the parties and their areas of commercial activity. Moreover, the reasoned decision of the Board is also published on the Authority's official website upon finalisation.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The Amendment Law amends Article 7 of the Competition Law and introduces the significant impediment of effective competition ("SIEC") test, similar to the approach under the EC Merger Regulation. This amendment aims to facilitate a more reliable assessment of unilateral and cooperation effects that could arise as a result of mergers or acquisitions. With this new test, the Board is now 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. As a matter of Article 7 of the Competition Law, mergers and acquisitions which do not create or strengthen a dominant position or do not significantly impede effective competition in a relevant product market within the whole or part of Turkey, shall be cleared by the Board.

4.2 To what extent are efficiency considerations taken into account?

Efficiencies that result from a concentration may play a more important role in cases where the activities of the parties overlap in Turkey regardless of their combined market shares. Unlike the previous sample notification form, the new form introduced with the Communiqué No. 2022/2 does not provide liberty to skip the relevant sections of the notification form on efficiencies based on the parties' market shares in the affected markets.

4.3 Are non-competition issues taken into account in assessing the merger?

The Board does not take non-competition issues into account in assessing the merger (such as public policy considerations, among others).

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Pursuant to Article 15 of Communiqué No. 2010/4, the Board may request information from third parties including the customers, competitors and suppliers of the parties, and other persons related to the transaction. If the Authority asks for another public authority's opinion, this will cut the 30-day review period and restart it anew from day one.

While not common practice, it is possible for the third parties to submit complaints about a transaction during the review period.

4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

Under Articles 14 and 15 of the Competition Law, the Authority may send requests for information and carry out on-the-spot investigations. Monetary penalties are applicable in the case of non-compliance. In this regard, pursuant to Article 16 of the Competition Law, if the information requested is incorrect or incomplete or the requested information is not provided to the Authority, the Authority will impose a turnover-based monetary fine of 0.1 per cent 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 taken into account) on natural persons or legal entities that qualify as an undertaking or as an association of undertakings, as well as the members of these associations in cases where incorrect or misleading information is provided by the undertakings or associations of undertakings in a notification filed for exemption, negative clearance or the approval of a merger or acquisition, or in connection with notifications and applications concerning agreements made before the Competition Law entered into force. As indicated above, the minimum amount of this fine is set at TL 47,409 (approximately EUR 2,716 or USD 2,897 at the time of writing) for 2022 and is revised annually.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The main legislation that regulates the protection of commercial information is Communiqué No. 2010/3 on Regulation of Right to Access to File and Protection of Commercial Secrets ("Communiqué No. 2010/3"). Communiqué No. 2010/3 puts the burden of identifying and justifying information or documents as commercial secrets on the undertakings. Therefore, undertakings must request confidentiality from the Board in writing and justify their reasons for the confidential nature of the information or documents that are requested to be treated as commercial secrets. While the Board can also *ex officio* evaluate the information or documents, the general rule is that information or documents that are not requested to be treated

as confidential are accepted as not confidential. The reasoned decisions of the Board are published on the website of the Authority after confidential business information is redacted.

Moreover, under Article 25 of the Competition Law, the Board and personnel of the Authority are bound with a legal obligation of not disclosing any trade secrets or confidential information which they have acknowledged during their service.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The Board may either render an approval or a prohibition decision concerning the proposed transaction. It may also give a conditional approval. The reasoned decisions of the Board are served on the representative(s) of the notifying party/parties, and are also published on the website of the Authority.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Article 14 of Communiqué No. 2010/4 enables the parties to provide commitments to remedy substantive competition law issues of a concentration under Article 7 of the Competition Law. Strategic thinking at the time of filing is somewhat discouraged through explicit language confirming that the review periods will start only after the filing is made. The Board is now explicitly given the right to secure certain conditions and obligations to ensure the proper performance of commitments. As per the Remedy Guideline, it is at the parties' own discretion whether to submit a remedy. The Board will neither impose any remedies nor *ex parte* change the submitted remedy. In the event that the Board considers the submitted remedies insufficient, the Board may enable the parties to make further changes to the remedies. If the remedy is still insufficient to resolve the competition problems, the Board may not grant clearance.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

As foreign-to-foreign mergers fall within the scope of the Turkish merger control regime to the extent that the turnover thresholds are triggered, remedies can also be submitted in foreign-to-foreign transactions by the parties, and thus the Remedy Guideline is also applicable in terms of foreign-to-foreign transactions.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

The parties may submit to the Board proposals for possible remedies either together with the notification document, during the preliminary review or during the investigation period. If the parties decide to submit the commitment during the preliminary review period, the notification is deemed filed on the date of the submission of the commitment. In any case, a signed version of the commitment text that contains detailed information on the context of the commitment should be submitted to the Authority.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The form and content of the divestment remedies vary significantly in practice. 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. As per the Remedy Guideline, the parties are required to submit detailed information regarding how the remedy would be applied and how it would resolve competition concerns. The Remedy Guideline states that the parties can submit behavioural or structural remedies. Although there are few decisions in which behavioural remedies are accepted (see, for example, *Bekaert/Pirelli*, 15-04/52-25, 22 January 2015), *Migros/Anadolu Industry Holding*, 29/420-117, 9 July 2015), the majority of conditional clearance decisions are based on structural remedies (see *ÇimSA/Bilecik*, 08-36/ 481-169, 2 June 2008; *Mey İçki/Diageo*, 11-45/1043-356, 17 August 2011; *Burgaz Rakı/Mey İçki*, 10-49/900-314, 8 July 2010). It explains acceptable remedies, such as divestment, to cease all kinds of connection with the competitors, remedies that enable undertakings to access certain infrastructure (e.g. networks, intellectual properties, essential facilities) and remedies on amending the long-term exclusive agreement.

5.6 Can the parties complete the merger before the remedies have been complied with?

The Board's clearance decision is conditional on the application of the remedies. Whether the parties may complete the merger before the remedies have been complied with depends on the nature of the remedies. Remedies may either be a condition precedent for the closing or may be designed as an obligation post-closing of the merger. The parties may complete the merger if the remedies are not designed as a condition precedent for the closing.

5.7 How are any negotiated remedies enforced?

As per the Remedy Guideline, in the case of a divestiture, a monitoring trustee is appointed by the parties to control the divestment process, and such an appointment must be approved by the Authority (e.g. *Luxottica/Essilor*, 18-36/585-286, 1 October 2018; *AFM*, 12-41/1164-M, 9 August 2012). In terms of behavioural remedies, the Board monitors the application of the behavioural commitments submitted to the Authority (e.g. *Bekaert-Pirelli*, 15-04/52-25, 22 January 2015; *Migros*, 15-29/420-117, 9 July 2015).

5.8 Will a clearance decision cover ancillary restrictions?

Article 13(5) of Communiqué No. 2010/4 provides that the approval granted by the Board concerning the transaction would also cover those restraints which are directly related and necessary to the implementation of the transaction. The parties may engage in self-assessment as to whether a particular restriction could be deemed ancillary. In cases where the transaction involves restraints with a novel aspect which have not been addressed in the Guideline on Undertakings Concerned and the Board's previous decisions, upon the parties' request, the Board may assess the restraints in question. In the event that the ancillary restrictions are not compliant, the parties may face an Article 4 investigation.

5.9 Can a decision on merger clearance be appealed?

Yes. As per Article 55 of the Competition Law, the administrative sanction decisions of the Board can be submitted for judicial review before the administrative courts in Ankara.

5.10 What is the time limit for any appeal?

The Board's administrative sanction decisions can be appealed before the administrative courts in Ankara by filing an appeal case within 60 days upon receipt by the parties of the reasoned decision of the Board.

5.11 Is there a time limit for enforcement of merger control legislation?

If the parties to a notifiable transaction violate the suspension requirement, the statute of limitation regarding the sanctions for infringements is eight years, pursuant to Article 20(3) of the Law on Misdemeanours No. 5326.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

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

Moreover, the research department of the Authority makes periodic consultations with relevant domestic and foreign institutions and organisations.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

Pursuant to the decision statistics of the Authority for 2020, the Board reviewed a total of 309 concentrations in 2021, among which 214 are acquisitions, 83 are joint ventures and five are mergers. In 2021, the Board approved 277 concentrations unconditionally, three concentrations conditionally. Twenty-nine 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 Article 7 of the Law No. 4054 on the Protection of Competition). Additionally, as per the 2021 Outlook Report for Mergers and Acquisitions, the number of concentrations which had pure domestic (i.e. established in Turkey) parties was 51, while the number of pure foreign-to-foreign transactions was 175. The decision statistics for 2021 show that the transactions in the chemical and mining sector took the lead with 37 notifications, followed by the information technologies and platform services sector with 32 notifications.

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

The president of the Authority announced on 8 April 2021 that the Authority initiated the "Digital Markets Legislation Study" to quickly identify the competition problems stemming from the digital transformation and to take the necessary steps to resolve these problems in a timely manner. Indeed, the Authority started working on its sector inquiries that focus on online marketplaces in June 2020 and that focus on online advertising in March 2021. Therewith, the Authority aimed to determine behavioural and structural issues surrounding these sectors and to offer solutions accordingly. Each of these sector inquiries served as preparatory components facilitating the Authority's legislative actions. Within the scope of the legislation preparations, the Authority sent information requests to undertakings active in the digital markets.

Relatedly, as a very recent development, the Amendment Communiqué has been published on the Official Gazette on 4 March 2022, and it has entered into force on 4 May 2022. Amendment Communiqué raised the jurisdictional turnover thresholds under Article 7 of Communiqué No. 2010/4.

Two of the most significant developments that the Amendment Communiqué entails, *inter alia*, are the introduction of threshold exemption for undertakings active in certain markets/sectors and the increase of the applicable turnover thresholds for the concentrations that require mandatory merger control filing before the Competition Authority.

Due to the special thresholds applicable to the undertakings active in certain sectors/markets, concentrations related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies, are expected to be more closely scrutinised by the Competition Authority.

Moreover, following the amendment of the Competition Law by the Amendment Law which entered into force on 24 June 2020, the Board enacted secondary legislation through the Communiqué on the Commitments to be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition and Abuse of Dominant Position published on 16 March 2021 alongside the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position that was published on 15 July 2021. The Authority published its Guidelines on Examination of Digital Data during On-site Inspections on 8 October 2020, which set forth the general principles with respect to the examination, processing and storage of data and documents held in the electronic media and information systems, during the on-site inspections. Lastly, as per Communiqué No. 2021/3 on Agreements, Concerted Practices and Decisions and Practice of Associations of Undertakings That Do Not Significantly Restrict Competition, promulgated in the Official Gazette on 16 March 2021, the *de minimis* principle would apply to following agreements that are deemed not to restrict competition in the market significantly: (1) the agreements signed between competing undertakings, if the total market share of the parties to the agreement does not exceed 10 per cent in any of the relevant markets affected by the agreement; and (2) the agreements signed between non-competing undertakings, if the market share of each of the parties does not exceed 15 per cent in any of the relevant markets affected by the agreement. Moreover, the *de minimis* principle is not applicable to 'naked and hardcore violations', which are: (1) price fixing between competitors, allocation of customers,

suppliers, regions or trade channels, restriction of supply amounts or imposing quotas, collusive bidding in tenders, and sharing competitively sensitive information including future prices, output or sales amounts; and (2) resale price maintenance between vertically related undertakings (i.e., setting fixed or minimum resale price levels for purchasers).

6.4 Please identify the date as at which your answers are up to date.

These answers are up to date as of 30 May 2022.

7 Is Merger Control Fit for Digital Services and Products?

7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?

In its announcement of 4 March 2022 on the Amendment Communiqué, the Authority indicated that amendments to the merger control regime became necessary in light of the deficiencies of the current regime as well as the contemporary approaches.

Accordingly, the Amendment Communiqué introduced special thresholds for the notifiability of the transactions where the acquired entity are the undertakings active in or assets related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies.

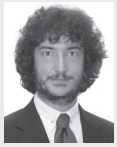
For the substantive assessment tests applicable to digital mergers, the current SIEC test is also applicable for these mergers. In addition, the Authority updated the Horizontal Guidelines on 4 April 2022 by including explanations on, *inter alia* (i) the theory of harm regarding digital markets and markets that are dependent on innovation and potential competition, and (ii) general principles applicable to the transactions whereby newly established or developing enterprises are acquired. Moreover, the Authority updated the Non-Horizontal Guidelines by providing, *inter alia*, further explanations regarding the unilateral effects and coordinated effects that may arise from the transactions with vertical overlaps or concerning multi-markets.

7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

The Amendment Communiqué introduced a threshold exemption for the undertakings active in certain markets/sectors. Pursuant to the Amendment Communiqué, special thresholds will be applicable for the acquired undertakings active in or assets related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies, if they (i) operate in the Turkish geographical market, (ii) conduct research and development activities in the Turkish geographical market, or (iii) provide services to the users in the Turkish geographical market. Accordingly, when an undertaking that falls within the definition and criteria above is being acquired, the transaction would be notifiable if the aggregate Turkish turnover of the Target Company and the acquirer exceeds TL 750 million or the worldwide turnover of the acquirer exceeds TL 3 billion.

7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?

There are no cases where the Board has highlighted the difficulties of dealing with digital mergers.



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Mr. Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak, which currently consists of 48 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 25 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, over 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 European Commission 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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