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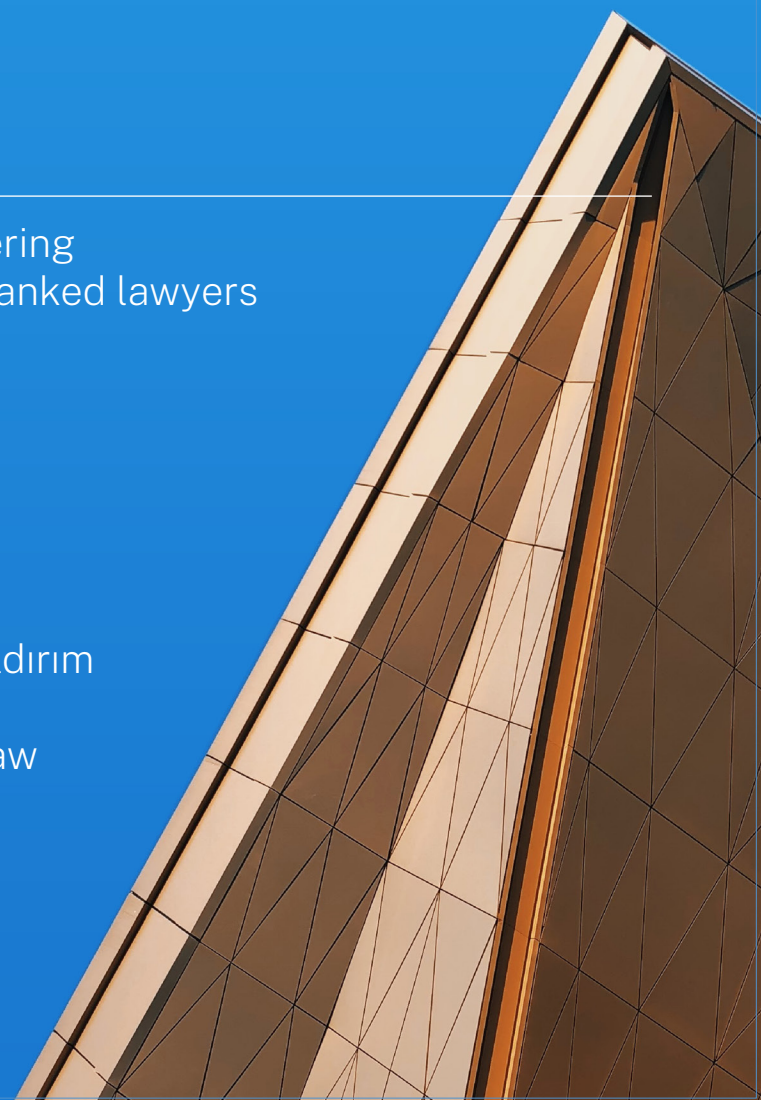

Türkiye: Law & Practice and Trends & Developments

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TÜRKIYE

Law and Practice

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Contents

ELIG Gürkaynak Attorneys-at-Law is a leading law firm comprising 95 lawyers based in Istanbul. Founded in 2005, the firm combines a solid knowledge of Turkish law with a business-minded approach to developing legal solutions that meet the ever-changing needs of clients in their international and domestic operations. The competition law and regulatory department is led by founding partner Gönenç Gürkaynak, along with seven other partners, eight counsel and 42 associates. In addition to its unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience of defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases and leniency handlings, as well as before courts on issues of private enforcement of competition law and in appeals against administrative decisions by the Turkish Competition Authority. ELIG Gürkaynak represents multinational corporations, business associations, investment banks, partnerships and individuals in the widest variety of competition law matters, while also collaborating with many international law firms.

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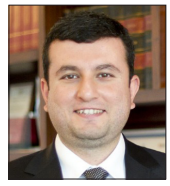

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Article 7 of Law No 4054 on Protection of Competition (the "Competition Law") governs M&A, in particular, and mandates that the Turkish Competition Board (the "Board") regulate and establish a merger control regime. Accordingly, certain M&A are subject to Turkish Competition Authority (TCA) review and approval in order to gain validity.

The amendment to the Competition Law, Law No 7246 (the "Amendment Law"), was published in the *Official Gazette* and entered into force on 24 June 2020. Furthermore, Communiqué No 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board is the primary legal instrument that establishes the Turkish merger control regime. On 4 March 2022, the TCA published Communiqué No 2022/2 on the Amendment of Communiqué No 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board. Communiqué No 2022/2 introduces certain new regulations concerning the Turkish merger control regime, which have fundamentally affected the notifiability analysis of merger transactions and the merger control notifications submitted to the TCA.

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

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

1.2 Legislation Relating to Particular Sectors

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

Banks

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

Privatisation Tenders

Communiqué No 2013/2 prescribes an additional pre-notification process that applies to privatisations in which the turnover of the undertaking, asset or unit intended for the production of goods or services to be privatised exceeds TRY250 million. Statutory sales to public institutions and organisations, including local governments, are excluded for the purposes of this calculation. If the threshold is met, a pre-notification should be filed with the TCA before the public announcement of the tender specifications.

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

Other Sector-Specific Rules

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

1.3 Enforcement Authorities

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

The main service unit comprises:

- six supervision and enforcement departments;
- a department of decisions;
- an economic analysis and research department;
- an information technologies department;
- an external relations and competition advocacy department;
- a strategy development department; and
- a cartel on-site inspection support division.

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

Other authorities may get involved in the review of mergers in certain sectors. By way of example, the TCA is statutorily required to get the opinion of the Turkish Information Technologies Authority for mergers concerning the telecommunications sector and must obtain the opinion of the Turkish Energy Markets Regulatory Authority in energy mergers.

2. Jurisdiction

2.1 Notification

Article 7 of Communiqué No 2010/4 amended by Communiqué No 2022/2 provides for a number of notification thresholds.

A transaction must be notified in Türkiye if one of the following increased turnover thresholds is met:

- the aggregate Turkish turnover of the transaction parties exceeds TRY750 million, and the Turkish turnover of at least two of the transaction parties each exceeds TRY250 million;
- the Turkish turnover of the transferred assets or businesses in acquisitions exceeds TRY250 million, and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY3 billion; or
- the Turkish turnover of any of the parties in mergers exceeds TRY250 million, and the worldwide turnover of at least one of the

other parties to the transaction exceeds TRY3 billion.

Communiqué No 2022/2 introduced a thresholds exemption for undertakings active in certain markets/sectors. Pursuant to Communiqué No 2022/2, the above-mentioned TRY250million Turkish turnover thresholds will not be sought for acquired undertakings active in, or assets related to, digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies if they:

- operate in the Turkish market;
- conduct research and development activities in the Turkish market; or
- provide services to Turkish users.

The new regulation does not seek the existence of an "affected market" in assessing whether a transaction triggers a notification requirement. If a concentration exceeds one of the alternative jurisdictional thresholds, it will automatically be subject to the approval of the Board.

Once the above-mentioned thresholds are exceeded, the parties are obliged to notify the transaction.

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

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

Another exception pertains to the Turkish Wealth Fund, which was incorporated as a national wealth and investment fund company under 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.

2.2 Failure to Notify

Competition Law

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

The minimum amount of this fine is revised each year. For 2025, it is set at TRY241,043.

Article 7 Violations

If the parties close a transaction that violates Article 7 (ie, transactions that significantly impede competition – in particular by creating a dominant position or strengthening an exist-

ing dominant position), the Board will impose a turnover-based monetary fine of up to 10% of the parties' turnovers generated in the financial year preceding the date of the fining decision. Employees and managers that had a determining effect on the creation of the violation may also be fined up to 5% of the fine imposed on the undertakings.

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

If the Board finds that the transaction violates Article 7, it shall issue a board resolution ordering:

- the parties concerned to follow or avoid certain behaviours in order to establish competition; and
- structural remedies such as the transfer of certain activities or shareholdings.

However, the relevant amendment introduces a "first behavioural, then structural remedy" rule for Article 7 violations. Therefore, in cases where behavioural remedies are ultimately considered to be ineffective, the Board will order structural remedies. Undertakings must comply with the structural remedies within a minimum of six months. If there is a possibility of serious and irreparable damages occurring, the Board is authorised to take interim measures until the final resolution on the matter.

There have been many cases where companies have been fined for failing to file a notifiable transaction (TAIF/SIBUR, 21-55/776-383, 11 November 2021; BMW/Daimler/Ford/Porsche/Ionity, 20-36/483-211, 28 July 2020; Brookfield/JCI, 20-21/278-132, 30 April 2020; Elon R Musk/Twitter Inc, 23-12/197-66, 2 March 2023, etc). The penalties are publicly announced via the Board's reasoned decisions, which are published on the TCA's official website.

2.3 Types of Transactions

Notifiable transactions are as follows:

- a merger of two or more undertakings;
- the acquisition of direct/indirect control on a lasting basis over all (or part) of one or more undertakings by one or more undertakings – or by persons who currently control at least one undertaking – through the purchase of assets or all (or part) of its shares, an agreement or other instruments; and
- the formation of a full-function joint venture.

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

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

2.4 Definition of "Control"

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

According to Article 5 (2) of Communiqué No 2010/4, control can be constituted by:

- rights, agreements or any other means that – either separately or jointly, de facto or de jure – confer the opportunity to exercise a decisive influence on an undertaking (particularly by ownership or the right to use all or part of the assets of an undertaking); or

- rights or agreements that confer decisive influence on the composition or decisions of the organs of an undertaking.

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

2.5 Jurisdictional Thresholds

Please see **2.1 Notification** for further details of jurisdictional thresholds, including a threshold exemption for undertakings active in certain markets/sectors.

2.6 Calculations of Jurisdictional Thresholds

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

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

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

Communiqué No 2022/2 also updates the rules that apply to the calculation of turnover of the financial institutions in accordance with the recent changes to the financial regulations. Recent updates of Article 9 of Communiqué No 2010/4 are as follows.

- For the calculation of financial institutions' turnovers, Communiqué No 2022/2 aligns the wordings and terms in view of the applicable banking and financial regulations – ie, it excludes the term "participation banks" and refers to "banks" in general, which covers all legal forms of banks.
- Communiqué No 2022/2 updates the names and references of the relevant regulations issued by the Banking Regulatory and Supervisory Agency and the Capital Markets Board referred to in Article 9 of Communiqué No 2010/4.

In respect of various financial institutions, the turnover determined by the special turnover calculation method consists of the sum of the following.

- Banks and participation banks – as included within the income statement requested under the Communiqué Concerning the Financial Tables to be Disclosed to the Public by Banks, and Related Explanations and Footnotes (Banking Regulatory and Supervisory Agency, 10/2/2007, 26430):

(a) interest and profit-sharing income;
(b) collected fees and commissions;
(c) dividend income;
(d) commercial profits/losses (net); and
(e) other operational income.

- Financial leasing, factoring and funding companies – real operating income and other operating income, as included within the income statement requested under the Communiqué Concerning the Uniform Accounting Plan to be Implemented by Financial Leasing, Factoring and Funding Companies and the Explanation Note Thereof, and Concerning the Format and Content of the Financial Tables to be Disclosed to the Public (the Banking Regulatory and Supervisory Agency, 17/5/2007, 26525).
- Intermediary institutions and portfolio management companies – as included within the detailed income statement requested under the Communiqué Concerning the Principles on Financial Reporting within the Capital Market (the Banking Regulatory and Supervisory Agency, 9/4/2008, 26842):
  (a) sales income;
  (b) interests;
  (c) fees;
  (d) premiums;
  (e) commissions and other income;
  (f) other operating income;
  (g) shares in the profits/losses of the investments valued via the equity method; and
  (h) financial income other than operating income.
- Insurance, reassurance and pension companies – in accordance with the last financial statements or data either (i) published by the Undersecretariat of the Treasury, the Association of Insurance and Reinsurance Companies of Türkiye, or the Pension Monitoring Centre or (ii) disclosed to the public by the companies related to the merger or acquisition (to be confirmed by the Undersecretariat of Treasury):
  (a) domestic direct premium production for insurance companies (gross);
  (b) domestic direct premium production for reassurance companies (gross); and
  (c) the total amount of contributions and the total amount of funds in pension companies, as well as domestic direct premium production (gross) for those pension companies that also operate in life insurance.
- Other financial institutions – interest and similar income, income generated from securities, commissions, net profit generated from financial activities and other operating income.

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

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

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

See **2.6 Calculations of Jurisdictional Thresholds**.

The seller's turnover is only included with that of the target in exceptional situations. It is included in joint-venture transactions if the seller remains a controlling party in the joint venture post-transaction (ie, both the seller and the buyer would be considered as buyers in cases where the buyer and the seller form a joint venture).

The Board will only consider the changes in the business during the reference period if they are

reflected in the relevant balance sheets of the businesses in question.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control if the turnover thresholds are triggered. The Competition Law states that the criterion to apply is whether or not the undertakings concerned affect the goods and services markets in Türkiye. Even if the relevant undertakings do not have local subsidiaries, branches, sales outlets, etc, in Türkiye, the transaction may still be subject to merger control if the relevant undertakings have sales in Türkiye and thus have effects on the relevant Turkish market.

The likelihood of the Board discovering a transaction is relatively high, as it closely follows M&A in the local and international press, and also the case practice of the EC and other important competition authorities. It may also examine the notifiability of past transactions in the context of a new notification.

Even transactions concerning the formation of a joint venture that will not be active in Türkiye in the foreseeable future could trigger a mandatory merger control filing if the parents trigger the applicable thresholds.

Board Decisions

There have been some cases where the Board has cleared decisions regarding joint ventures that do not involve sales in Türkiye and considered them notifiable. Recent cases include Baoshan Iron&Steel/Saudi Arabian Oil Company/Public Investment Fund (23-40/782-274, 31 August 2023), Nestle SA/PAI Partners Sarl (23-28/531-180, 22 June 2023), Gs Yuasa International/Leoch Battery Company (23-48/925-328, 12 October 2023), Tricon/Chemieuro-JV (22-15/248-107, 31 March 2022), and Baker Hughes/Dussur-Baker Petrolite (22-28/451-182, 23 June 2022).

2.9 Market Share Jurisdictional Threshold

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

2.10 Joint Ventures

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

The Guidelines on the Concept of Control explain the concept of "full functionality". The following elements should be considered:

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

Please refer to **2.8 Foreign-to-Foreign Transactions** for details of the Board's approach to joint venture cases.

2.11 Power of Authorities to Investigate a Transaction

If a transaction raises substantive competition law concerns and is viewed as problematic under the significant impediment to effective competition (SIEC) test, the TCA may still investigate the transaction either upon complaint or on its own initiative – even where the transac-

tion does not meet the jurisdictional thresholds. The applicable limitation period is eight years, pursuant to Article 20 (3) of the Law on Misdemeanours No 5326.

2.12 Requirement for Clearance Before Implementation

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

2.13 Penalties for the Implementation of a Transaction Before Clearance

Pursuant to Article 16 of the Competition Law, if the parties to a notifiable transaction violate the suspension requirement, a turnover-based monetary fine (based on the local turnover generated in the financial year preceding the date of the fining decision at a rate of 0.1%) will be imposed on the incumbent firms – ie, the acquirer(s) in the case of an acquisition and both merging parties in the case of a merger. A monetary fine imposed for a violation of the suspension requirement will be no less than TRY241,043 in 2025. The wording of Article 16 does not give the Board discretion as to whether or not to impose a monetary fine for a violation of the suspension requirement – rather, once the violation of the suspension requirement is detected, the monetary fine will be imposed automatically.

These penalties are applied frequently in practice. In recent years, examples have included:

- TAIF/SIBUR, 21-55/776-383, 11 November 2021;
- BMW/Daimler/Ford/Porsche/Ionity, 20-36/483-211, 28 July 2020; and
- Brookfield, 20-21/278-132, 30 April 2020.

2.14 Exceptions to Suspensive Effect

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

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

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

2.15 Circumstances Where Implementation Before Clearance Is Permitted

The Board would not permit closing before the clearance decision. There is no specific regulation allowing or disallowing carve-out or hold-separate arrangements. However, the Board has so far consistently rejected all carve-out and hold-separate arrangements proposed by undertakings (eg, Total SA, 20 December 2006, 06-92/1186-355; CVR Inc-Inco Limited, 1 February 2007, 07-11/71-23). The Board argued that

a closing is sufficient for it to impose a suspension violation fine, and an analysis of whether change in control actually took effect in Türkiye is unwarranted. The Board therefore considers the "carve-out" concept to be unconvincing.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is no specific deadline for filing in Türkiye. However, the filing should be made, and approval obtained, before the closing. In practice, it is recommended that the transaction be filed at least 60 calendar days before the projected closing. For details of penalties in the case of failure to do so, please see **2.13 Penalties for the Implementation of a Transaction Before Clearance**.

3.2 Type of Agreement Required Prior to Notification

A binding agreement is not required prior to notification. Parties can file on the basis of a less formal agreement, such as a letter of intent, a memorandum of understanding or a non-binding term sheet. There are some cases where the parties merely enclosed a letter of intent and/or a memorandum of understanding (Defacto Perakende/European Bank, 22-55/872-359, 15 December 2022; Kavak/Araba Sepeti, 21-43/627-309, 16 September 2021; Opel-Saft, 20-08/78-45, 6 February 2020). However, Communiqué No 2010/4 requires the submission of a written document prior to notification. A filing thus cannot be made where there is nothing in writing (eg, based on a good-faith intention to reach an agreement).

3.3 Filing Fees

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

3.4 Parties Responsible for Filing

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

3.5 Information Included in a Filing

The notification form is similar to Form CO. The Board requires that one hard copy and an electronic copy of the notification form be submitted in Turkish. The recent updates allow notifying parties to submit the notification form via e-Devlet, which is an elaborate system of web-based services that includes electronic submission. e-Devlet had already been made available for submissions, especially during the pandemic period. However, Communiqué No 2010/4 explicitly mentions this alternative form of submission, making it official.

Additional documents are also required, such as:

- the executed or current copies and sworn Turkish translations of the transaction document(s) that brings about the transaction;
- financial statements (including the balance sheets of the parties); and
- market research reports for the relevant market (if available).

A signed and notarised (and apostilled, if applicable) power of attorney is also required.

3.6 Penalties/Consequences of Incomplete Notification

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

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

3.7 Penalties/Consequences of Inaccurate or Misleading Information

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

3.8 Review Process

Upon its preliminary review (Phase I) of the notification, the Board will decide either to approve the transaction or to investigate it further (Phase II). The Board notifies the parties of the outcome within 30 days following a complete filing. There is an implied approval mechanism whereby tacit approval is assumed if the Board does not react within 30 calendar days upon a complete filing. However, in practice, the Board almost always reacts within the 30-day period – either by sending a written request for information or, very rarely, by rendering its decision within the original 30-day period. The TCA also frequently asks formal questions and adds more time to the review process, as it is advisable to notify the filing at least 60 calendar days before the projected closing.

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

3.9 Pre-Notification Discussions With Authorities

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

3.10 Requests for Information During the Review Process

It is common practice for the TCA to send written requests to the parties involved in the transaction to any other party related to the transaction, or to third parties such as competitors, customers or suppliers. The TCA's written information requests will cut the review period and restart the 30-day period as of the date on which the responses are submitted.

3.11 Accelerated Procedure

Communiqué No 2010/4 also brought a modified notification form that will replace the current notification form as of 4 May 2022. According to

the modified notification form, there is a short-form notification (without a fast-track procedure) if a transition from joint control to sole control is at stake, or if there are no affected markets within Türkiye.

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

4. Substance of the Review

4.1 Substantive Test

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

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

4.2 Markets Affected by a Transaction

Pursuant to Communiqué No 2010/4, the relevant product markets are those that might be affected by the notified transaction where:

- two or more of the parties are commercially active in the same product market (horizontal relationship); or
- at least one of the parties is commercially active in the downstream or upstream market of any product market in which another party operates (vertical relationship).

4.3 Reliance on Case Law

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

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

4.4 Competition Concerns

The TCA primarily focuses on unilateral effects, but may also consider co-ordinated effects (Ladik, 05-86/1188-340, 20 December 2005) and vertical effects (Migros, 15-29/420-117, 9 July 2015 – in which the transaction was conditionally cleared). However, the TCA has not yet prohibited a transaction on the grounds of "conglomerate effects".

4.5 Economic Efficiencies

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

Efficiencies that result from a concentration may play a more important role in cases where the activities of the parties overlap in Türkiye, 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 the freedom to skip the relevant sections of the notification form on efficiencies based on the parties' market shares in the affected markets.

4.6 Non-Competition Issues

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

The TCA has so far kept its independence and impartiality in its enforcement activities in respect of both local and foreign investors. The merger control regulations also apply to foreign direct investments, given that there are no separate merger control regulations for foreign direct investments in Türkiye.

4.7 Special Consideration for Joint Ventures

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

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

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

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

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

The Board has broad powers during the investigation stage. If it determines that the transaction may violate the Competition Law, the Board may notify the undertaking (or associations of undertakings) concerned of a decision regarding the actions to be taken or avoided so as to establish and maintain competition before infringement occurs. The Board may also forward its opinion on how to terminate such infringement.

The Board can re-examine a clearance decision at any time. It may subsequently decide on prohibition and the application of other sanctions for a merger or acquisition if:

- the clearance was granted based on incorrect or misleading information from one of the undertakings; or
- the obligations provided in the decision are not complied with.

For there to be a prohibition decision, the Board must show that the transaction could significantly impede competition. In cases of conditional clearance, the Board must show that the transaction would produce these effects in the absence of the relevant structural and/or behavioural remedies.

5.2 Parties' Ability to Negotiate Remedies

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

The Remedy Guidelines require that the parties should submit detailed information on how the remedy would be applied and how it would resolve the competition concerns. The guidelines state that behavioural or structural remedies may be submitted by the parties and outline the acceptable remedies, which include:

- divestment in order to cease all kinds of connection with the competitors;
- remedies that enable undertakings to access certain infrastructure issues (eg, networks, IP, essential facilities); and
- remedies in respect of concluding/amending long-term exclusive agreements.

Typical Remedies

The number of cases in which the Board has requested divestment or licensing commitments, or other structural or behavioural remedies, has increased dramatically in the past few years. In practice, the Board is inclined to apply different types of divestment remedies. Examples of the Board's pro-competitive divestment remedies include divestitures, ownership unbundling, legal separation, access to essential facilities and obligations to apply non-discriminatory terms.

Remedy Guidelines

The Remedy Guidelines include all steps and conditions for the enforcement of remedies.

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

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

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

The conditions may be revised on a case-by-case basis. In some cases, for example, an obligation may be imposed such that the purchaser is active in the sector rather than seeking financial investment.

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

5.3 Legal Standard

Pursuant to the Remedy Guidelines, the parties must take the following principles into account when submitting proposed remedies.

- Parties must base their remedies on the legal and economic principles specific to the transaction at hand. Solutions must aim to protect the market from the potential effects of the transaction through the protection of the market's competitive structure.
- The main aim of a remedy is to protect the pre-transaction level of competition.
- The remedy must protect competition, rather than protect the competitors.
- The conditions of the remedy must be clear and feasible.

The Board should only accept remedies that have been shown to eliminate the problem of significant restriction on competition. In addition, the Remedy Guidelines require the remedies to be capable of being implemented effectively as soon as possible, as market conditions may change before the implementation of the proposed remedy.

5.4 Negotiating Remedies With Authorities

The parties may submit proposals for possible remedies during either the preliminary review or the investigation process.

There have been several cases where the Board has accepted remedies or commitments (such as divestments) proposed to or imposed by the EC, as long as these remedies or commitments ease competition law concerns in Türkiye (eg, Synthomer plc/OMNOVA Solutions, 20-08/90-55, 6 February 2020; Obilet/Biletal, 21-33/449-224, 1 July 2021; and American Securities/Ferro, 22-10/144-59, 24 February 2022).

For further details, see **5.1 Authorities' Ability to Prohibit or Interfere With Transactions**.

5.5 Conditions and Timing for Divestitures

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

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

5.6 Issuance of Decisions

The Board serves the final decisions to the representative(s) of the notifying party/parties. Following the removal of any confidential business information, final decisions are also published on the website of the TCA.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

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

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

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

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

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

General rules on ancillary restraints are defined in the Guidelines on Undertakings Concerned. The parties make a self-assessment as to whether

a certain restriction could be deemed ancillary; therefore, the Board will not allocate a separate part in its decision to explaining the ancillary status of all the restraints. The Board may review the restraints per the parties' request and, if the ancillary restrictions are not compliant with the merger control regulation, may launch an Article 4 investigation.

7. Third-Party Rights, Confidentiality and Cross-Border Co-Operation

7.1 Third-Party Rights

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

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

7.2 Contacting Third Parties

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

7.3 Confidentiality

Communiqué No 2010/4 introduces a mechanism that requires the TCA to publish notified transactions on its official website, including only the names of the undertakings concerned and their areas of commercial activity. Once the parties have notified a transaction to the TCA, the existence thereof is no longer a confidential matter.

Communiqué No 2010/3 on the Regulation of Right to Access to File and Protection of Commercial Secrets is the main legislation that regulates the protection of commercial information. Pursuant to Communiqué No 2010/3, undertakings must identify and justify information or documents as commercial secrets.

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

As mentioned in **5.7 Issuance of Decisions**, the reasoned decisions of the Board are published on the website of the TCA once confidential business information has been removed. Moreover, the Board and personnel of the TCA are bound by a legal obligation not to disclose any trade secrets or confidential information they have acknowledged during the course of their work.

In the event that the Board decides to have a hearing during the investigation, hearings at the

TCA are – in principle – open to the public. However, in order to protect public morality or trade secrets, the Board may decide that the hearing must be held in camera.

Article 15 (2) of Communiqué No 2010/3 implies that the TCA may not consider confidentiality requests related to information and documents that are necessary evidence to prove the infringement of competition. In such cases, the TCA can disclose information and documents that could be classed as trade secrets – provided it takes into account the balance between public interest and private interest and makes the disclosure in accordance with the proportionality criterion.

7.4 Co-Operation With Other Jurisdictions

The TCA is authorised to contact certain regulatory authorities around the world, including the EC, in order to exchange information. Authorities are not obliged to seek the parties' permission to share information with each other.

Article 43 of Decision No 1/95 of the EC–Türkiye Association Council (Decision No 1/95) empowers the TCA to notify the EC and request that the Directorate-General for Competition applies relevant measures if the Board believes that transactions realised in EU territory adversely affect competition in Türkiye. This provision grants reciprocal rights and obligations to the parties (EU–Türkiye) and, thus, the EC has the authority to ask the Board to apply the necessary measures to restore competition in the relevant markets.

In addition, the TCA's research department makes periodical consultations with relevant domestic and foreign institutions and organisations. In the past, the EC has been reluctant to share any evidence or arguments that the TCA had explicitly requested on a limited number of occasions.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

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

Filing an administrative action does not automatically stay the execution of the Board's decision. However, at the request of the plaintiff, the court may – by providing its justifications – decide on a stay of execution if the execution of the Board's decision is highly likely to:

- cause serious and irreparable damages; and/or
- be against the law (ie, upon showing of a prima facie case).

Judicial Review Period

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

Regional Courts

The regional courts will investigate the case file, on both procedural and substantive grounds, and make their decision based on the merits of the case. The regional court's decision will be considered final in nature.

Pursuant to Article 46 of the Administrative Procedure Law, the decision of the regional court will be subject to the High State Court's review in exceptional circumstances. In such a case, the High State Court may decide to uphold or reverse the regional court's decision. If the decision is reversed by the High State Court, it will be remanded back to the deciding regional court, which will in turn issue a new decision that takes the High State Court's decision into account.

8.2 Typical Timeline for Appeals

The parties should file an appeal case within 60 calendar days of receiving the reasoned decision of the Board. The judicial review before the Ankara administrative courts of first instance usually takes about 12 to 24 months. The appeal before the High State Court usually takes about 24 to 36 months. Court decisions in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts 24 to 30 months.

8.3 Ability of Third Parties to Appeal Clearance Decisions

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

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

As previously mentioned in **4.6 Non-competition Issues**, merger control regulations under the Turkish competition law regime are also applicable to foreign direct investments. There are no separate merger control regulations for foreign direct investments.

Trends and Developments

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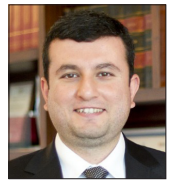

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The legislative branches of the government have been quiet with regard to merger control legislation in the recent months. The most recent development was the enactment of Communiqué No 2022/2, which was published in the *Official Gazette* on 4 March 2022 and entered into force on 4 May 2022. The main purpose of Communiqué No 2022/2 was to raise the jurisdictional turnover thresholds under Article 7 of Communiqué No 2010/4 for mergers that need to be notified to the Competition Authority between certain undertakings.

Two of the most significant developments associated with Communiqué No 2022/2 are, among other things, the introduction of threshold exemption for undertakings active in certain markets and sectors, and an increase in the applicable turnover thresholds for concentrations that require mandatory merger control filing before the Competition Authority.

Communiqué No 2022/2 does not seek a Turkish nexus in terms of activities that qualify for the threshold exemption. In other words, it would be sufficient for the target company to be active in the fields of digital platforms, software (including gaming software), financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies anywhere in the world for the threshold exemption to become applicable, provided that the target company operates in the Turkish market, conducts R&D activities in Türkiye or provides services to Turkish users in the fields listed above. Accordingly, Communiqué No 2022/2 does not require the generation of revenue from customers located in Türkiye, nor that the target company conducts R&D activities in Türkiye or provides services to Turkish users concerning the fields listed above for the exemption on the local turnover thresholds to become applicable.

The increased turnover thresholds and the exemption on the local turnover thresholds mechanism introduced by Communiqué No 2022/2 seemingly altered the scope of the transactions that are notifiable to the Competition Authority. In this regard, concentrations related to the fields of digital platforms, software (including gaming software), financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies are expected to be more closely scrutinised by the Competition Authority. The main aim of this change is to encourage more undertakings in the relevant sectors.

As indicated by the Competition Authority's Mergers and Acquisitions Insight Report for 2024, the Turkish Competition Board (the "Board") assessed 311 transactions in 2024. The number of assessments in 2024 was higher than the average number of assessments made between 2013 and 2024.

Some of the more prominent Board decisions in the recent past are as follows.

Compugroup/Bupa Decision (Decision 24-11/174-69 of 29 February 2024)

The Board, in its reasoned decision, describes the transaction parties and then delves into a detailed explanation of the relevant product market. Regarding the acquirer, the Board notes that Bupa Turkey is the subsidiary of Bupa International Markets Limited ("Bupa International") which is an international health insurance provider. As for the target, Compugroup Medical is currently indirectly controlled by Compugroup Medical Global (CGM). CGM is a group of companies operating internationally and focusing on the digitalisation of healthcare systems.

The Board, in its reasoned decision, notes that Bupa International operates globally in the fields of health insurance, healthcare and elderly care, while Bupa Turkey provides consultancy services in areas such as strategy, finance, marketing and trade mark matters. Concerning the relevant product market, the Board identified "information technology systems and operational support for health insurance companies" and "sickness-health insurance". The Board further considered segmenting the insurance market into "complementary health insurance" and "private health insurance" due to the product focus of the software. However, since this segmentation did not affect the merger control review outcome, the Board based its analysis on the broader market definition and left the relevant market definition open.

The Board assessed the transaction under the Guideline on Non-Horizontal Mergers and Acquisitions, highlighting primary anti-competitive risks: (i) input foreclosure (ie, when a supplier could insulate a significant part, or even the entirety, of the upstream market by limiting rivals' access post-acquisition, having effects such as heightening entry barriers), (ii) customer foreclosure (ie, output foreclosure, when a vertical merger restricts upstream rivals' access to the downstream), and (iii) the potential for co-ordinated effects that could restrict competition.

Regarding input foreclosure, the Board expressed concerns that, after the transaction, Compugroup Medical might cease providing its software services and operational support to competitors of Bupa Acıbadem Sigorta AŞ ("Bupa Acıbadem"), a subsidiary of Bupa International in Türkiye. The Board reviewed the market shares of Compugroup Medical and concluded that it holds a significant market share in the relevant sector and is a market leader in terms of both the customer base and premium production volumes of insurance companies. Based on this, the Board concluded that Compugroup Medical's potential cessation of services to competitors in the healthcare insurance sub-market could significantly restrict access to essential inputs and potentially result in market foreclosure.

Regarding customer (or output) foreclosure, the Board noted that since the merged entity will operate in both the upstream and downstream markets after the transaction, the acquisition could limit the ability of existing and potential competitors in the upstream market to access a significant customer base in the downstream market. However, following an assessment of market shares, the Board concluded that, post-transaction, Compugroup Medical's competitors will still be able to access potential customers, and that the services provided by Bupa Acıbadem will remain largely unchanged. As such, the Board determined that the transaction will not result in significant customer foreclosure or significant impediment of effective competition.

Regarding co-ordinated effects, the Board judged that Compugroup Medical's potential to share sensitive data with Bupa Acıbadem could create competitive concerns, from both a unilateral and a co-ordination perspective. The Board also considered that vertical transactions can increase transparency in the market, allowing for access to sensitive information or price monitoring, which could facilitate co-ordination among undertakings.

To alleviate the Board's anti-competitive concerns, Bupa submitted behavioural remedies pertaining to the maintenance of existing contracts between Compugroup Medical and insur-

ance companies, effective unless there is just cause for termination or unilateral termination by the customer. It also committed to renewing contracts upon customer request and providing all current and future products and services to other insurance companies under market conditions, without granting an advantage to entities within its own economic unit, such as Bupa Acıbadem. The proposed remedies also include measures to prevent the exchange of commercial secrets and/or competitively sensitive information between Compugroup Medical and Bupa Acıbadem.

The Board assessed the proposed remedies and concluded that the commitment package sufficiently addresses the identified competitive concerns, and unanimously approved the transaction subject to the behavioral remedies outlined in the remedy package.

Tat Gıda/Memişoğlu Decision (Decision 24-07/128-52 of 8 February 2024)

On 8 February 2024, the Turkish Competition Authority published the Board's decision regarding the acquisition of control and shares corresponding to 49.04% of Tat Gıda Sanayi AŞ ("Tat Gıda") by Memişoğlu Tarım Ürünleri Ticaret Ltd Şti ("Memişoğlu"). The Board evaluated whether there is a permanent change of control within the scope of Article 5 of Communiqué No 2010/4, which would typically imply becoming the majority shareholder or procuring majority voting rights in order to assert that the proposed transaction could be defined as an acquisition. The Board performed a comprehensive analysis regarding whether the acquisition of a minority shareholding by Memişoğlu would lead to de facto sole control over Tat Gıda.

The Board examined (i) the participation rates in Tat Gıda's shareholders' meetings between 2013 and 2023, (ii) the lowest rate of affirmative vote in these meetings, and (iii) the rate of affirmative vote outside Koç Group. Through its examination of the provided information, the Board determined that Memişoğlu's shareholding of 49.04% represents a significant majority based on the participation rates at Tat Gıda's shareholders' meetings in the past 11 years. Additionally, The Board found that it is highly likely that Memişoğlu's shareholding of 49.04% at the shareholders' meeting will allow Memişoğlu to establish a stable majority at Tat Gıda's shareholders' meeting in the future. The Board concluded that Memişoğlu will acquire de facto sole control over Tat Gıda as a result of the transaction.

After determining that the transaction results in a change in control over Tat Gıda on a lasting basis, the Board found that there is horizontal overlap between the activities of Tat Gıda and Memişoğlu in Türkiye in the market for instant soup. However, due to (i) the very low market shares of the transaction parties, (ii) a limited market share increase as a result of the transaction, (iii) the absence of any legal barriers to entry, and (iv) the existence of a high number of national and local brands active in this market, the Board concluded that the transaction will not lead to any anti-competitive concerns in this market.

The Board also determined that there is a vertical relationship between Tat Gıda's activities in the downstream market for convenience food (finding that, according to the market shares of the undertakings active in the market for convenience food in Turkiye, Tat Gıda is the market leader, followed by Yayla Agro Gıda San ve Tic AŞ and Dardanel Önentaş Gıda San AŞ) and Memişoğlu's activities in the upstream market for dried legumes.

In terms of whether the transaction would lead to input foreclosure concerns, the Board examined whether the merged entity's competitors in the downstream market would be unable to access sufficient alternative sources of supply in case Memişoğlu supplied all of its dried legume produce to Tat Gıda. To better understand the market dynamics, the Board analysed the sales of dried legumes by Memişoğlu to its customers in Türkiye and found that Tat Gıda is not the sole buyer of Memişoğlu's dried legumes. Furthermore, the Board determined that since there are many large and small players in the upstream market for dried legumes, Memişoğlu's existing customers would still have access to alternative suppliers even if Memişoğlu ceased to supply. Therefore, the Board found that there are no barriers to import, and that there are many alternative sources of supply both in and outside Türkiye. As such, the Board arrived at the conclusion that the transaction will not result in any input foreclosure concerns.

In terms of potential customer foreclosure concerns, the Board examined the purchases of dried legumes made by Tat Gıda and found that Memişoğlu is not the only supplier from whom Tat Gıda procured dried legumes. Furthermore, the Board considered that there are no barriers to export in the market for dried legumes, and therefore that the undertakings active in this market have alternative customers both in Türkiye and abroad. To that end, the Board judged that suppliers of dried legumes would have alternative buyers even if Tat Gıda stopped purchasing dried legumes from them, such that the transaction will not lead to any customer foreclosure concerns.

Even though the Board came to the foregoing conclusions, it cleared the transaction unconditionally. Through this decision, the Board provided further guidance to acquirers regarding the question of whether the acquisition of a minority shareholding could confer control on a lasting basis and thus result in a notifiable concentration from a merger control perspective due to the specific governing procedures and mechanisms of target entities.

The decision holds significance as it reinforces the Board's settled decisional practice regarding the assessment of de facto sole control on the basis of historic voting patterns and attendance rates at the shareholders' meetings of acquired undertakings. Through this decision, the Board provides further guidance regarding the question of whether the acquisition of a minority shareholding could confer control on a lasting basis and thus result in a notifiable concentration from a merger control perspective due to the specific governing procedures and mechanisms of target entities.

Conclusion

As can be seen from the Competition Authority's Mergers and Acquisitions Insight Report for 2024, (i) there has been a significant increase in the Competition Authority's scrutiny of transactions, and (ii) the introduction of a threshold exemption for undertakings active in certain markets and sectors may be one of the reasons for this considerable increase.

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