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Merger Control

Law and Practice – Turkey

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Law and Practice

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Contributed by ELIG, Attorneys-at-Law ***Authors:*** Gönenç Gürkaynak, K. Korhan Yıldırım

ELIG, Attorneys-at-Law is an eminent, independent Turkish law firm based in Istanbul. The firm was founded in 2005. ELIG delivers the top competition law practice in Turkey with 45 competition law specialists. The team has three partners and one counsel and is led by Mr Gönenç Gürkaynak, the firm s managing partner. In addition to our unparalleled experience in merger control issues, ELIG has vast experience in defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases, leniency handlings, and before the courts on issues of private enforcement of competition law, along with appeals of the administrative decisions of the Turkish Competition Authority. During the past year, we have been involved in over 60 merger clearances by the Turkish Competition Authority, more than 20 defence projects in investigations and over 15 antitrust appeals before the administrative courts. ELIG also provided more than 50 antitrust education seminars to its clients' employees.

Authors

Gönenç Gürkaynak is a founding partner and the managing partner of ELIG, Attorneys-at-Law, a leading law firm of 80 lawyers based in Istanbul, Turkey. He graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Gürkaynak received his LLM degree from Harvard Law School, and is qualified to practise in Istanbul, New York, Brussels and England and Wales (currently non-practising). Before founding ELIG, Attorneys-at-Law in 2005, Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years. Gürkaynak heads the competition law and regulatory department of ELIG, Attorneys-at-Law. He has unparalleled experience in Turkish competition law counselling issues with more than 19 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year Gürkaynak represents multinational companies and large domestic clients in more than 20 written and oral defences in investigations of the Turkish Competition Authority, about 15 antitrust appeal cases in the high administrative court, and over 60 merger clearances of the Turkish Competition Authority, in addition to co-ordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EU competition law topics.

K. Korhan Yıldırım graduated from Galatasaray University Faculty of Law in 2005 and is a member of the Istanbul Bar Association. Yıldırım has been working with ELIG, Attorneys-at-Law for more than ten years and has been a partner in the competition law and regulatory department since January 2014. He has successfully represented numerous multinational and national companies before the Turkish Competition Authority and Turkish courts. Yıldırım has provided numerous legal opinions and trainings in relation to compliance to competition law rules. Yıldırım has also authored and co-authored many articles on competition law and merger control matters, and is a frequent speaker at various conferences and symposia.

1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The relevant legislation on merger control is the Law on Protection of Competition No 4054 (the "Competition Law") and Communiqué No 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (the "Communiqué No 2010/4", as amended by Communiqué No 2012/3). Article 7 of the Competition Law governs mergers and acquisitions in particular.

Article 7 of the Competition Law mandates the Competition Board (the "Board") to regulate and establish a merger control regime. Accordingly, mergers and acquisitions are subject to review and approval by the Turkish Competition Authority (the "TCA") in order to gain validity. Further to this provision, Communiqué No 2010/4 is the primary legal instrument that establishes the Turkish merger control regime and introduces a notification system.

Further guidelines adopted by the TCA are as follows:

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

1.2 Legislation Relating to Particular Sectors

There is no particular legislation applicable to foreign transactions or investment in Turkey, as far as the merger control rules are concerned. However, there are sector-specific merger control rules for mergers that concern banks, privatisation tenders and certain other fields.

Banks: Banking Law No 5411 provides that mergers in the banking industry fall outside of the merger control regime, the Communiqué No 2010/4", subject to the condition that the sectoral share of the total assets of the banks does not exceed 20%. The Board draws a line between

- transactions involving foreign acquiring banks with no operations in Turkey, to which the Competition Law applies; and
- foreign acquiring banks already operating in Turkey, to which the Competition Law does not apply if the conditions for the application of the Banking Law exception are fulfilled.

Privatisation tenders: Communiqué No 2013/2 establishes an additional pre-notification system. This applies to privatisation matters in which the turnover of the undertaking or asset or unit intended for production of goods or services subject to privatisation exceeds TRY30 million (approximately EUR8.98 million or USD9.93 million). For the purposes of this calculation, statutory sales to public institutions and organisations, including local governments, are excluded. 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 is to be cleared. Following the tender, the winning bidder will still have to make a merger filing and obtain clearance before the Privatisation Administration's decision on the final acquisition.

Finally, there are various sector-specific rules alongside the merger control rules for sectors such as media, telecommunications, energy and petrochemicals. For example:

Energy: 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.

Broadcasting: Under Law No 6112, transfer of shares of a joint stock company holding a broadcasting licence should be notified to the Turkish Radio and Television Supreme Council.

1.3 Enforcement Authorities

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

The main service units consist of several supervision and enforcement departments: the department of decisions, the economic analyses and research department, the information management department, the external relations, training and competition advocacy department, the strategy development, regulation and budget department, the press department and the cartel on-the-spot inspections support division. There is a 'sectoral' job definition of each supervision and enforcement department.

Other authorities may get involved in the review of mergers in certain sectors. For example, the TCA is statutorily required to get the opinion of (i) the Turkish Information Technologies Authority for mergers that concern the telecommunication sector, and (ii) the Turkish Energy Markets Regulatory Authority in energy mergers.

2. Jurisdiction

2.1 Notification

The notification is compulsory, provided that the applicable turnover thresholds are exceeded. The thresholds are as follows:

- the aggregate Turkish turnover of the transaction parties exceeding TRY100 million (approximately EUR29.94 million or USD33.11 million) and the Turkish turnover of at least two of the transaction parties, each exceeding TRY30 million (approximately EUR8.98 million or USD9.93 million); or

- the Turkish turnover of the transferred assets or businesses in acquisitions exceeding TRY30 million (approximately EUR8.98 million or USD9.93 million), and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY500 million (approximately EUR149.70 million or USD165.56 million); or
- the Turkish turnover of any of the parties in mergers exceeding TRY30 million (approximately EUR8.98 million or USD9.93 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY500 million (approximately EUR149.70 million or USD165.56 million).

The Board reviews the aforementioned thresholds every two years. The Board did not confirm or revise the thresholds at the beginning of 2017.

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

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

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

2.2 Failure to Notify

The Competition Law introduces penalties for failing to notify or closing the transaction before clearance. Where the parties to a merger or an acquisition which 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 the TCA will ultimately clear the transaction. The minimum amount of this fine is set at TRY18,377 (approximately EUR4,700 or USD5,100) for 2016 and is revised each year.

In the event that the parties close a transaction that violates Article 7 (ie a transaction that creates or strengthens a dominant position, thereby significantly reducing competition in a relevant market), 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 who had a determining effect on the creation of the violation may also be fined up to 5% of the fine imposed on the undertakings.

Invalidity of the transaction

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 its legal consequences in Turkey, pending clearance.

Termination of infringement and interim measures

If the Board finds that the transaction violates Article 7 (ie creates or strengthens a dominant position and significantly lessens competition in a relevant market), it is to order the parties to take the necessary actions in order to restore the same status that prevailed before the closure of the transaction, and thereby restore the pre-transaction level of competition. In the event that there is a possibility that serious and irreparable damage may occur, the Board is authorised to take interim measures until the final resolution on the matter.

There have been many cases where companies were fined for failing to file a notifiable transaction (Tekno İnşaat, 12-08/224-55, 23.02.2012; Zhejiang/Kiri, 11-33/723-226, 02.06.2011; Ajans Press Medya Takip A.Ş.-İnterpress Medya Hizmetleri Ticaret A.Ş./ Mustafa Emrah Fandaklı/ Ziya Açıkça, 10-66/1402-523, 21.10.2010; etc). In very few of such cases, the notifiable transaction also raised substantive competition law concerns, as it was viewed as problematic under the dominance test applicable in Turkey (Ro-Ro, 05-69/959-260, 19.10.2005 – the seller incurred a fine of 5% of its annual Turkish turnover. The buyer was the complaining party, therefore benefiting from lenient treatment).

The penalties are made public as they are announced via the Board's reasoned decisions, which are published on the TCA's official website.

2.3 Types of Transactions

Notifiable transactions are as follows:

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

- formation of a full-function joint venture. These transactions are caught on the condition that they exceed the applicable thresholds (see **2.1 Notification**).

Please see **2.1 Notification** for the transactions that are not subject to the approval of the Board. Operations not involving the transfer of shares or assets can be caught, to the extent that 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' and that definition is akin to the definition in Article 3 of the Council Regulation No 139/2004.

According to Article 5(2) of the Communiqué No 2010/4:

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.

According to Article 5(2) of the Communiqué No 2010/4, acquisition of control on a de facto basis amounts to a change of control.

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

2.5 Jurisdictional Thresholds

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

The Turkish merger control regime does not introduce sector-specific thresholds. Therefore, the thresholds apply to all sectors. However, there are certain special turnover calculation methods for certain sectors such as banks, financial institutions, leasing companies, factoring companies, securities agents, insurance companies, etc. Please see **2.6 Calculation of Jursidictional Thresholds** for details.

However, as also previously mentioned, there are specific merger control provisions for banks, privatisation tenders and certain other sectors (see **1.1 Merger Control Legislation**).

2.6 Calculation of Jursidictional Thresholds

Communiqué No 2010/4 sets out detailed rules for turnover calculation. A brief summary of the calculation methods is as follows:

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

However, as described in **2.5 Jurisdictional Thresholds**, there are certain special turnover calculation methods for certain sectors such as banks, financial institutions, leasing companies, factoring companies, securities agents, insurance companies, etc.

These special turnover calculation methods are as follows:

Concerning financial institutions, the turnover consists of the sum of:

- for banks and participation banks: as included within the income statement requested under the Communiqué Concerning the Financial Tables to be Disclosed to the Public by Banks, and Related Explanations and Footnotes (Banking Regulatory and Supervisory Agency, 10/2/2007, 26430); interest and profit-sharing income, collected fees and commissions, dividend income, commercial profits/losses (net), other operational income;
- for financial leasing, factoring and funding companies: as included within the income statement requested under the Communiqué Concerning the Uniform Accounting Plan to be Implemented by Financial Leasing, Factoring and Funding Companies and the Explanation Note Thereof, and Concerning the Format and Content of the Financial Tables to be Disclosed to the Public (the Banking Regulatory and Supervisory Agency, 17/5/2007, 26525); real operating income, other operating income;
- for intermediary institutions and portfolio management companies: as included within the detailed income statement requested under the Communiqué Concerning the Principles on Financial Reporting within the Capital Market (the Banking Regulatory and Supervisory Agency, 9/4/2008, 26842); sales income, interests, fees, premiums, commissions and other income, other operating income, shares in the profits/losses of the investments valued via

the equity method, financial income other than operating income;
- for insurance, reassurance and pension companies: in accordance with the last financial statements or data either published by the Undersecretariat of Treasury, Association of The Insurance and Reinsurance Companies of Turkey or Pension Monitoring Centre, or disclosed to the public by the companies related to the merger or acquisition, to be confirmed by the Undersecretariat of Treasury; domestic direct premium production for insurance companies (gross), domestic direct premium production for reassurance companies (gross), total amount of contributions and total amount of funds in pension companies, as well as domestic direct premium production (gross) for those pension companies which also operate in life insurance; and
- for other financial institutions: interest and similar income, income generated from securities, commissions, net profit generated from financial activities, other operation income.

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

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

2.7 Relevant Businesses/Corporate Entities for the Purpose of Calculation

See **2.6 Calculation of Jurisdictional Thresholds**.

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

During the reference period, the Board will consider the changes only 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 the Turkish merger control regime provided that the turnover thresholds are triggered. The Competition Law defines the 'effects criteria', pursuant to which the criterion to apply is whether the undertakings concerned affect the goods and services markets in Turkey. Even if the relevant undertakings do not have local subsidiaries, branches, sales outlets etc in Turkey, the transaction can still be subject to the Turkish merger control regime if the relevant undertakings have sales in Turkey and thus have effects on the relevant Turkish market. In 2015, 64 of the notified transactions were foreign-to-foreign transactions.

The likelihood that the Board finds out a transaction is relatively high as the Board vigorously follows mergers and acquisitions in the local and international press and also closely follows the case practice of the European Commission and other important competition authorities. It may also examine the notifiability of past transactions in the context of a new notification. In its 2014 Activity Report, the Authority announced that it will step up these efforts further.

In the event that a target has no sales and/or assets in Turkey, the transaction would not, in principle, trigger the thresholds set forth by the Communiqué No 2010/4, since the Communiqué No 2010/4 requires that the Turkish turnover of the transferred assets or businesses in acquisitions should exceed TRY30 million for the transaction to be notifiable. However, in cases where the transaction concerns the formation of a joint venture, which will not be active in Turkey in the foreseeable future, the transaction could trigger a mandatory merger control filing requirement, to the extent that the parent companies trigger the applicable thresholds. The Board found some exceptional foreign-to-foreign transactions (eg Sorgenia/KKR 14.07.2011, 11-43/919-288) that are outside the scope of the Turkish merger control regime pursuant to Article 2 of the Competition Law.

However, there are some cases where the Board cleared decisions regarding joint ventures that do not involve sales in Turkey and considered them notifiable. Examples of this approach are as follows:

In Lur Berri/LBOF/Financiére de Kiel (12.12.2011, 11-61/1580-565), the Board decided that the joint venture transaction was notifiable, and cleared the transaction. Since local counsel assisted on this file, it knows that the conclusion on jurisdiction rested on the fact that the joint venture's products (festive food) "could be" imported into Turkey, so the transaction "could" potentially produce an impact on the Turkish market.

The Board found a Greenfield healthcare joint venture in Kuwait to be notifiable (Eksim-Rönesans/Acıbadem case, 16.05.2012, 12-26/759-213). The Board concluded that although the joint venture would be established and would be in operation outside of Turkey, the Turkish market could be affected indirectly. The Board also stated that the parties who are forming the joint venture have companies that are active in Turkey and the increase of their market power through the turnover generated from the joint venture in Kuwait would increase their power in Turkey indirectly. Therefore, the Board concluded that the transaction would affect the Turkish market indirectly and thus the Board decided that the transaction was notifiable. This approach of

the Board indicates that the Board is inclined to disregard "the ability to import products into Turkey" and consider a joint venture transaction that will not have any effect in the near future in Turkey to be within the scope of Article 7 of the Competition Law.

The Board's other decisions (Galenica Ltd./ Fresenius Medical Care AG&Co. KGaA, 24.11.2011, 11-59/1515-540; The Blackstone Group, 17.11.2011, 11-57/1468-525; Ocean 17.08.2011, 11-45/1106-382; Angola LNG Limited, 25.04.2012, 12-22/564-162) clearly implied that it does not matter that the joint venture is not/will not be in active in Turkey and will not have any effects on Turkish markets in the near future.

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 whilst assessing whether or not a notification is required for a transaction.

2.10 Joint Ventures

To the extent that the joint venture is full-function, the transaction is subject to merger control once the turnover thresholds are exceeded. To qualify as full-function, the joint venture must fulfil the following criteria: (i) existence of joint control over the joint venture; and (ii) the joint venture being an independent economic entity established on a lasting basis (ie having adequate capital, labour and an indefinite duration).

Guidelines on Cases Considered as Mergers and Acquisitions and the Concept of Control explain the concept of full-functionality. The following elements should be considered: (i) sufficient resources to operate independently; (ii) making activities beyond one specific function for the parent companies; (iii) independence from the parent companies in sale and purchase activities; and (iv) operations on a lasting basis.

If the parties' turnovers do not trigger the thresholds, the transaction is not notifiable. The fact that the joint venture's products/services are or will not be offered in Turkey would not change the analysis. However, see 2.7 for the Board's approach regarding the joint venture cases.

2.11 Power of Authorities to Investigate Transactions

If a transaction raises substantive competition law concerns and is viewed as problematic under the dominance test applicable in Turkey (ie creates or strengthens a dominant position and significantly lessens competition in a relevant market), the TCA may still investigate the transaction, even if it does not meet the jurisdictional thresholds. The Board may do so upon a complaint or on its own initiative. The applicable limitation period is eight years pursuant to Article 20(3) of Law on Misdemeanours No 5326.

2.12 Requirement to Close Before Clearance

The Turkish competition law regime features a suspension requirement whereby implementation of a notifiable concentration is prohibited until approval by the Turkish Competition Board (Sections 7, 10, 11 and 16 of Law No 4054) is given. Failure to comply with the suspension requirement might trigger monetary fines and legal status risks, as explained in 2.2.

These penalties are applied very frequently in practice. Below is a non-exhaustive list of cases where companies were fined by the Turkish Competition Board for failing to file a notifiable transaction in Turkey:

- Tekno İnşaat (12-08/224-55, 23.02.2012)
- Zhejiang/Kiri (11-33/723-226, 02.06.2011)
- Ajans Press Medya Takip A.Ş.-İnterpress Medya Hizmetleri Ticaret A.Ş./ Mustafa Emrah Fandaklı/ Ziya Açıkça (10-66/1402-523, 21.10.2010)
- Batı Çim Enerji Elektirik Üretim A.Ş./ Ada Enerji Mühendislik ve Kontrol sistemleri San.Tic.Ltd.Şti. (10-38/641-217, 27.05.2010)
- CVRD Canada Inc. (10-49/949-332, 08.07.2010)
- Mesa Mesken/ TOBB/ TOBB-ETÜ (10-56/1088-408, 26.08.2010)
- Flir Systems Holding/ Raymarine PLC (10-44/762-246, 17.06.2010)
- Sarten Ambalaj/ TKS Ambalaj (10-31/471-175, 15.04.2010)
- Cegedim S.A./ Cegedim Bilişim Danışmanlık/ Dendrite Turkey Inc./ Boğaç Giritlioğlu/ Sinan Reşit Çilesiz/ Mehmet Kerim Kahyagil/ Julide Handan Çilesiz/ Ayşe İdil Giritlioğlu (10-56/1089-411, 26-08-2010)
- Samsonite Europe NV/ Desa Deri (10-27/391-144, 31.03.2010).

These penalties have been published on the website of the TCA.

2.13 Exceptions to the Suspensive Effect

There are no general exceptions to the suspensive effect. The Turkish merger control regime does not include a similar provision to Article 7(2) of the EC Merger Regulation. That being said, there is a specific precedent, where the Board did not find a violation of the suspension requirement, on condition that the acquirer would not exercise the voting rights in the case of a public bid (Camargo Corrêa S.A., 12-24/665-187, 03.05.2012).

Apart from this, seeking a waiver or getting derogation from the suspensive effect is not possible.

2.14 Circumstances Where Closing Before Clearance is Permitted

The Board will 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 or hold-separate arrangements (eg Total SA, 20.12.2006, 06-92/1186-355 and CVR Inc-Inco Limited, 01.02.2007, 07-11/71-23) proposed by undertakings. The Board argued that a closing is sufficient for the Board to impose a suspension violation fine and a deep analysis of whether change in control actually took effect in Turkey is unwarranted. The Board therefore considers the "carve-out" concept as unconvincing.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is no specific deadline for filing in Turkey. However, the filing should be made and approval should be obtained before the closing of the transaction.

In practice, it is recommended that the transaction is filed at least 40-45 calendar days before the projected closing.

See **2.11 Power of Authorities to Investigate Transactions** for the examples where the Board imposed penalties for closing without or before the Board's approval.

3.2 Type of Agreement Required

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, a non-binding term sheet or an agreement in draft form. There have been some cases where the parties merely enclosed a letter of intent and/or a memorandum of understanding (Greenwich AeroGroup/Aero Precision Industries 13-05/50-27, 17.01.2013, Evonik, 07.12.2011, 11-60/1564-555).

3.3 Filing Fees

There are no filing fees 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 one of the parties, the filing party should notify the other party of the filing.

3.5 Information Required in a Filing

The notification form is similar to the Form CO of the European Commission. The Board requires the submission of one hard copy and an electronic copy of the notification form. The parties are required to provide a sworn Turkish translation of the final executed or current version of the document(s) that bring(s) about the transaction. Additional documents such as the executed or current copies and sworn Turkish translations of the transaction documents, financial statements including balance sheets of the parties, and, if available, market research reports for the relevant market are also required. The notification and transaction documents must be submitted in Turkish. In addition, a signed and notarised (and apostilled, if applicable) power of attorney is required.

3.6 Penalties/Consequences if Notification Deemed Incomplete

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

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

Additionally, the TCA imposes a turnover-based monetary fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) in the event that incorrect or misleading information is provided by the parties. There have been some cases where the Board imposed a fine on the relevant undertakings on the grounds that they had submitted incorrect or misleading information to the Board (Akzo Nobel N.V., 10-24/339-123, 18.3.2010; Omya Madencilik, 08-62/1017-393, 7.11.2008).

3.7 Phases of the Review Process

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

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

frequently asks formal questions and adds more time to the review process. Therefore, it is advisable to notify the filing at least 60 to 67 calendar days before the projected closing.

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

The TCA's written information requests for missing information will cut the review period and restart the 30 calendar-day period from day one as of the date on which the responses are submitted.

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

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. As explained in **3.5 Information Required in a Filing**, the TCA may issue various information requests, but it will only do so after the notification is made.

It is possible to notify a transaction on the basis of a close-to-final draft version of the transaction agreement instead of a signed agreement. It is also possible to submit the notification form under a MoU, letter of intent, or term sheet.

3.8 Accelerated Procedure

There is a short-form notification (without a fast-track procedure) on the condition that: (i) one of the transaction parties will be acquiring the sole control of an undertaking over which it has joint control; or (ii) the total of the parties' respective market shares is less than 20% in horizontally affected markets and each party's market share is less than 25% in vertically affected markets. Turkish merger control rules do not introduce other ways to speed up the procedure.

The Competition Law and the Communiqué No 2010/4 do 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 relevant substantive test in the Turkish merger control regime is a typical dominance test. Pursuant to Article 7 of the Competition Law and Article 13 of the Communiqué No 2010/4, the Board clears the mergers and acquisitions that do not create or strengthen a dominant position and do not significantly impede effective competition in a relevant product market within the whole or part of Turkey.

Article 3 of 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".

However, the substantive test is a cumulative test and the Board only blocks a merger or acquisition when the concentration not only creates or strengthens a dominant position but also significantly impedes the competition in the whole territory of Turkey or in a substantial part of it.

4.2 Competition Concerns

The TCA primarily focuses on unilateral effects. It may also consider co-ordinated effects (Ladik, 20.12.2005, 05-86/1188-340). However, to date the TCA has not prohibited a transaction on the grounds of 'vertical foreclosure' or 'conglomerate effects'.

4.3 Economic Efficiencies

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

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

4.4 Non-Competition Issues

The TCA does not take non-competition issues into account when assessing merger transactions. The TCA assesses a transaction on the basis of competition-related criteria rather than industrial policies, national security, foreign investment, employment or other public interest issues. Therefore, the TCA is independent in the application and enforcement of Turkish competition law. Article 20 of the Competition Law implies that no organ, authority, entity or person can give orders or directives to affect the final decisions of the Board.

4.5 Special Consideration for Joint Ventures

Under the Turkish merger control regime, special consideration is given to joint ventures. The joint venture must not

have an object or effect to restrict the competition between the parties and the joint venture. Article 5 of the Competition Law defines that the parties may notify the joint venture to the Board (which is not full-function) for individual exemption. Communiqué No 2010/4 provides individual exemption for full-function joint ventures if the joint venture has an object or effect to restrict the competition between the parties and the joint venture.

On the condition that the joint venture is full-function, the standard dominance test applies to the joint venture. In addition, under the Turkish merger control regime, the notification form includes a particular section that is designed to collect information to assess whether the joint venture will lead to co-ordination. Article 13/III of the Communiqué No 2010/4 provides that the Board will carry out an individual exemption review on notified joint ventures that emerge as independent economic units on a lasting basis, but have as their object or effect the restriction of competition amongst 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 JVs are not subject to merger control but they may fall under Article 4 of the Competition Law, which prohibits restrictive agreements. The parties may conduct a self-assessment to see if the non-full function JV fulfils the conditions of individual exemption.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With a Transaction

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

The Board has broad powers during the investigation stage. If the Board determines that the transaction violates Article 4, 6 or 7 of the Competition Law, it may notify the undertaking or associations of undertakings concerned of a decision with regard to the actions to be taken or avoided so as to establish competition and maintain the situation before infringement and forward its opinion on how to terminate such infringement.

The Board may at any time re-examine a clearance decision and eventually prohibit a transaction or impose other sanctions for a merger or acquisition, provided that the clearance was granted based on incorrect or misleading information from one of the undertakings or the obligations provided for in the decision are not complied with. In such a scenario, the Board is to re-examine the clearance decision for the transaction in question.

For there to be a prohibition decision, the Board must show that the transaction (i) creates or strengthens a dominant position in at least one relevant market, and (ii) significantly lessens competition in such relevant market(s). In cases of conditional clearance, the Board must show that the transaction would have produced these effects in the absence of the relevant structural and/or behavioural remedies.

5.2 Parties' Ability to Negotiate Remedies

According to Article 14 of Communiqué No 2010/4, the parties are able to negotiate remedies. Article 14 of Communiqué No 2010/4 enables the parties to provide commitments to remedy substantive competition law concerns of a concentration under Article 7 of the Competition Law.

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

Under Turkish merger control regime the structural remedies take precedence over behavioural remedies. To that end, the behavioural remedies can be considered in isolation only if (i) structural remedies are impossible to implement and (ii) behavioural remedies are beyond doubt as effective as structural remedies.

5.3 Typical Remedies

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

The jurisdiction of the TCA is limited to competition-related matters. Therefore, remedies that do not concern competition-related matters fall outside Turkish antitrust enforcement.

As set out in the Remedy Guideline, the intended effect of the divestiture will take place only if the divestment business is assigned to a suitable purchaser which is capable of creating an effective competitive power in the market. To make sure that the business will be divested to a suitable purchaser,

the proposed remedy must include the elements that define the suitability of the purchaser.

Approval of a possible purchaser by the Board is basically 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 the 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 cause a risk of delay in the implementation of the commitments. Therefore, the purchaser must stand capable of obtaining all the necessary authorisations from the relevant regulatory authorities as concerns the transfer of the divestment business.

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

As per the Remedy Guideline, there are two methods that are accepted by the Board. The first method 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 method is the signing of a sales contract with a suitable purchaser before the authorisation decision (fix-it-first).

5.4 Negotiating Remedies with Authorities

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

Under the Turkish merger control regime, authorities cannot propose or demand remedies on their own motions. It is at the parties' own discretion whether to submit a remedy. Therefore, 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.

There have been several cases where the Competition Board has accepted the remedies or commitments (such as divestments) proposed to or imposed by the European Commission as long as these remedies or commitments ease competition law concerns in Turkey (see, for example, Cookson/Foseco, No 08-25/254-83 of 20 March 2008).

5.5 Conditions and Timing for Divestitures

Please see **5.3 Typical remedies**.

The Board conditions 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. In other words, remedies are of different natures; some remedies are a condition precedent for the closing and some remedies are an obligation that could be only complied with after closure. Therefore, the parties cannot complete the transaction before the remedies are complied with on the condition that the nature of the remedy requires that they be complied with before the closing.

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

5.6 The Decision

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

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The Board granted its conditional approval to the transaction based on the commitments provided by Bekaert during its Phase II review. This is an example of a recent conditional clearance case (15-04/52-25, 22.01.2015). In a very recent case, the Board prohibited outright the acquisition by Setur (a subsidiary of Koç Holding, Turkey's largest industrial conglomerate) of Beta Marina and Pendik Turizm.

Whilst there are few decisions (see eg Bekaert/Pirelli 22.01.2015, 15-04/52-25, Migros/Anadolu Endüstri Holding 09.07.2015, 29/420-117) where behavioural remedies were recognised, the great majority of the conditional clearance decisions rely on structural remedies (see eg AFM/Mars, 22.11.2012, 12-59/1590-M; ÇimSA/Bilecik, 02.06.2008, 08-36/481-169; Mey İçki/Diageo, 17.08.2011, 11-45/1043-356;

Burgaz Rakı/Mey İçki, 08.07.2010, 10-49/900-314). In some of these cases (see eg Cadbury/Schweppes, 07-67/836-314, 23.08.2007), the parties initially proposed purely behavioural remedies, which ultimately failed.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

The Board's approval on the transaction also covers restraints that are directly related and necessary to enforce the transaction (Article 13(5) of Communiqué No 2010/4). Therefore, a restraint will 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 the ancillary restraints are defined in the Guideline on Undertakings Concerned. The parties make a self-assessment as to whether a certain restriction could be deemed as ancillary and therefore the Board will not allocate a separate section in its decision to explain the ancillary status of all the restraints. In the event that the transaction contains uncommon restraints that have not been included in the Guideline on Undertakings Concerned and the Board's early decisions, the Board may review the restraints at the parties' request. The Board may open an Article 4 investigation if the ancillary restrictions are not compliant with merger control regulation.

7. Third Party Rights, Confidentiality and Cross-Border Cooperation

7.1 Third Party Rights

The Board is authorised to request information from third parties, including customers, competitors, complainants, and other persons related to the transaction. During the review process, third parties may (i) submit complaints about a transaction and (ii) 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 on the condition that they prove their legitimate interest.

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

7.2 Confidentiality

The Communiqué No 2010/4 introduces a mechanism that requires the TCA to publish the notified transactions on its official website, including only (i) the names of the undertakings concerned and (ii) their areas of commercial activity. Therefore, when the parties notify a transaction to the TCA, the existence of a transaction is no longer a confidential matter. Communiqué No 2010/3 on Regulation of Right to Access to File and Protection of Commercial Secrets ("Communiqué No 2010/3") is the main legislation which regulates the protection of commercial information. Pursuant to Communiqué No 2010/3, undertakings must identify and justify information or documents as commercial secrets. Therefore, it is the undertakings' responsibility to request confidentiality from the Board in writing and justify their reasons for the confidential nature of the information or documents that they are requesting to be treated as commercial secrets. Except where the Board ex officio assesses the information or documents, the general rule is that the information and 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 has been removed.

Additionally, Article 25 of the Competition Law requires that the Board and personnel of the TCA are bound by a legal obligation not to disclose any trade secrets or confidential information they have acknowledged during the course of their work.

In the event that the Board decides to hold a hearing during the investigation, such hearings at the TCA are, in principle, open to public. The Board may, on the basis of protection of public morality or trade secrets, decide that the hearing is to be held in camera.

Article 15(2) of the Communiqué No 2010/3 implies that the TCA may not take into account confidentiality requests related to information and documents that are essential for use as evidence to prove the infringement of competition. In such cases, the TCA can disclose such information and documents that could be considered as trade secrets, by taking into account the balance between public interest and private interest, and in accordance with the proportionality criterion.

7.3 Cooperation With Other Juridictions

The TCA is authorised to make contact with certain regulatory authorities around the world in order to exchange information, including the European Commission. In this respect, Article 43 of the Decision No 1/95 of the EC-Turkey Association Council (Decision No 1/95) empowers the TCA to notify and request the European Commission (Competition Directorate-General) to apply appropriate measures if the Board believes that transactions realised in the territory of the European Union adversely affect competition in Turkey. Such provision grants reciprocal rights and obligations to the parties (EU-Turkey), and thus the European Commis-

sion has the authority to request the Board to apply appropriate measures to restore competition in relevant markets.

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

In recent years, the European Commission has been reluctant to share any evidence or arguments with the TCA, in a few cases where the Authority explicitly asked for the evidence or arguments.

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

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

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Parties can appeal the Board's final decisions, including its decisions on interim measures and fines, before the administrative courts of Ankara. The parties should file an appeal case within 60 calendar days upon receipt by the parties of the reasoned decision of the Board. Third parties can also challenge a Competition Board decision before the competent administrative courts on the condition that they have a legitimate interest. Decisions of the Competition Board are considered as administrative acts, and thus legal actions against them shall be pursued in accordance with the Turkish Administrative Procedural Law. The judicial review comprises both procedural and substantive review.

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

The judicial review period before the Ankara administrative courts of first instance usually takes about 12 to 24 months. However, it may take longer to become finalised due to (i) the characteristics and complexities of the case, and in particular, (ii) the workload of the court. The decisions of the Ankara administrative courts of first instance are subject to appeal before the regional courts (appellate courts) and the High State Court.

After the recent legislative changes, administrative litigation cases will now be subject to judicial review before the newly established regional courts (appellate courts). This creates a three-level appellate court system consisting of administrative courts, regional courts (appellate courts) and the High State Court.

The regional courts will (i) go through the case file, both on procedural and substantive grounds, and (ii) investigate the case file and make their decision considering the merits of the case. The regional courts' decisions will be considered as final in nature. The decision of the regional court will be subject to the High State Court's review in exceptional circumstances as set forth in Article 46 of the Administrative Procedure Law. In such a case, the High State Court may decide to uphold or reverse the regional courts' decision. If the decision is reversed by the High State Court, it will be remanded back to the deciding regional court, which will in turn issue a new decision which takes into account the High State Court's decision. The appeal period before the High State Court usually takes about 24 to 36 months. Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts 24 to 30 months.

9. Recent Developments

9.1 Recent Changes or Impending Legislation

The Draft Law reforming Turkish competition law is currently under discussion at the Turkish Parliament. The Draft Law proposes to align the Competition Law further with EU competition law. The Draft Law also aims to shape procedures which are more efficient with regard to time and resource allocation.

The following are significant changes which are proposed within the Draft Law:

- The Phase I review period will be changed from 30 calendar days to 30 working days, therefore approximately 40 days in total. Phase I proceedings are thus expected to last longer.
- The Phase II procedure (six or 12 months) will be abolished. Instead, there will be an extension of the review period to four months for cases that require an in-depth assessment. During this process, the parties can submit written opinions to the Board.
- The current dominance test will be replaced by the SIEC test which is applicable in the EU.
- The term "concentration" will be consistently used instead of "mergers and acquisitions".
- The exemption from merger control rules of acquisitions by inheritance will be abolished.

The Draft Law also suggests determining upper limits for the fines for certain procedural violations, such as 0.1% for failure to notify a concentration and hindering on-site inspections.

Additionally, the Draft Regulation on Administrative Monetary Fines for the Infringement of Law on the Protection of Competition ("Draft Regulation") was also sent to the Turkish Parliament on 17 January 2014; this will replace the current Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices and Decisions and Abuse of Dominance.

Furthermore, on 24 February 2017, the Communique No 2010/4 was amended by the Communique No 2017/2 on the Amendment of Communique No 2010/4 ('Communique No 2017/2'). The new amendments brought by the Communique No 2017/2 are as follows:

- Prior to the amendment brought by the Communique No 2017/2, the Article 8(5) of Communique 2010/4 was stating that 'two or more transactions carried out between the same persons or parties within a period of two years shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of the Communique.' Article 2 of Communique No 2017/2 amended Article 8(5) of Communique No 2010/4 as follows: 'two or more transactions carried out between the same persons or parties or within the same relevant product market, within a period of three years, shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of this Communique.'
- Article 3 of Communique No 2017/2 introduced a new paragraph to be included in Article 10 of Communique No 2010/4, which reads as follows: 'If the control is acquired from various sellers through a series of transactions in terms of securities within the stock exchange, the concentration could be notified to the Turkish Competition Board after the realisation of the transaction provided that the following conditions are satisfied: (a) the concentration is notified to the Turkish Competition Board without delay; (b) the voting rights attached to the acquired securities are not exercised or the voting rights are exercised only upon an exception provided by the Board, which ensures that the full value of the investment is protected.

9.2 Recent Enforcement Record

The Board's enforcement actions are very frequent in the field of merger control. There are several cases where the Board levied monetary fines against the parties for failing to notify in foreign-to-foreign transactions. The same is true for conditional clearances. So far, only a few transactions have been blocked altogether, though one such case is recent (Setur, 15-29/421-118, 09.07.2015; Gaziantep Çimento, 05-86/1190-342, 20.12.2005).

9.3 Current Competition Concerns

Furthermore, in 2015 the Board took the acquisition by Anadolu Endüstri Holding A.Ş., which controls the major food and beverages companies including Coca Cola Turkey, of the majority shares of MH Perakendecilik Perakendecilik ve Ticaret A.Ş., which is controlled by Moonlight Capital S.A. and is one of the major retailer companies in Turkey, into Phase II review, and cleared it conditionally.

The Board's eagerness shows that the Board will not hesitate to go into Phase II review if it finds the review to be necessary on the basis of potential competition law concerns.

The following is a summary of the Board's merger control decisions in the last three years:

- The Board assessed 158 transactions and took seven transactions into Phase II review (2015).
- The Board assessed 215 transactions and took seven transactions into Phase II review (2014).
- The Board assessed 213 transactions and none of these transactions were taken into Phase II (2013).

This summary also shows the Board's inclination towards Phase II reviews.

ELIG, Attorneys-at-Law
Çitlenbik Sokak, No:12
Yıldız Mahallesi
Beşiktaş
Istanbul 34349
Turkey

Tel: +90 212 327 1724
Fax: +90 212 327 1725
Email: info@elig.com
Web: www.elig.com