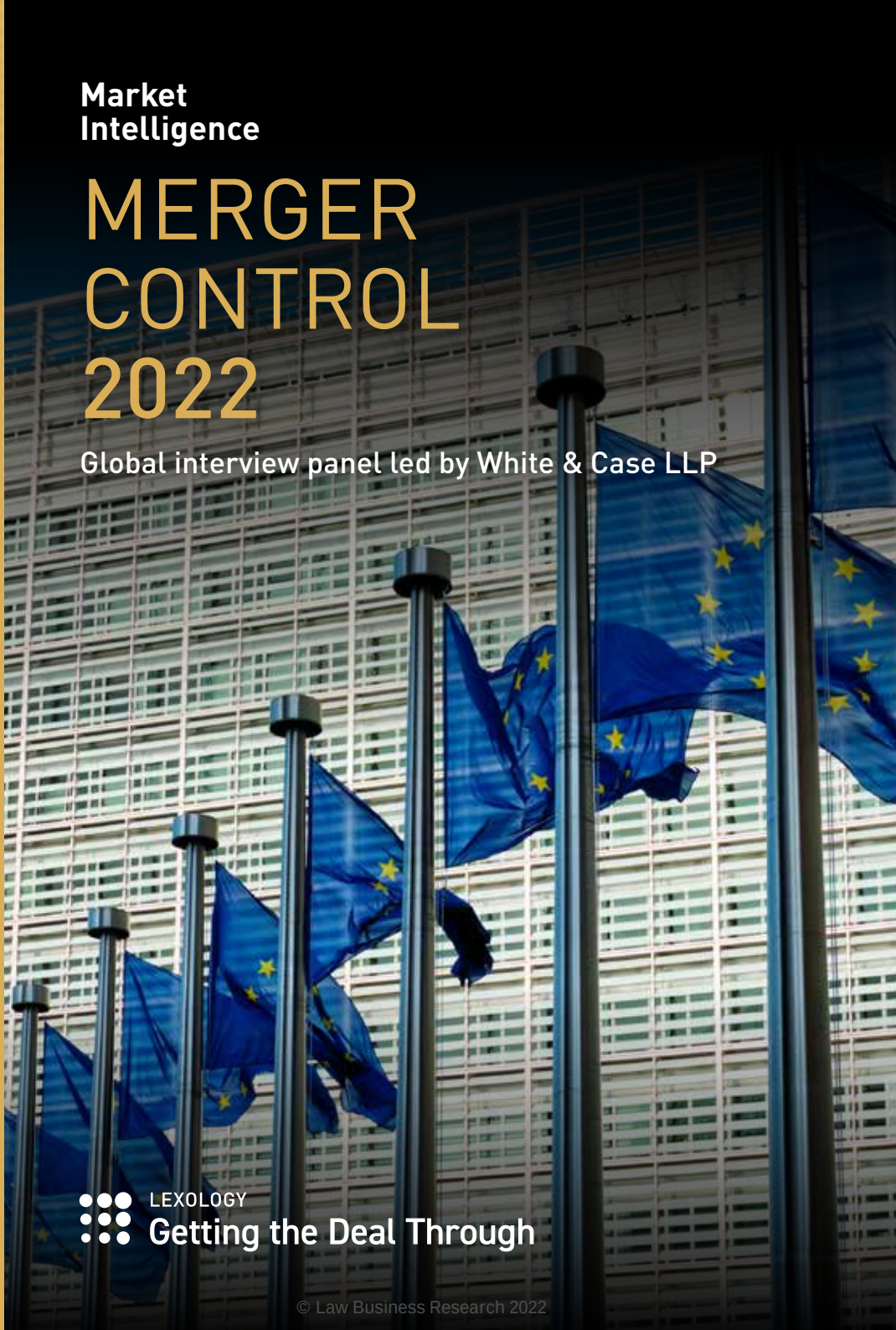
Market Intelligence

MERGER CONTROL 2022

Global interview panel led by White & Case LLP



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Getting the Deal Through

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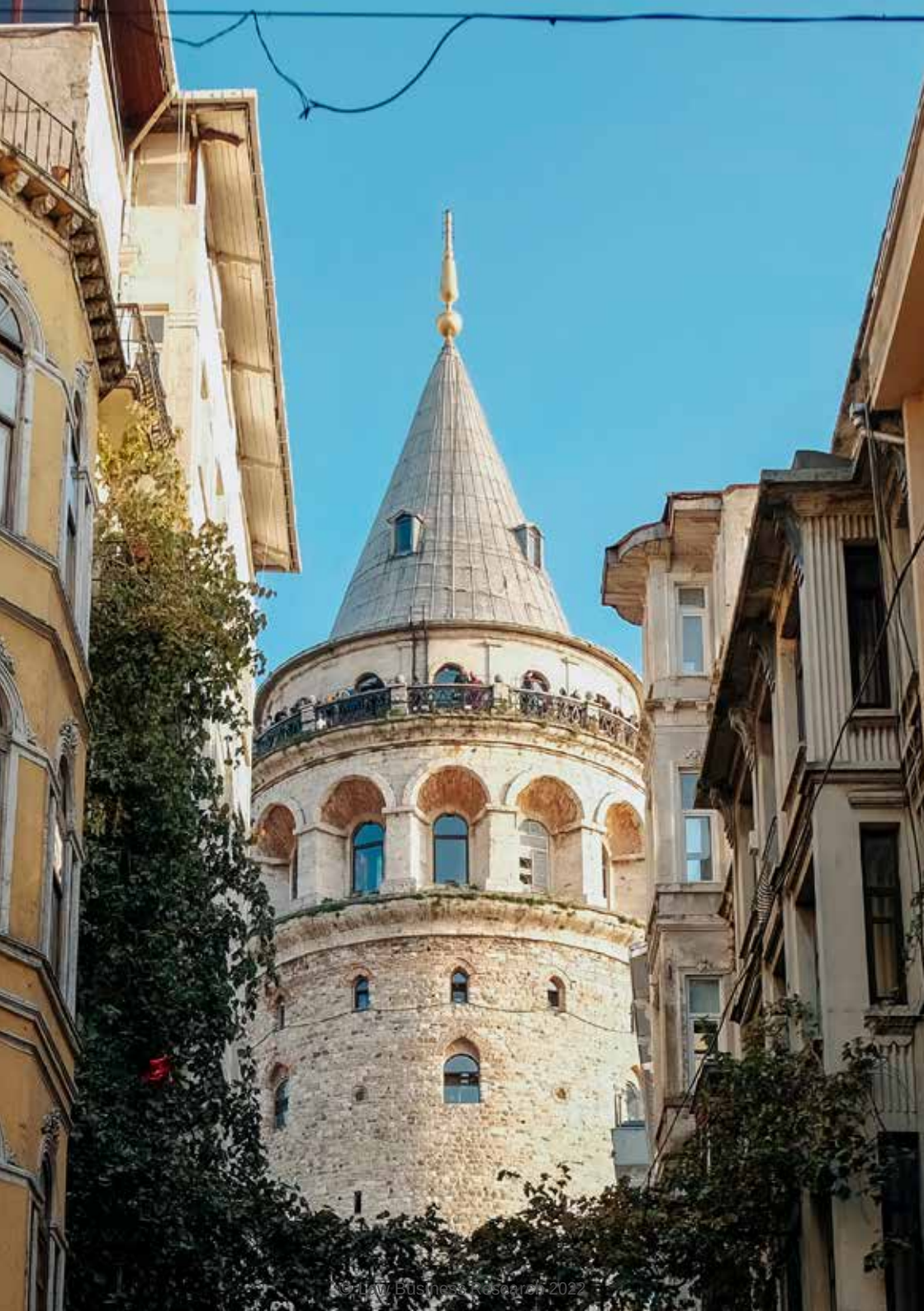


Turkey

Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 95 lawyers based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University Faculty of Law in 1997 and was called to the Istanbul Bar in 1998. He received his LLM degree from Harvard Law School and is qualified to practise in Istanbul, New York, Brussels and England and Wales.

Before founding ELIG Gürkaynak in 2005, Mr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years. He heads the competition law and regulatory department of ELIG Gürkaynak, which currently consists of 47 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 25 years of competition law experience, starting with the establishment of the Turkish Competition Authority.

Öznur İnanılır is a partner in ELIG Gürkaynak's regulatory and compliance department. She graduated from Başkent University Faculty of Law in 2005 and obtained her LLM in European law from London Metropolitan University in 2008. Öznur has extensive experience in all areas of competition law, including compliance matters, defences in investigations alleging restrictive agreements, abuse of dominance cases and complex merger control matters.

1 What are the key developments in the past year in merger control in your jurisdiction?

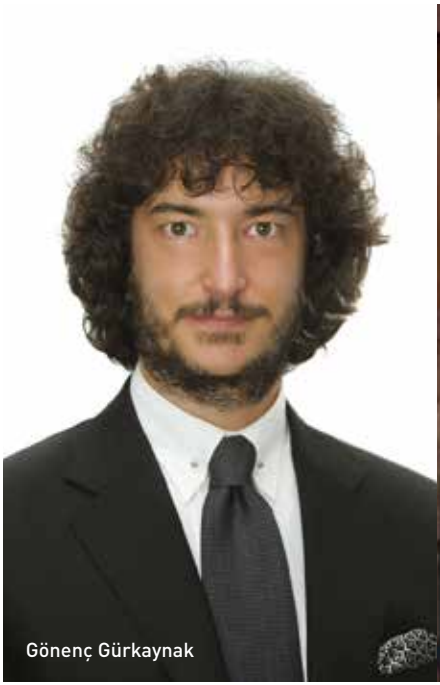
On 4 March 2022, the Turkish Competition Authority (the Authority) published Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 on Mergers and Acquisitions Subject to the Approval of the Competition Board (the Amendment Communiqué). The Amendment Communiqué introduces new regulations concerning the Turkish merger control regime, which will fundamentally affect the analysis of whether a transaction requires mandatory notification in Turkey and the content of the merger control notifications submitted to the Authority.

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

The Amendment Communiqué does not seek a Turkish nexus for the threshold exemption. In other words, it is sufficient for the target company to be active in the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies anywhere in the world for the threshold exemption to be applicable, provided that the target company (1) generates revenue from customers located in Turkey, (2) conducts research and development (R&D) activities in Turkey or (3) provides services to Turkish users in any fields other than the above-mentioned ones. Accordingly, the Amendment Communiqué does not require (1) revenue to be generated from customers located in Turkey, (2) R&D activities to be conducted in Turkey or (3) services to be provided to Turkish users relating to the fields listed above for the exemption on the local turnover thresholds to be applicable.

The increased turnover thresholds and the exemption on the local turnover thresholds mechanism introduced by the Amendment Communiqué seem to alter the scope of the transactions that are notifiable to the Authority. On that note, concentrations relating to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies are expected to be scrutinised more closely by the Authority.

Moreover, pursuant to the Decision Statistics of the Authority for 2021, the Competition Board (the Board) reviewed a total of 309 transactions in 2021, including 277 mergers and acquisitions, that were approved unconditionally and three decisions that were approved conditionally. Twenty-nine were out of the scope of merger control (ie, they either did not meet the turnover thresholds or fell outside the scope of article 7 of Law No. 4054 on the Protection of Competition). The Decision Statistics


Gönenç Gürkaynak


Öznur İnanılır

for 2021 show that the transactions in the chemical and mining sector took the lead with 37 notifications, followed by the information technology and platform services sector with 32 notifications.

Some of the Board's most important recent merger control decisions are as follows.

A notable transaction concluded in 2021 was the Board's *Danfoss and Eaton* Phase II review decision (4 May 2021, 21-25/313-144). The transaction concerns the acquisition of sole control over Eaton Corporation plc's (Eaton) hydraulic business by Danfoss A/S (Danfoss). The Board defined the following product markets, where the competitive concerns are concentrated: automation and control systems market, hydraulic mobile valves market, hydraulic mobile pumps market, components for power steering for off-road vehicles market, orbit motors market and orbit engine market excluding hydraulic motors. Following the preliminary examination, the Board decided to conduct a final examination in accordance with the first paragraph of article 10 of Law No. 4054 regarding the proposed transaction. The transaction was taken into Phase II review by many authorities, including the European Commission. Subsequently, the parties presented the commitment package containing the

solution proposals, which were stated to resolve the competitive concerns, and, as a result, the transaction was conditionally approved by the Commission. In addition, the parties submitted the letter containing the explanations about the commitments and the effects of these commitments in Turkey to the Authority. As per the Board's assessment on the letter, the Board concluded that:

- there is technical substitutability between the hydraulic steering units models that are planned to be divested within the scope of the commitments and the models that Danfoss will retain. It is proposed that existing buyer agreements will also be transferred to the buyer of the divested business in a way that will enable it to compete with the combined entity's product range;
- the market share increment will be minimal in the market for hydraulic steering units as a result of the divestment in comparison with the increment in absence of the commitments;
- the hydraulic steering units market in Turkey is, in fact, import-based, and there are no significant entry barriers in respect of imports;
- there is a countervailing buyer power in the market; and
- global competitive pressure will increase after the divestment.

As a result of the commitments submitted by the parties to the Commission, it has been decided that there is no possibility of impeding effective competition in the relevant markets within the framework of article 7 of Law No. 4054, and the Board approved the transaction.

In *Aon/WTW* (14 July 2021, 21-35/503-246), which is another Phase II decision, the Board approved the transaction concerning transfer of all shares of Willis Towers Watson Public Limited Company (WTW) to Aon plc (Aon). After the preliminary examination, the Board decided to take the transaction into Phase II review in accordance with the first paragraph of article 10 of Law No. 4054.

For the non-life commercial reinsurance distribution market, which is one of the affected markets within the scope of the transaction, it was deemed that two of the three largest undertakings will merge as a result of the transaction, that the market in question is subject to the highest concentration concerning the transaction at hand and that a significant competitive power will be lost from the market following the transaction. Thus, the Board evaluated that the transaction might cause significant competitive restrictions.

While the Phase II review was in progress, the parties submitted to the European Commission the text of the commitment to transfer WTW's global non-life commercial reinsurance distribution, including the treaty and discretionary reinsurance businesses, to a third party. The Board evaluated that the commitments submitted by the parties to the Commission essentially cover Turkey. Following the realisation

"It is now even more advisable for the transaction parties to keep an eye on the notification and suspension requirements and avoid potential violations on that front."

of the commitments, it is deemed that there will be no possible anticompetitive effects in the relevant market concerning the transaction in Turkey, and the Board approved the transaction.

In *EssilorLuxottica/Hal* (10 June 2021, 21-30/395-199), the Board reviewed the acquisition of Hal Holding NV's (Hal) indirectly owned shares in GrandVision NV (Grandvision) by EssilorLuxottica SA (EssilorLuxottica). EssilorLuxottica is active in Turkey in the following relevant markets: manufacturing and wholesale of stock lenses; wholesale of Rx lenses; wholesale of branded sunglasses; wholesale of branded prescription optic glass frames; manufacture and distribution of ophthalmic machinery, equipment and consumables; and retail sales of optic products. Grandvision is active in Turkey in the market for retail sales of optic products. Accordingly, the activities of the parties overlap horizontally in the market for retail sales of optic products, whereas other activities of the parties overlap vertically in terms of the remaining markets. The Board determined that EssilorLuxottica was in a dominant position in the markets for wholesale branded sunglasses and wholesale ophthalmic lenses while holding significant market power in the remaining markets that it operates in and that, following the consummation of the proposed

transaction, it would have a strong and leading position at the retail level as well, with a vertically integrated structure. The transaction was approved by the Board based on the behavioural remedies submitted to alleviate the competitive concerns that might arise in the respective relevant markets.

2 | Have there been any developments that impact how you advise clients about merger clearance?

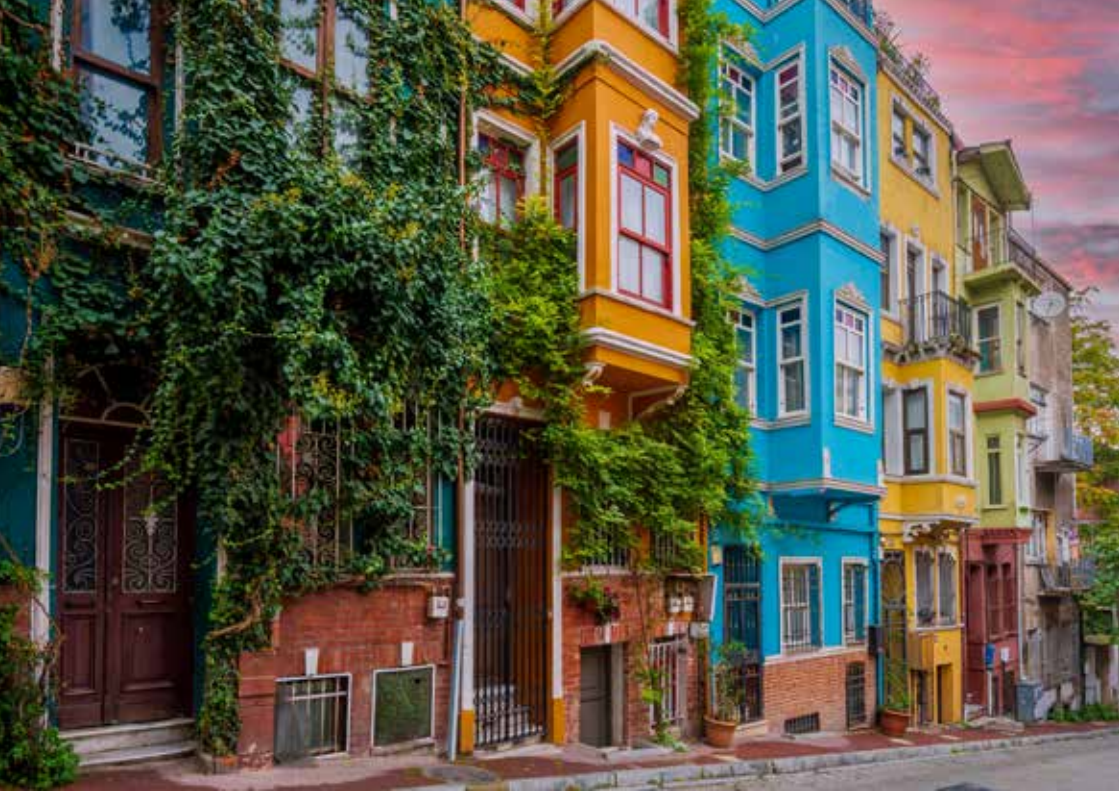
As mentioned in question 1, the Amendment Communiqué raised the notification thresholds. Article 7 of Communiqué No. 2010/4 amended by Communiqué No. 2022/2 provides that a transaction will be required to be notified in Turkey if one of the following increased turnover thresholds is met:

- the aggregate Turkish turnover of the transaction parties exceeds 750 million lira and the Turkish turnover of at least two of the transaction parties each exceeds 250 million lira;
- the Turkish turnover of the transferred assets or businesses in acquisitions exceeds 250 million lira and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion lira; or
- the Turkish turnover of any of the parties in mergers exceeds 250 million lira and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion lira.

The Amendment Communiqué also introduced a threshold exemption for undertakings that are active in certain markets and sectors. Pursuant to Communiqué No. 2022/2, the 250 million lira Turkish turnover thresholds mentioned will not be sought for the acquired undertakings that are active in or have assets relating to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies, if they (1) operate in the Turkish geographical market, (2) conduct R&D activities in the Turkish geographical market or (3) provide services to Turkish users.

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

Additionally, with the recent changes in Law No. 4054, the Board has geared up for a merger control regime that focuses much more on deterrents. Accordingly, it is now even more advisable for the transaction parties to keep an eye on the notification and suspension requirements and avoid potential violations on that front. This is particularly important when transaction parties intend to put in place



carve-out or hold-separate measures to override the operation of the notification and suspension requirements in foreign-to-foreign mergers. The Board is currently rather dismissive of carve-out and hold-separate arrangements, even though the wording of the new regulation allows some room to speculate that carve-out and hold-separate arrangements are now allowed. As the position the Authority will take in interpreting this provision is not yet clear, such arrangements cannot be considered as safe early closing mechanisms recognised by the Board.

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

The Turkish merger control regime currently utilises a significant impediment of effective competition test (SIEC) test in the evaluation of concentrations. In line with EU law, Law No. 7246 Amending Law No. 4054 on the Protection of Competition (the

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"The Amendment Communiqué introduced a threshold exemption for the undertakings that are active in or with assets relating to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies."

Amendment Law) entered into force on June 2020 and has replaced the dominance test with the SIEC test. Based on the new substantive test, mergers and acquisitions that do not significantly impede effective competition in a relevant product market within the whole or part of Turkey will be cleared by the Board. This amendment aims to allow a more reliable assessment of the unilateral and cooperation effects that might arise as a result of mergers or acquisitions. The Board will be able to prohibit not only transactions that might result in the creation of a dominant position or strengthen an existing dominant position but also those that can significantly impede effective competition.

On the other hand, the SIEC test may also reduce over-enforcement as it focuses more on whether and by how much competition is impeded as a result of a transaction. Thus, pro-competitive mergers and acquisitions may benefit from the test, even though a transaction leads to significant market power based on, for instance, major efficiencies.

Furthermore, economic analysis and econometric modelling have been seen more often in recent years. For example, in *AFM/Mars Cinema* (17 November 2011, 11-57/1473-539), the Board employed the ordinary, least-squared and the two-staged, least-squared estimation models to determine price increases that would be expected as a result of the transaction. The Board also used the Breusch–Pagan, Breusch–Pagan/Godfrey/Cook–Weisberg and White/Koenker nR2 tests and the Arellano–Bond test on the simulation model. Such economic analyses are rare but increasing in practice. Economic analyses that are used more often are the Herfindahl-Hirschman Index (HHI) and concentration ratio indices to analyse concentration levels. In 2019, the Board also published the *Handbook on Economic Analyses Used in Board Decisions*, which outlines the most prominent methods utilised by the Authority (eg, correlation analysis, the small but significant and non-transitory increase in price test and the Elzinga–Hogarty test).

3 Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

Generally, the Authority pays special attention to those transactions in sectors where infringements of competition are frequently observed and the concentration level is high. Concentrations that concern strategic sectors such as automotive, construction, telecommunications and energy, etc, receive particular attention. As stated above, the consolidated statistics regarding merger cases in 2021 show that transactions in the chemical and mining sector took the lead with 37 notifications, followed by the information technologies and platform services sector with 32 notifications. The sector reports published annually by the Authority also indicate

trends. The latest three sector reports concerned e-marketplaces, fresh vegetables and fruit, and financial technology in payment services.

Further, as noted above, the Amendment Communiqué introduced a threshold exemption for the undertakings that are active in or with assets relating to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies.

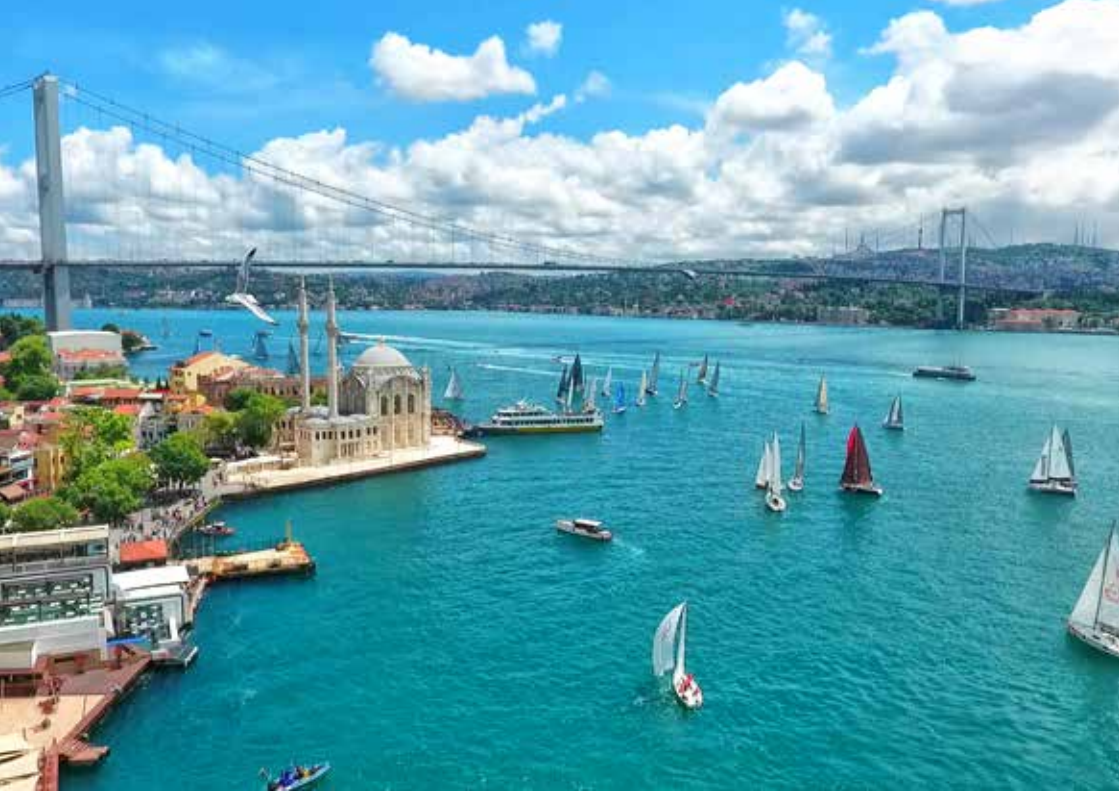
Additionally, in its announcement of 4 March 2022 on the Amendment Communiqué, the Authority indicated that amendments to the merger control regime became necessary in light of the deficiencies of the current regime, as well as the contemporary approaches. In a similar vein, the Final Report on the E-Marketplace Sector Inquiry, which was published on 14 April 2022, noted that digital platforms with significant market power detect their potential competitors with the help of the extensive data they hold, and that acquiring them to eliminate their competitive threat at the early stage creates 'kill zones' for potential innovators in the market, deterring them from entering into the market.

To that end, it would be prudent to anticipate that the Authority will scrutinise notifications of transactions in any one of the sectors noted above.

4 Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? Any notable deals that have been blocked or cleared subject to conditions?

As per the amendments introduced to Law No. 4054 via the Amendment Law, the Board is explicitly granted the power to impose behavioural or structural remedies in the case of a competition law infringement. This also applies to the infringement of article 7 of Law No. 4054, which prohibits concentrations, which would result in a significant lessening of effective competition within a market for goods or services, particularly in the form of creating or strengthening a dominant position. Article 9 of Law No. 4054 aims to grant the Board the power to order structural remedies for anticompetitive conduct infringing articles 4, 6 and 7 of Law No. 4054, provided that behavioural remedies are first applied and failed. Further, if the Board determines with a final decision that behavioural remedies have failed, undertakings or associations of undertakings will be granted at least six months to comply with structural remedies. Both behavioural and structural remedies should be proportionate and necessary to end the infringement effectively.

Recent indications in practice show that remedies and conditional clearances are becoming increasingly important in Turkish merger control enforcement. The number of cases in which the Board decided on divestment or licensing commitments or other structural or behavioural remedies has increased dramatically



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over the past years. Examples include some of the most important decisions in the history of Turkish merger control enforcement, such as *Danfoss and Eaton* (4 May 2021, 21-25/313-144) *Aon/WTW* (14 July 2021, 21-35/503-246), *EssilorLuxottica/Hal* (10 June 2021, 21-30/395-199), *PSA/FCA* (17 July 2020, 20-34/441-M), *Bekaert/Pirelli* (22 January 2015, 15-04/52-25), *Migros/Anadolu* (9 July 2015, 29/420-117), *Luxottica/Essilor* (1 October 2018, 18-36/585-286), *AFM/Mars* (17 November 2011, 11-57/1473-539), *Vatan/Doğan* (10 March 2008, 08-23/237-75) *ÇimSA/Bilecik* (2 June 2008, 08-36/481-169) *OYAK/Lafarge* (18 November 2009, 09-56/1338-341), *THY/HAVAS* (27 August 2009, 09-40/986-248) and *Burgaz/Mey Icki* (8 July 2010, 10-49/900-314).

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

Separately, in *TIL /Marport*, the Board refused to grant approval to the transaction concerning Terminal Investment Limited Sàrl's (TIL) acquisition of sole control over Marport Liman İşletmeleri Sanayi ve Ticaret Anonim Şirketi (Marport), which was under the joint control of TIL before the transaction, on the grounds that the notified transaction was likely to cause significant impediment of effective competition pursuant to article 7 of Law No. 4054. The Board found, among other things, that:

- the relevant transaction would lead to a horizontal overlap in the relevant product market for port management for container handling services and a vertical overlap in the relevant product market for container line transportation;
- TIL has significant market power in port management for container handling services and its sub-segments;
- the parent of TIL (the Mediterranean Shipping Company (MSC)) (ie, holding joint control over TIL) is the biggest customer of TIL, and another joint venture of MSC (Asyaport Liman AŞ (Asyaport)) also almost entirely serves the MSC regarding transit and local loads, and, in terms of local loads, MSC is the main customer of Marport;
- in the port management for container handling services market for local loads in the North-West Marmara Region, Marport is the biggest player and Asyaport is in the third place. Hence, the market share of TIL's parent group would significantly increase post-transaction;
- the HHI level in the relevant product market was already high and would increase to 4,573 by a rise of 1,187; and
- because MSC is one of the biggest line operators on a global scale, when evaluated together with its significant presence in the area of line transportation, the fact that MSC would operate a significant part of the container handling capacity of the North-West Marmara Region is likely to create a disadvantage for other line operators that use the ports in the North Marmara Region.

5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

On 14 April 2022, the Authority published its final report on the review regarding the e-marketplace platforms sector. On 11 March 2022, it published its final report on the review regarding the fresh vegetables and fruit sector. Also, the review report on financial technology in payment services was published on 9 December 2021.

In addition, the Authority updated the Horizontal Guidelines on 4 April 2022 by including explanations on, inter alia, (1) the theory of harm regarding digital

"Industry research conducted by foreign competition authorities as well as the Authority and the experience and know-how gained from investigations concerning digital markets are likely to form the basis of digital market regulations in Turkey."

markets and markets that are dependent on innovation and potential competition and (2) general principles applicable to the transactions whereby newly established or developing enterprises are acquired. Moreover, the Authority updated the Non-Horizontal Guidelines by providing, inter alia, further explanations regarding the unilateral effects and coordinated effects that might arise from transactions with vertical overlaps or those concerning multi-markets.

6 Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

On 8 April 2021, the president of the Authority announced that the Authority had initiated the Digital Markets Legislation Study to quickly identify competition problems stemming from digital transformation and to take the necessary steps to resolve these problems in a timely manner. The Authority started working on sector inquiries that focus on online marketplaces in June 2020 and on online advertising in March 2021. Therewith, the Authority aimed to determine behavioural

and structural issues surrounding these sectors and to offer solutions accordingly. Each of these sector inquiries served as preparatory components facilitating the Authority's legislative actions. Within the scope of the legislation preparations, the Authority sent information requests to undertakings that were active in the digital markets. As stated by the chair of the Authority, Birol Küle, the Authority is currently working on digital market regulations. Therefore, industry research conducted by foreign competition authorities as well as the Authority and the experience and know-how gained from investigations concerning digital markets are likely to form the basis of digital market regulations in Turkey.

The Amendment Communiqué was published in the Official Gazette on 4 March 2022 and entered into force on 4 May 2022. As explained above, the Amendment Communiqué raised the jurisdictional turnover thresholds under article 7 of Communiqué No. 2010/4.

In this respect, two of the most significant developments that the Amendment Communiqué introduces, inter alia, are the introduction of threshold exemptions for undertakings that are active in certain markets and sectors and the increase of the

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applicable turnover thresholds for concentrations that require mandatory merger control filing before the Authority.

Additionally, the proposal for an amendment to Law No. 4054 was approved by the Turkish parliament (the Grand National Assembly of Turkey) on 17 June 2020. The Amendment Law, which has been published in the Official Gazette and entered into force on 24 June 2020, essentially clarifies certain mechanisms in Law No. 4054 that might have led to legal uncertainty in practice to a certain extent, and introduces new mechanisms as to the selection of cases for the Authority to focus on, such as the de minimis principle for agreements, concerted practices or decisions of association of undertakings (except hardcore violations), the SIEC test for mergers and acquisitions, behavioural and structural remedies for anticompetitive conduct, commitments and settlement mechanisms, clarification on the powers of the Authority in on-site inspections and clarification on the self-assessment procedure in individual exemption mechanism. The amendments that directly relate to merger control are (1) the SIEC test and (2) the Board's power to apply behavioural and structural remedies for anticompetitive conduct.

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

amounts or imposing quotas; collusive bidding in tenders and sharing competitively sensitive information including future prices, output or sales amounts; and (2) resale price maintenance between vertically related undertakings (ie, setting fixed or minimum resale price levels for purchasers).

In terms of the significant changes to the merger control rules, with the SIEC test introduced via the Amendment Law, the Board will be able to prohibit not only transactions that might create a dominant position or strengthen an existing dominant position but also those that could significantly impede competition.

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The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

In a multi-jurisdictional transaction, a prospective client should consider that the Turkish Competition Authority might be inclined to cooperate and get in contact with authorities from other jurisdictions in case the contemplated transaction raises competition-related issues.

In any case, it should be noted that the Competition Authority is familiar with contacting other competition authorities, and indeed there have been cases where it has fielded such requests or requested to contact other competition authorities. However, the Competition Board will conduct its own analyses and assessments. Thus, any concern raised in another jurisdiction will not, by itself, affect the assessment of the transaction. We have seen a number of cases where the Authority cleared a transaction in Turkey while other authorities went into Phase II, or vice versa, by taking into account the Turkey-specific aspects of the transaction.

In your experience, what makes a difference in obtaining clearance quickly?

All the necessary information must be provided in the notification form to minimise the risk of receiving additional questions. The review process must be followed closely; merger control cases require the skill to closely follow up the process and build close contacts with the case handlers to ensure a smooth review process. Other significant factors are anticipating potential competition law concerns that the case handlers could raise beforehand, taking the necessary measures to avoid such concerns and filing the notification form at least 60 calendar days before closing.

What merger control issues did you observe in the past year that surprised you?

Within the past year, where public authorities and private businesses have continued to adapt to the circumstances created by the covid-19 pandemic, the Competition Authority has handled hundreds of merger cases with an impressive swiftness, despite the pandemic.

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