Merger Control Comparative Guide

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1.Legal and enforcement framework

1. 1. Which legislative and regulatory provisions govern merger control in your jurisdiction?

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The relevant legislation on merger control is the Law on Protection of Competition 4054 dated 13 December 1994 ('Law 4054') and the communiqués published by the Turkish Competition Authority (TCA). In particular, Article 7 of Law 4054 governs mergers and acquisitions. Law 7246 on the Amendment to Law 4054 on the Protection of Competition was recently published in the *Official Gazette* and entered into force on 24 June 2020 ('Amendment Law').

Article 7 of Law 4054 authorises the Competition Board to regulate, through communiqués, which mergers and acquisitions should be notified in order to be valid. Further to this provision, as of 1 January 2011, Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board replaced Communiqué 1997/1 on Mergers and Acquisitions Requiring the Approval of the Competition Board as the primary instrument for assessing merger cases in Turkey. Communiqué 2010/4 sets forth the types of mergers and acquisitions that are subject to the Competition Board's review and approval, introducing some significant changes to the Turkish merger control regime.

On 4 March 2022, the TCA published Communiqué 2022/2 on the Amendment of Communiqué 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board ('Amendment Communiqué'). The Amendment Communiqué introduced certain new rules concerning the Turkish merger control regime which fundamentally affect the merger control notifications submitted to the TCA. Pursuant to Article 7 of the Amendment Communiqué, the changes introduced by the communiqué became effective as of 4 May 2022. The most significant developments include:

- an increase in the applicable turnover thresholds for concentrations that require mandatory merger control filing before the TCA; and
- the introduction of a threshold exemption for undertakings active in certain markets/sectors (see question 1.2).

1. 2. Do any special regimes apply in specific sectors (eg, national security, essential public services)?

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Along with the general items to be taken into account in calculating the total turnover of the parties to the transaction, Article 9 of Communiqué 2010/4 sets forth specific methods for calculating the turnover of financial institutions. These special methods of calculation apply to banks, financial leasing companies, factoring companies, insurance companies and similar.

The Banking Law 5411 provides that Articles 7, 10 and 11 of Law 4054 will not apply if the sectoral share of the total assets of the banks involved in the merger or acquisition does not exceed 20%.

The notification process differs for privatisation tenders. With regard to privatisation tenders, Communiqué 1998/4 of the Competition Board was replaced with a new Communiqué on the Procedures and Principles to be Pursued in Pre-notifications and Authorisation Applications to be Filed with the TCA in order for Acquisitions via Privatisation to Become Legally Valid. According to Communiqué 2013/2, it is mandatory to file a pre-notification before the public announcement of a tender and to seek the opinion of the Competition Board if the turnover of the undertaking or the value of the asset or service production unit to be privatised exceeds TL 250 million. The communiqué states that in order for acquisitions to become legally valid through privatisation, which requires pre-notification of the TCA, the approval of the Competition Board is also mandatory. The application should be filed by all winning bidders after the tender, but before the Privatisation Administration's decision on the final acquisition.

Moreover, the Amendment Communiqué discussed introduced a threshold exemption for undertakings active in the following fields:

- digital platforms;
- software or gaming software;
- financial technologies;
- biotechnology;
- pharmacology;
- agricultural chemicals; and
- health technologies.

Pursuant to the Amendment Communiqué, special thresholds will apply to acquired undertakings active in, or assets relating to these fields if they:

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

To clarify the meaning and scope of the sectors which are exempt from the local turnover thresholds, a non-exhaustive description of the activities undertaken in the individual sectors is set out below.

Digital platforms: Digital platforms are systems and interfaces that form a commercial network or market that facilitates business-to-business, business-to-customer or even customer-to-customer transactions. Digital platforms include:

- social media platforms;
- knowledge-sharing platforms;
- media-sharing platforms;
- service-oriented platforms;
- online marketplaces; and
- digital content aggregators.

Software and gaming software: Software relates to a set of instructions, data or programs used to operate computers and execute specific tasks; while gaming software concerns software customised for gaming. This field includes the following activities:

- writing and publication of software and gaming software (including computer games);

- the wholesale, retail sale, distribution and marketing of software (both customised and non-customised) and gaming software;
- the reproduction of software from master copies;
- the manufacture of electronic games with fixed (non-replaceable) software;
- the translation or adaptation of software and gaming software;
- computer programming activities – that is, designing the structure and content of, and/or writing the computer code necessary to create and implement systems software (including updates and patches), software applications (including updates and patches), databases and websites, and the customisation of software; and
- software installation services.

Financial technologies: This relates to technology-enabled innovation in the financial services sector. Undertakings which sit at the crossroads of financial services and technology fall within the scope of this definition. In brief, the term 'financial technologies' is used to define software and other technology that aims to modify, enhance or automate financial services for businesses or consumers. Financial technologies include but are not limited to technologies and software developed in the following fields:

- financial services (eg, monetary intermediation; financial leasing; granting of credit);
- insurance, reinsurance and pension funding;
- activities auxiliary to financial services, insurance and pension funding, such as:
    - administration of financial markets (eg, futures commodity contracts exchanges; securities exchanges; stock exchanges; stock or commodity options exchanges);
    - security and commodity contracts brokerage (eg, dealing in financial markets on behalf of others, such as stock broking and related activities; securities brokerage; commodity contracts brokerage; activities of bureaux de change);
    - risk and damage evaluation;
    - activities of insurance agents and brokers;
    - fund management activities;
    - financial transaction processing and settlement;
    - investment advisory activities; and
    - activities of mortgage advisers and brokers;
- accounting, bookkeeping and auditing activities and tax consultancy (eg, recording of commercial transactions from businesses or others; preparation or auditing of financial accounts; examination of accounts and certification of their accuracy; preparation of personal and business income tax returns; advisory activities and representation of clients before the tax authorities); and
- digital lending, payments, blockchain and digital wealth management.

Biotechnology: This refers to technology that utilises biological systems, living organisms or parts thereof to develop or create different products. The sector includes the following activities:

- research and experimental development on biotechnology:
    - DNA/RNA (eg, genomics, pharmacogenomics; gene probes; genetic engineering; DNA/RNA sequencing/synthesis/amplification; gene expression profiling; use of antisense technology);
    - proteins and other molecules (eg, sequencing/synthesis/engineering of proteins and peptides (including large molecule hormones); improved delivery methods for large molecule drugs; proteomics, protein isolation and purification, signalling, identification of cell receptors);
    - cell and tissue culture and engineering (cell/tissue culture; tissue engineering, including tissue

scaffolds and biomedical engineering; cellular fusion; vaccine/immune stimulants; embryo manipulation);
    - process biotechnology techniques (eg, fermentation using bioreactors, bioprocessing, bioleaching, biopulping, biobleaching, biodesulphurisation, bioremediation, biofiltration and phytoremediation);
    - gene and RNA vectors (eg, gene therapy; viral vectors);
    - bioinformatics (the construction of databases on genomes; protein sequences; modelling of complex biological processes, including systems biology); and
    - nanobiotechnology (the tools and processes of nano/microfabrication to build devices for studying biosystems and applications in drug delivery, diagnostics etc); and
- the manufacture of biotech pharmaceuticals such as plasma derivatives.

Pharmacology: A biomedical science, pharmacology deals with the research, discovery and characterisation of chemicals which show biological effects, and the elucidation of cellular and organismal function in relation to these chemicals. In other words, 'pharmacology' refers to the science of how drugs act on biological systems and how the body responds to different drugs. The study of pharmacology encompasses the sources, chemical properties, biological effects and therapeutic uses of drugs. Pharmacology includes biomedical studies and R&D activities conducted in the following areas:

- pharmacodynamics (the relationship of drug concentrations and the biologic effect, whether physiological or biochemical);
- pharmacokinetics (the interrelationship of the absorption, distribution, binding, biotransformation and excretion of a drug and its concentration at its locus of action);
- clinical pharmacology and therapeutics (understanding what a drug is doing to the body, what happens to a drug in the body and how drugs work in terms of treating a particular disease);
- pharmacotherapy (the treatment of a disorder or disease with medication);
- neuropharmacology (understanding how drugs affect cellular function in the nervous system);
- pyscopharmacology (the use of medications in treating mental disorders);
- cardiovascular pharmacology (understanding how drugs influence the heart and vascular system);
- molecular pharmacology (understanding the molecular mode of action of drugs, using genetic and molecular biology methods, among others);
- radiopharmacology (the study and preparation of radioactive pharmaceuticals); and
- the manufacture and R&D of pharmaceuticals (eg, antisera and other blood fractions; vaccines; and diverse medicaments, including homeopathic preparations), pharmaceutical preparations and medicinal chemicals (eg, the manufacture of medicinal active substances to be used for their pharmacological properties in the manufacture of medicaments – antibiotics, basic vitamins, salicylic and O-acetylsalicylic acids etc);
- the wholesale, retail sale, distribution and marketing of pharmaceuticals, pharmaceutical preparations and medicinal chemicals; and
- the growing of drugs and narcotic crops.

Agricultural chemicals: Agricultural chemicals are chemicals used in agriculture to control pests and disease or control and promote growth, such as pesticides, herbicides, fungicides, insecticides and fertilisers. The sector includes the following activities:

- mining of chemical and fertiliser minerals;
- supporting activities for other mining and quarrying (where these relate to agricultural chemicals and fertilisers);

- the manufacture of fertilisers (eg, straight or complex nitrogenous, phosphatic or potassic fertilisers; urea, crude natural phosphates and crude natural potassium salts) and nitrogen compounds (eg, nitric and sulphonitric acids, ammonia, ammonium chloride, ammonium carbonate, nitrites and nitrates of potassium);
- the manufacture of organic and inorganic basic chemicals (where this relates to agricultural chemicals and fertilisers);
- the manufacture of pesticides and other agrochemical products (eg, insecticides, rodenticides, fungicides, herbicides, acaricides, molluscicides, biocides, anti-sprouting products, plant growth regulators and disinfectants for agricultural and other use); and
- the wholesale, retail sale, distribution and marketing of fertilisers and agrochemical products.

Health technologies: Health technologies involve the application of organised knowledge and skills in the form of medicines, medical devices, vaccines, procedures and systems developed to solve a health problem and improve quality of life. They refer to any technology – including medical devices, IT systems, algorithms, artificial intelligence, cloud and blockchain – designed to support healthcare organisations and patients. Health technologies include technologies and software developed or being developed for the following fields:

- human health activities – that is, hospital activities, medical activities (medical consultation and treatment) and dental activities (eg, dentistry; endodontic and paediatric dentistry; oral pathology; orthodontics);
- residential healthcare activities (eg, residential nursing care activities; residential care activities for mental disability, mental health and substance abuse; residential care activities for the elderly and disabled); and
- the manufacture of medical and dental instruments (eg, operating tables, examination tables, hospital beds with mechanical fittings, dentists' chairs, surgical appliances).

The special thresholds applicable to acquired undertakings active in these markets/sectors or assets relating to these markets/sectors are outlined in question 2.6.

1. 3. Which body is responsible for enforcing the merger control regime? What powers does it have?

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The national body responsible for enforcing Law 4054 in Turkey is the TCA, a legal entity with administrative and financial autonomy. The TCA consists of the Competition Board, the presidency and main service units. As the competent body of the TCA, the Competition Board is responsible for, among other things, reviewing and resolving on M&A notifications. The Competition Board consists of seven members and is seated in Ankara.

The main service units consist of six supervision and enforcement departments:

- a decisions department;
- an economic analyses and research department;
- an information technologies department;

- an external relations, training and competition advocacy department; and
- a strategy development, regulation and budget department; and
- an on-the-spot inspection and cartels support division.

Each supervision and enforcement department has its own 'sectoral' job description.

The TCA can send written information requests to the parties involved in the merger or acquisition, any other party relating to the transaction and third parties such as competitors, customers and suppliers, and can thus conduct an extensive market investigation within the specified legal timeframe (with possible extensions). Article 15 of Law 4054 authorises the Competition Board to conduct on-site investigations in order to carry out the duties assigned to it by Law 4054.

2.Definitions and scope of application

2. 1. What types of transactions are subject to the merger control regime?

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The Amendment Law amended Article 7 of Law 4054 and introduced the 'significant impediment of effective competition' (SIEC) test, similar to the approach under the EU Merger Regulation. Under this amendment, the Turkish Competition Authority (TCA) may prohibit transactions that could significantly impede competition, along with those that may create a dominant position or strengthen an existing dominant position in the market. Article 5 of Communiqué 2010/4 defines the scope of notifiable transactions as follows:

- the merger of two or more undertakings; and
- the acquisition of, or the acquisition of direct or indirect control over, all or part of one or more undertakings by one or more undertakings or persons that currently control at least one undertaking, through the purchase of assets or all or part of its shares, through an agreement or through another instrument.

Pursuant to Article 6 of Communiqué 2010/4, the following transactions do not fall within the scope of Article 7 of Law 4054 and therefore are not subject to the approval of the Competition Board:

- intra-group transactions and other transactions that do not lead to a change in control;
- temporary possession of securities for resale purposes by undertakings whose normal activities are to conduct transactions in 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 undertaking issuing the securities;
- acquisitions by public institutions or organisations further to the order of law, for reasons such as liquidation, winding up, insolvency, cessation of payments, concordat or privatisation; and
- acquisition by inheritance, as provided for in Article 5 of Communiqué 2010/4.

In addition, Article 2 of Communiqué 2017/2 modified Article 8(5) of Communiqué 2010/4. Together with this amendment, the Competition Board can consider transactions realised by the same undertaking concerned in the same relevant product market within a three-year period as a single transaction; this is likewise the case for two transactions carried out between the same persons or parties within a three-year period. Lastly, Article 3 of Communique 2017/2 introduced a new paragraph to Article 10 of Communique 2010/4, which provides an exemption for transactions in which control is acquired from different sellers through serial transactions on the stock exchange. Such transactions may be notified to the Competition Board after their execution, provided that:

- the transaction is notified to the Competition Board without delay; and
- the voting rights connected to the acquired securities are not exercised, in the absence of an exception granted by Competition Board decision, in order to preserve the full value of the investments.

This provision is similar to Article 7(2) of the EU Merger Regulation. Although there was previously no similar specific statutory rule to this effect in Turkey, the case law of the Competition Board has shed light on the matter.

2. 2. How is 'control' defined in the applicable laws and regulations?

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Communiqué 2010/4 and the Guideline on the Concept of Control provide a definition of 'control' which is similar to the definition of this term in Article 3 of the EU Merger Regulation (139/2004). Article 5(2) of Communiqué 2010/4 stipulates the following:

> *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.*

Pursuant to the presumption regulated under Article 5(2) of Communiqué 2010/4, control will be deemed acquired by persons or undertakings that are the holders of the rights or entitled to the rights under the agreements concerned; or, while not being the holders of the rights or entitled to the rights under such agreements, that have *de facto* power to exercise those rights.

In short, much like the EU regime, under Law 4054, mergers and acquisitions resulting in a change of control are subject to the approval of the Competition Board. 'Control' is understood to be the right to exercise decisive influence over day-to-day management or long-term strategic business decisions, and can be exercised *de jure* or *de facto*. Thus, minority and other interests that do not lead to a change of control do not trigger the filing requirement. However, if minority interests acquired are granted certain veto rights that may influence management of the company (eg, privileged shares conferring management powers), then the nature of control may be deemed as changed (eg, a change from sole to joint control) and the transaction may be subject to filing.

2. 3. Is the acquisition of minority interests covered by the merger control regime, and if so, in what circumstances?

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The acquisition of a minority shareholding may be covered by the merger control regime if and to the extent that it leads to a change in the control structure of the target. In other words, if minority interests acquired are granted certain veto rights that may influence the management of the company (eg, privileged shares conferring management powers), then the nature of control may be deemed as changed (from sole to joint control) and the transaction may be subject to filing. As specified under the Guideline on the Concept of Control, such veto rights must relate to strategic decisions on business policy and must go beyond ordinary 'minority rights' - that is, the veto rights normally accorded to minority shareholders to protect their financial interests.

2. 4. Are joint ventures covered by the merger control regime, and if so, in what circumstances?

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According to Article 5(3) of Communiqué 2010/4, joint ventures are also subject to notification to, and approval by, the Competition Board. Article 5(3) stipulates that joint ventures that permanently meet all functions of an independent economic entity are deemed notifiable if the merger control thresholds are met.

The Competition Board evaluates joint venture notifications according to two criteria:

- the existence of joint control in the joint venture; and
- the joint venture being an independent economic entity (ie, having adequate capital and labour, and an indefinite duration).

In recent years the Competition Board has consistently applied the 'full-functioning' test in determining whether a joint venture is an independent economic entity. If the transaction is found to bring about a full-function joint venture in view of the two criteria mentioned above, the standard SIEC test is applied. Additionally, under the merger control regime, a specific section in the notification form aims to collect information to assess whether the joint venture will lead to coordination. Article 13/III of Communiqué 2010/4 provides that the Competition Board will carry out an individual exemption review of notified joint ventures that emerge as an independent economic unit on a lasting basis, but that have as their object or effect the restriction of competition between the parties or between the parties and the joint venture itself. The wording of the standard notification form also allows for such a review

2. 5. Are foreign-to-foreign transactions covered by the merger control regime, and if so, in what circumstances?

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Foreign-to-foreign transactions are caught under Law 4054 regardless of whether the joint venture has a Turkish nexus or generates any Turkish turnover. In other words, whether the joint venture has a Turkish nexus is not relevant for the notifiability analysis under the Turkish merger control regime. Additionally, according to Communiqué 2010/4, whether an 'affected market' exists will not be considered in assessing whether a transaction triggers the notification requirement. However, the concept of affected market carries weight in terms of the substantive competitive assessment and the notification form.

As long as the joint venture is a full-function joint venture and the jurisdictional thresholds set out under Article 7 of Communiqué 2010/4 are reached, the relevant transaction will be subject to mandatory merger control in Turkey. The Competition Board's precedents also illustrate this approach (eg, *Engie/FCA* (Decision 21-15/187-79 of 18 March 2021); *Housing Development/Warburg Pincus* (Decision 21-13/167-72 of 11 March 2021); *Astorg/Nordic* (Decision 21-08/109-45 of 18 February 2021); *Partners Group/Warburg Pincus* (Decision 21-05/60-27 of 28 January 2021); *TransnetBVV GmbH/MHP* (Decision 21-04/43-18 of 21 January 2021); *Warner Bros/Universal* (Decision 20-25/324-152 of 21 May 2020); *BP/RIL-RBPML* (Decision 20-21/284-138 of 30 April 2020); *Warburg Pincus/Archimed-Polyplus* (Decision 20-19/252-121 of 9 April 2020); *SGIS/JFE-Baosteel* (Decision 20-14/180-92 of 12 March 2020); *Elliott/Apollo-EP Energy* (Decision 20-13/171-90 of 5 March 2020); *Toyota/Mitsui-KINTO* (Decision 20-13/166-85 of 5 March 2020); *Generali/Apleona-Sansa* (Decision 20-12/140-77 of 27 February 2020); *Daimler/Swiss* (Decision 20-10/105-61 of 13 February 2020); *Sumitomo/Toyota/Lewis-MMP* (Decision 20-10/101-59 of 13 February 2020); *Generali/Union-Zaragoza Properties* (Decision 20-08/73-41 of 6 February 2020); *Alpla Holding/PTT Global* (Decision 20-04/37-19 of 16 January 2020); *HSI/Hilton Sao Paulo Morumbi* (Decision 20-04/33-16 of 16 January 2020); *Mitsubishi Corporation/Wallenius Wilhelmsen* (Decision 20-04/35-18 of 16 January 2020); *FSI/Snam-OLT Offshore* (Decision 20-03/18-8 of 9 January 2020); *AMG/Shell* (Decision 20-03/20-10 of 9 January 2020); *Engie/EDF/CDC/La Poste* (Decision 19-45/747-321 of 19 December 2019); *Bamesa/Steel Center* (Decision 19-44/739-316 of 12 December 2019); *Astorg/eResearch Technology* (Decision 19-44/730-310 of 12 December 2019); *CDC/Total* (Decision 19-42/700-299 of 29 November 2019); *BP/Bunge* (Decision 19-35/526-216 of 11 October 2019); *Faurecia/Michelin-SymbioFCell* (Decision 19-33/491-211 of 26 September 2019); *Leoni/Hengtong* (Decision 19-08/93-38 of 21 February 2019); *Daimler/Volkswagen-MT Holding* (Decision 19-06/61-25 of 7 February 2019); *DENSO/Aisin Seiki* (Decision 19-04/32-13 of 17 January 2019); *Adient/Boeing* (Decision 18-21/364-180 of 28 June 2018); *GE/Rosneft* (Decision 18-14/259-124 of 8 May 2018); *IBM/Maersk* (Decision 18-08/138-68 of 15 March 2018); *Daimler/Volkswagen-AutoGravity* (Decision 17-28/463-202 of 7 September 2017); *NIPIgas/Technip/Linde/JV* (Decision 17-23/366-159 of 19 July 2017)). Against the foregoing, full-function joint venture transactions will be subject to mandatory merger control filings whenever the jurisdictional turnover thresholds are exceeded, even in cases where the joint venture is not/will not be active in Turkey.

Additionally, the foreign-to-foreign nature of the transaction does not prevent the imposition of an administrative monetary fine (for violation of either the suspension requirement or Article 7), in and of itself. In case of failure to notify (ie, closing before clearance), foreign-to-foreign mergers are caught under Law 4054 to the extent that they have effects on the relevant markets within the territory of Turkey.

As an example, in *Simsmetal/Fairless* (Decision 09-42/1057-269 of 16 September 2009), in which both parties were exporters into Turkey, the Competition Board imposed an administrative monetary fine on acquirer Simsmetal East LLC under the first paragraph of Article 16 of Law 4054, totalling 0.1% of its gross revenue generated in fiscal year 2009, because the transaction closed before the Competition Board's approval had been obtained. Similarly, *Longsheng* (Decision 11-33/723-226 of 2 June 2011), *Flir Systems Holding/Raymarine PLC* (Decision 10-44/762-246 of 17 June 2010) and *CVRD Canada Inc* (Decision 10-49/949-332 of 8 July 2010) are instances in which the Competition Board imposed a turnover-based monetary fine based on violation of the suspension requirement in a foreign-to-foreign transaction.

2. 6. What are the jurisdictional thresholds that trigger the obligation to notify? How are these thresholds calculated?

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The Amendment Communiqué (see question 1.1) has amended the turnover thresholds that a given merger or acquisition must exceed in order to be subject to notification for the purposes of the Turkish merger control regime. Following the enactment of the amendments, the thresholds under Article 7 are as follows:

- Article 7(a): The total turnover in Turkey of the parties to a concentration exceeds TL 750 million and the Turkish turnover of at least two parties each exceeds TL 250 million.
- Article 7(b): Either:
    - the Turkish turnover of the transferred assets or businesses being acquired (as well as joint ventures) exceeds TL 250 million and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (Article 7(b)(i)); or
    - the Turkish turnover of any of the parties being merged exceeds TL 250 million and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (Article 7(b)(ii)).

  The tests under Article 7(b) thus include two separate tests: Article 7(b)(i) is applicable only to acquisitions (as well as joint ventures), while Article 7(b)(ii) is applicable only to mergers.

Furthermore, the Amendment Communiqué has introduced a threshold exemption for undertakings active in the following fields:

- digital platforms;
- software or gaming software;
- financial technologies;
- biotechnology;
- pharmacology;
- agricultural chemicals; and
- health technologies.

Pursuant to the Amendment Communiqué, special thresholds will apply to acquired undertakings active in, or assets relating to these fields if they:

- operate in the Turkish geographical market;
- conduct research and development activities in the Turkish geographical market; or

- provide services to Turkish users.

Therefore, the Amendment Communiqué does not require a Turkish nexus for activities to qualify for the threshold exemption. In other words, it will suffice if the target is active in one of the relevant fields anywhere in the world in order for the threshold exemption to apply. Accordingly, for the threshold exemption to apply, the target need not:

- generate revenue from customers located in Turkey;
- conduct research and development activities in Turkey; or
- provide services to Turkish users.

If the target is active in one of the relevant markets/sectors, the following thresholds will apply:

- The aggregate Turkish turnover of the transaction parties exceeds TL 750 million; or
- The worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion.

Accordingly, where an undertaking that meets these criteria is being acquired, the transaction will be notifiable if either:

- the aggregate Turkish turnover of the target and the acquirer exceeds TL 750 million; or
- the worldwide turnover of the acquirer exceeds TL 3 billion.

Clarifications on the meaning and the scope of the relevant markets/sectors are provided in question 1.2.

Where the transaction does not meet the above thresholds, the transaction will not be deemed notifiable. Furthermore, Communiqué 2010/4 does not require the existence of an 'affected market' in assessing whether a transaction triggers a notification requirement.

In terms of the above threshold exemption for certain undertakings, reasoned decisions of the Competition Board have begun to be published, slowly creating precedent on the issue. Of the approximately 10 decisions in which the relevant exemption was applied, examples include:

- *IFGL/Cinven* (Decision 22-23/372-157 of 18 May 2022), which concerned an undertaking active in the digital platform markets;
- *Airties/Providence* (Decision 22-25/403-167 of 2 June 2022), which concerned a programming undertaking;
- *Affidea/GBL* (Decision 22-27/431-176 of 16 June 2022), which concerned a biotechnology undertaking;
- *Clayton/TPG/Covetrus* (Decision 22-32/512-209 of 7 July 2022), which concerned a pharmacology undertaking;
- *Astorg/Corden* (Decision 22-25/398-164 of 2 June 2022), which concerned a pharmacology undertaking;
- *Biocon Viatris* (Decision 22-23/380-159 of 18 May 2022), which concerned a pharmacology/molecular medicine undertaking;
- *Citrix/Tibco* (Decision 22-21/344-149 of 12 May 2022), which concerned a software undertaking; and
- *Impala Bidco/HG Capital/EQT Fund/TA* (Decision 22-21/354-152 of 12 May 2022), which concerned technology undertakings.

Finally, Communiqué 2017/2 Amending Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board removed the provision of Article 7(2) of Communiqué 2010/4 stating that "The thresholds … are re-determined by the Board biannually". As a result, the Competition Board is no longer required to review the turnover thresholds for concentrations every two years.

2. 7. Are any types of transactions exempt from the merger control regime?

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The following transactions are not subject to the approval of the Competition 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;
- 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.

There is no *de minimis* exception under the Turkish merger control regime.

3.Notification

3. 1. Is notification voluntary or mandatory? If mandatory, are there any exceptions where notification is not required?

Turkey
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If the jurisdictional turnover thresholds set out in Communiqué 2010/4, are exceeded, then notification is mandatory. However, certain types of mergers in the banking sector are exempt from notification: the Banking Law (5411) provides that Articles 7, 10 and 11 of Law 4054 will not apply where the sectoral share of the total assets of the banks involved in the merger or acquisition does not exceed 20%.

Another exception pertains to the Turkish Wealth Fund, which was incorporated as a national wealth and investment fund company under Law 6741. Transactions performed by the Turkish Wealth Fund and/or companies established by the Turkish Wealth Fund are not subject to the merger control rules.

The competition legislation includes no special regulations applicable to foreign investments.

3. 2. Is there an opportunity or requirement to discuss a planned transaction with the authority, informally and in confidence, in advance of formal notification?

Turkey

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Transactions are notified to the Turkish Competition Authority (TCA) formally, by filling out the notification form provided as an annex to Communique 2010/4. There is no protocol against informing the TCA prior to formal submission of the notification form, but the TCA will only take into consideration the formal submissions and meetings thereafter.

3. 3. Who is responsible for filing the notification?

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In principle, under the merger control regime, a filing can be made by either party to the transaction or jointly. In case of filing by either party, the filing party should notify the other party of the filing.

However, the acquirer(s) in case of an acquisition and both merging parties in case of a merger share responsibility for ensuring that notification has been duly filed. Pursuant to Article 16 of Law 4054, if the parties to a notifiable transaction violate the suspension requirement, a turnover-based monetary fine (based on the local turnover generated in the financial year preceding the date of the fining decision, at a rate of 0.1%) will be imposed on the incumbent firms (ie, the acquirer(s) in the case of an acquisition and both merging parties in the case of a merger).

3. 4. Are there any filing fees, and if so, what are they?

Turkey
ELIG Gürkaynak Attorneys-at-Law

No filing fee or other charges apply in Turkish merger control proceedings.

3. 5. What information must be provided in the notification? What supporting documents must be provided?

Turkey
ELIG Gürkaynak Attorneys-at-Law

The notification must be submitted based on the sample notification form, which is attached to Communiqué 2010/4 as amended by the Amendment Communiqué. The Amendment Communiqué (see question 1.1) includes a more complex notification form, which requests the provision of information such as the following:

- the relevant global product markets in which the parties operate;
- any globally overlapping markets and market share data regarding such activities; and
- data on:
    - supply and demand structures;
    - imports;
    - potential competition; and

- expected efficiencies.

In terms of formalities and supporting documents, the parties must submit the signed or latest version of the transaction document, along with a sworn Turkish translation. Moreover, signed, notarised and apostilled powers of attorney are required in order to represent notifying parties before the TCA. The signed, notarised and apostilled power of attorney requires local legalisation by a notary public in Turkey (relating to notarisation of the sworn Turkish translation of the executed, notarised and apostilled power of attorney).

The parties to the transaction must also submit officially approved documents (ie, approved balance sheets) showing their latest accounts. In addition, where applicable, for Turkish subsidiaries and/or affiliated entities of the parties, the latest certified balance sheets and/or profit and loss statements (as approved by the relevant tax office in Turkey) should be submitted along with the merger control filing.

Finally, the parties must also submit their organisational (corporate structure) charts or a list of subsidiaries showing each person or economic entity that is directly or indirectly controlled by the parties. No formal requirements apply in this regard.

If available, market research reports for the relevant market are also required.

It is not required to submit the certification of incorporation and articles of association as annexes to the merger control filing.

All supporting documents should be submitted together with the notification form; otherwise, the notification form will be incomplete and the notification will be deemed filed only once such information has been completed upon the Competition Board's subsequent request. Further, any written request by the Competition Board for missing information or documents resets the clock and the review period begins again from day one once the responses and documents have been received.

3. 6. Is there a deadline for filing the notification?

Turkey
ELIG Gürkaynak Attorneys-at-Law

There is no specific deadline for filing the notification. However, under the Turkish merger control regime, closing a notifiable transaction before Competition Board approval has been obtained constitutes a violation of the suspension requirement (ie, a standstill obligation), as regulated under Article 11 of Law 4054. Therefore, the parties must obtain the Competition Board's approval before closing the transaction. According to Article 16 of Law 4054, failure to do so can trigger monetary fines and legal status risks.

3. 7. Can a transaction be notified prior to signing a definitive agreement?

Turkey
ELIG Gürkaynak Attorneys-at-Law

It is possible to notify a transaction based on a draft version of the transaction agreement instead of a signed agreement. It is also possible to submit the notification form under the memorandum of understanding, letter of intent, term sheet or similar.

3. 8. Are the parties required to delay closing of the transaction until clearance is granted?

Turkey
ELIG Gürkaynak Attorneys-at-Law

Due to the standstill obligation, the parties must obtain the Competition Board's approval before closing the transaction. According to Article 16 of Law 4054, failure to do so can trigger monetary fines and legal status risks.

3. 9. Will the notification be publicly announced by the authority? If so, how will commercially sensitive information be protected?

Turkey
ELIG Gürkaynak Attorneys-at-Law

Communiqué 2010/4 introduced a mechanism through which the TCA publishes notified transactions on its official website (www.rekabet.gov.tr), stating only the names of the undertakings concerned and their areas of commercial activity. Therefore, once a transaction has been notified to the TCA, its existence is no longer confidential. However, confidential information that the parties provide as part of the filing process is protected.

The main legislation that regulates the protection of commercial information is Communiqué 2010/3 on Regulation of Right to Access to File and Protection of Commercial Secrets. Under Communiqué 2010/3, the undertakings are required to identify information or documents deemed as commercial secrets and justify the reasons for the same. To this end, undertakings must request confidentiality from the Competition Board in writing and justify the reasons for the confidential nature of the information or documents that are requested to be treated as commercial secrets. While the Competition Board can also evaluate information or documents *ex officio*, the general rule is that information or documents that are not requested to be treated as confidential are accepted as not confidential. The reasoned decisions of the Competition Board are published on the website of the TCA once confidential business information has been redacted.

Moreover, under Article 25 of Law 4054, Competition Board and TCA personnel are bound by a legal obligation not to disclose any trade secrets or confidential information to which they are privy during their service.

4.Review process

4. 1. What is the review process and what is the timetable for that process?

Turkey
ELIG Gürkaynak Attorneys-at-Law

A notification is deemed filed once it has been received in complete form by the Turkish Competition Authority (TCA). If the information requested in the notification form is incorrect or incomplete, the

notification is deemed filed on the date on which such information is completed or corrected.

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

The Competition Board will notify the parties of the outcome within 30 days of submission of a complete filing. There is an implied approval mechanism whereby tacit approval is assumed if the Competition Board has not responded within 30 calendar days of submission of a complete filing. In practice, the Competition Board almost always responds within this period by either sending a written request for information or – very rarely – by issuing a final decision.

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

Any written request by the TCA for missing information will cut the review period, which will then restart from day one as of the date on which the responses are received.

If a notification leads to an investigation (Phase II), a full investigation will be launched. This takes about six months, which may be extended for an additional six months if necessary.

4. 2. Are there any formal or informal ways of accelerating the timetable for review? Can the authority suspend the timetable for review?

Turkey
ELIG Gürkaynak Attorneys-at-Law

Aside from close follow-up with the case handlers reviewing the transaction, the parties have no available means of speeding up the review process. The TCA may extend the timeline by sending requests for information; however, there is no provision within Law 4054 for the TCA to suspend the review period.

4. 3. Is there a simplified review process? If so, in what circumstances will it apply?

Turkey
ELIG Gürkaynak Attorneys-at-Law

Neither Law 4054 nor Communiqué 2010/4 foresees a ‘fast-track’ or simplified review procedure to speed up the clearance process.

4. 4. To what extent will the authority cooperate with its counterparts in other jurisdictions during the review process?

Turkey
ELIG Gürkaynak Attorneys-at-Law

The TCA is empowered to contact certain regulatory authorities around the world, including the European Commission, to exchange information. In this respect, Article 43 of Decision 1/95 of the EC-Turkey Association Council authorises the TCA to notify and request the European Commission (Directorate-General of Competition) to apply relevant measures if the Competition Board believes that transactions realised in the EU territory will adversely affect competition in Turkey. This provision grants reciprocal rights and obligations to the parties, and the European Commission can thus have TCA request the Competition Board to apply relevant measures to restore competition in relevant markets.

Moreover, the research department of the TCA periodically consults with relevant domestic and foreign institutions and organisations. However, the European Commission has been reluctant to share any evidence or arguments with the TCA in a few cases where the TCA explicitly requested them.

The TCA also cooperates internationally with several antitrust authorities in other jurisdictions and develops training programmes for cooperation purposes. In recent years, programmes have been organised for:

- 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 Competition Authority of the Turkish Republic of Northern Cyprus.

Similar programmes have also been developed in cooperation with:

- the Azerbaijan State Service for Anti-monopoly Policy and Consumer Rights Protection;
- the State Committee of the Republic of Uzbekistan on De-monopolisation; and
- the Ukrainian Anti-Monopoly Committee.

These programmes were developed under bilateral cooperation agreements.

The TCA's cooperation agreements can be found on its website. In April 2018, it entered into cooperation agreements with Kosovo, Macedonia and Serbia. Furthermore, the TCA signed a cooperation protocol with the competition authorities of Azerbaijan in February 2020 and Morocco in January 2021.

In 2021, the TCA participated in the following programmes:

- the National Competitiveness Barometer Project webinar organised by the Russian Competition Council;
- the joint United Nations Economic and Social Commission for Western Asia/United Nations Conference on Trade and Development (UNCTAD)/Organisation for Economic Co-operation and Development (OECD) Competition Forum;
- a programme of the Statistics, Economic and Social Research and Education Centre of Islamic Countries entitled "Increasing the Capacity of Competition Authorities", organised by the TCA and the Tunisian Competition Council;
- a webinar entitled "South-South Sharing of Policy Experiences on Platform Domination" organised by UNCTAD in collaboration with the Public Citizen and Third World Network;
- online meetings of the Intergovernmental Expert Group on Competition Law and Policy organised by UNCTAD;
- a cartel workshop organised by the International Competition Network Cartel Study Group; and

- the Global Forum organised by the OECD.

Since 2019, the TCA has also organised the Istanbul Competition Forum in collaboration with UNCTAD to discuss a wide range of key and emerging competition law issues.

4. 5. What information-gathering powers does the authority have during the review process?

Turkey
ELIG Gürkaynak Attorneys-at-Law

The TCA may send written information requests to the parties and any other party relating to the transaction; or may conduct comprehensive market research by requesting information from third parties such as competitors, customers and suppliers within the specified legal timeframe, with possible extensions. The provision of false or misleading information can result in monetary fines pursuant to Article 16 of Law 4054.

Law 4054 provides extensive powers to the TCA in relation to dawn raids. Judicial authorisation will be obtained by the Competition Board only if the target undertaking refuses to allow the dawn raid, which will also result in a fine. While Law 4054 states that employees may be compelled to provide oral testimony, case handlers do allow for a delay in response, as long as there is quick written follow-up correspondence. Therefore, in practice, employees can avoid responding on issues that are uncertain to them, provided that a written response is submitted within a mutually agreed timeframe. Computer records are fully examined by the TCA, including deleted items.

The TCA published its Guidelines on Examination of Digital Data during On-site Inspections on 8 October 2020, which set forth the general principles with respect to the examination, processing and storage of data and documents held in companies' electronic media and information systems during on-site inspections. As per the guidelines, the TCA can inspect and make copies of all information and documents held in companies' electronic media and information systems. The guidelines also empower the TCA to examine mobile devices (eg, mobile phones and tablets), unless it is determined that such devices are used solely for the personal use of a given employee. Regardless, the TCA is authorised to conduct a quick review of any portable electronic device to ascertain its intended purpose.

Officials conducting on-site investigations must possess a deed of authorisation from the Competition Board. The deed of authorisation must specify the subject matter and purpose of the investigation. Officials are not entitled to exercise their investigative powers (eg, copying records or recording statements by company staff) in relation to matters that do not fall within the scope of the investigation, as set out in the deed of authorisation.

Only TCA staff may participate in on-site inspections. They have no duty to wait for a lawyer to arrive. That said, they may sometimes agree to wait for a short while for a lawyer to arrive, but may impose certain conditions in this regard (eg, that files be sealed or email communications disrupted).

4. 6. Is there an opportunity for third parties to participate in the review process?

Turkey
ELIG Gürkaynak Attorneys-at-Law

Pursuant to Article 15 of Communiqué 2010/4, the Competition Board may request information from third parties, including customers, competitors and suppliers of the parties, and other persons related to the merger or acquisition. According to Article 11(2) of Communiqué 2010/4, if the TCA is required by law to request another public authority's opinion, this will cut the review period, which will restart anew from day one once the opinion has been received. Third parties – including customers and competitors of the parties, and other persons related to the merger or acquisition – may participate in a hearing held by the Competition Board during the investigation, provided that they prove their legitimate interest.

Although this is not common practice, the TCA may even invite the views of third parties on a transaction that clearly raises no competition issues. There is no specific provision requiring that market testing be carried out in the merger control filing process.

4. 7. In cross-border transactions, is a local carve-out possible to avoid delaying closing while the review is ongoing?

Turkey
ELIG Gürkaynak Attorneys-at-Law

There is no normative regulation allowing or disallowing carve-out arrangements. However, carve-out arrangements have previously been rejected by the Competition Board (eg, *Total SA*, Decision 06-92/1186-355 of 20 December 2006; and *CVR Inc Inco Limited*, Decision 07-11/71-23 of 7 February 2007), which has argued that closing is in itself sufficient for the imposition of a suspension violation fine, and that further analysis of whether a change in control actually took effect in Turkey is unwarranted. The wording of the Competition Board's reasoned decisions does not analyse the merits of carve-out arrangements, but rather takes the position that the notion of a carve-out is unconvincing. Therefore, measures such as carve-outs and hold separate agreements will not circumvent the filing requirement and cannot be recommended as safe early closing mechanisms recognised by the Competition Board. Finally, the Turkish merger control rules do not provide for the possibility of derogation from the suspension obligation.

However, none of the cases cited in this regard points to the establishment of *de facto* precedent concerning a Competition Board-accepted derogation from the suspension obligation, due to the exceptional characteristics of the cited cases.

4. 8. What substantive test will the authority apply in reviewing the transaction? Does this test vary depending on sector?

Turkey
ELIG Gürkaynak Attorneys-at-Law

The substantive test is the 'significant impediment of effective competition' (SIEC) test under the new Amendment Law (Article 9(1) of Law 4054), similar to the approach under the EU Merger Regulation. Applying this new test, the TCA can prohibit not only transactions that may create a dominant position or strengthen an existing dominant position, but also those that could significantly impede competition. Although the Competition Board has started to apply the SIEC test in its decisions, it has not published detailed assessments on its application and new guidelines have not been introduced as a result of the changes to the primary legislation. That said, in terms of creating or strengthening a dominant position, Article 3 of Law 4054 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". Along with other factors such as vertical foreclosure or barriers to entry, market shares of about 40% and higher are considered an indication of a dominant position in a relevant product market.

The test does not vary by sector.

4. 9. Does a different substantive test apply to joint ventures?

Turkey
ELIG Gürkaynak Attorneys-at-Law

In addition to the SIEC test explained in question 4.8, the TCA examines whether a joint venture would result in coordination within a given market. Article 13/III of Communiqué 2010/4 provides that the Competition Board will carry out an individual exemption review of notified joint ventures that emerge as an independent economic unit on a lasting basis, but that have as their object or effect the restriction of competition between the parties or between the parties and the joint venture itself. The wording of the standard notification form also allows for such a review.

4. 10. What theories of harm will the authority consider when reviewing the transaction? Will the authority consider any non-competition related issues (eg, labour or social issues)?

Turkey
ELIG Gürkaynak Attorneys-at-Law

Unilateral effects are the predominant criterion in the TCA's assessment of mergers and acquisitions in Turkey. That said, in a couple of exceptional cases the Competition Board discussed the coordinated effects under a 'joint dominance test' and rejected the transactions on those grounds (eg, *Ladik*, Decision 05-86/1188-340 of 20 December 2005). These cases related to the sale of certain cement factories by the Savings Deposit Insurance Fund. The Competition Board evaluated the coordinated effects of the mergers under a joint dominance test and blocked the transactions on the grounds that they would lead to joint dominance in the relevant market. The Competition Board took note of factors such as:

- structural links between the undertakings in the market;
- past coordinative behaviour;
- entry barriers;

- transparency of the market; and
- the structure of demand.

It concluded that certain factory sales would result in the establishment of joint dominance by certain players in the market, thus significantly lessening competition. Regarding one such decision, which was appealed before the Council of State, the Council of State mentioned in its ruling, among other things, that Law 4054 prohibits only single dominance and therefore stayed execution of the decision by the Competition Board, which was based on collective dominance.

No transaction has yet been blocked on the grounds of vertical foreclosure or conglomerate effects. However, a few decisions discuss those theories of harm. For example, one decision in this respect was the Competition Board's *Luxottica/Essilor* decision (Decision 18-36/585-286 of 1 October 2018). The Competition Board examined the conglomerate effects that the transaction might have with respect to the lens and optical frames markets and possible bundling applications.

Although no transaction has yet been blocked on the grounds of vertical foreclosure or conglomerate effects, in *Toyota/Vive* (Decision 17-12/143-63 of 6 April 2017), the Competition Board outlined the main factors that should be considered in evaluating conglomerate concentrations. The decision is significant as it is the first time that the Competition Board has focused on conglomerate effects, even though conglomerate effects have been an important issue in the European Union in 2017 (eg, *Qualcomm/NXP* and *Bayer/Monsanto*). The transaction concerned Toyota's acquisition of sole control over Vive BV. While the parties to the transaction submitted that no market would be affected, since their activities did not horizontally or vertically overlap in Turkey, the Competition Board decided that the transaction would lead to a conglomerate concentration, given that the parties' activities were complementary and substitutive. Accordingly, the Competition Board asserted that competitors could be foreclosed from the market through unilateral conduct in the form of tying, bundling and other exclusionary behaviour; and that in addition to the parties' market shares, their incentive and ability to foreclose the market should be considered in assessing the existence of conglomerate effects. The Competition Board ultimately decided that the market shares of the parties and the structures of the two relevant product markets would not give the parties the necessary market power and ability to foreclose the market, and unconditionally approved the transaction.

Further to the Amendment Law (Article 9(1) of Law 4054), the new SIEC test allows for a more robust assessment of the unilateral and cooperation effects that might arise as a result of mergers or acquisitions, as it focuses more on whether and to what extent competition will be impeded as a result of the transaction.

As the scope of Law 4054 is limited to the assessment of competition in a given market, the Competition Board's assessment is limited to this and does not take account of labour or social issues.

5.Remedies

5. 1. Can the parties negotiate remedies to address any competition concerns identified? If so, what types of remedies may be accepted?

The parties have the discretion to submit remedies under the Guidelines on the Remedies that Would Be Permitted by the Turkish Competition Authority (TCA) in Mergers and Acquisitions. The parties can submit either behavioural or structural remedies. According to the Guidelines on Remedies, structural remedies take precedence over behavioural remedies, as they produce preferable and concrete results. While there have been several decisions in which behavioural remedies have been accepted (eg, *EssilorLuxottica/Hal Holding* (Decision 21-30/395-199 of 10 June 2021); *Bekaert/Pirelli* (Decision 15-04/52-25 of 22 January 2015; *Obilet/Biletal* (Decision 21-33/449-224 of 1 July 2021); *Essilor/Luxottica* (Decision 18-36/585-286 of 1 October 2018); *Migros/Anadolu Industry Holding* (Decision 29/420-117 of 9 July 2015)), the majority of conditional clearance decisions are based on structural remedies (eg, see *ÇimSA/Bilecik* (Decision 08-36/481-169 of 2 June 2008); *Mey İçki/Diageo* (Decision 11-45/1043-356 of 17 August 2011); *Burgaz Rakı/Mey İçki* (Decision 10-49/900-314 of 8 July 2010); *Essilor/Luxottica* (Decision 18-36/585-286 of 1 October 2018); *Lesaffre/Dosu Maya* (Decision 18-17/316-156 of 31 May 2018)). The guidelines outline measures which would be considered to constitute acceptable remedies, such as:

- divestments;
- cessation of all kinds of connections with competitors;
- remedies that enable undertakings to access certain infrastructure (eg, networks, intellectual property, essential facilities); and
- remedies on amending long-term exclusive agreements.

The Competition Board will not impose remedies itself or revise the proposed remedies *ex parte*. If the Competition Board considers the submitted remedies insufficient, it may allow the parties to make further changes to them. If the remedies are still insufficient to resolve the competition concerns, the Competition Board will not grant clearance.

5. 2. What are the procedural steps for negotiating and submitting remedies? Can remedies be proposed at any time throughout the review process?

Turkey
ELIG Gürkaynak Attorneys-at-Law

The form and content of divestiture remedies vary significantly in practice. The Guidelines on Remedies set out all applicable procedural steps and conditions. The parties must submit detailed information as to how the remedies will be applied and how they will resolve the competition concerns.

The parties can submit to the Competition Board proposals for possible remedies during either the preliminary review (Phase I) or the investigation period (Phase II).

While the parties can submit remedies during Phase I, the notification is deemed filed only on the date of submission of the commitments. In any case, a signed version of the remedies containing detailed information on their context and a separate summary should be submitted to the TCA. The Guidelines on Remedies also provide a form that lists the necessary information and documents to be submitted in relation to the remedies.

5. 3. To what extent have remedies been imposed in foreign-to-foreign transactions?

Turkey
ELIG Gürkaynak Attorneys-at-Law

In several cases the Competition Board has accepted remedies or commitments (eg, divestments) proposed to, or imposed by, the European Commission, as long as these would ease competition law concerns in Turkey (*Agilent-Varian,* Decision 10-18/212-82 of 18 February 2010; *Maersk Line-HSDG*, Decision 17-15/210-89 of 4 May 2017; *Valeo/FTE Group* Decision 17-35/560-244 of 26 October 2017; *Monsanto/Bayer*, Decision 18-14/261-126 of 8 May 2018). Furthermore, the Competition Board accepted structural and behavioural remedies in granting conditional clearance to the merger of Luxottica and Essilor in 2018 (Decision 18-36/585-286 of 1 October 2018).

6.Appeal

6. 1. Can the parties appeal the authority's decision? If so, which decisions of the authority can be appealed (eg, all decisions or just the final decision) and what sort of appeal will the reviewing court or tribunal conduct (eg, will it be limited to errors of law or will it conduct a full review of all facts and evidence)?

Turkey
ELIG Gürkaynak Attorneys-at-Law

Under Law 6352, administrative sanction decisions of the Competition Board can be submitted to the administrative courts in Ankara for judicial review by filing an appeal within 60 calendar days of receipt of the Competition Board's reasoned decision.

Under Article 27 of the Administrative Procedural Law, filing an administrative action for judicial review does not automatically stay execution of the decision. However, upon request by the plaintiff, the court may stay execution of the decision if:

- execution is likely to cause serious and irreparable damage; and
- the decision is highly likely to be against the law (ie, the showing of a *prima facie* case).

The judicial review period before the administrative court usually takes about eight to 12 months. After exhausting the litigation process before the administrative courts of Ankara, the final step in judicial review is to appeal the administrative court's decision before the regional courts within 30 calendar days of official service of the reasoned decision of the administrative court.

Since 20 July 2016, administrative litigation cases have been subject to judicial review before the newly established regional courts (appellate courts), which has created a three-level appellate court system consisting of administrative courts, regional courts (appellate courts) and the High State Court.

The regional courts will:

- examine the case file on both procedural and substantive grounds;
- investigate the case file; and
- make their decision considering the merits of the case.

Their decisions are considered final. However, in exceptional circumstances laid down in Article 46 of the Administrative Procedure Law, a decision of the regional court may be subject to review by the High State Court and therefore will not be considered final. In such case the High State Court may decide to uphold or reverse the regional court's decision. If the decision is reversed, it will be remanded to the regional court, which in turn will issue a new decision to take account of the High State Court's decision.

Decisions of courts in private suits may be appealed to 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.

6. 2. Can third parties appeal the authority's decision, and if so, in what circumstances?

Turkey
ELIG Gürkaynak Attorneys-at-Law

Third parties can challenge Competition Board decisions before the competent administrative courts if they can prove a legitimate interest.

7.Penalties and sanctions

7. 1. If notification is mandatory, what sanctions may be imposed for failure to notify? In practice, does the relevant authority frequently impose sanctions for failure to notify?

Turkey
ELIG Gürkaynak Attorneys-at-Law

As explained in question 3.3, pursuant to Article 16 of Law 4054, if the parties to a notifiable transaction violate the suspension requirement, a turnover-based monetary fine based on the local turnover generated in the financial year preceding the date of the fining decision at a rate of 0.1% will be imposed on the incumbent firms (ie, the acquirer(s) in the case of an acquisition and both merging parties in the case of a merger).

A monetary fine imposed due to violation of the suspension requirement shall in no event be less than TL 150,688 in 2023. The wording of Article 16 of Law 4054 does not give the Competition Board discretion as to whether to impose a monetary fine in case of violation of the suspension requirement. In other words, once a violation is detected, the monetary fine will be imposed automatically.

If, at the end of its review of a notifiable transaction that was not notified, the Competition Board decides that the transaction falls within the prohibition of Article 7 under the 'significant impediment of effective competition' test applicable in Turkey, the undertakings may be subject to fines of up to 10% of their turnover generated in the financial year preceding the date of the fining decision. Employees and managers of the undertakings concerned who had a determining impact on the violation may also be fined up to 5% of the fine imposed on the undertakings, as a result of implementing a problematic transaction without the Competition Board's approval.

In case of failure to notify, in addition to monetary sanctions, the Competition Board is authorised under Article 11(b) of Law 4054 to take all necessary measures to:

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

Additionally, under Article 7 of Law 4054, a notifiable merger or acquisition which is not notified to and approved by the Competition Board is deemed legally invalid, with all the attendant legal consequences. Therefore, in such a situation the parties may be unable to enforce their rights under the agreement before the Turkish courts until the Competition Board has cleared the transaction. The Competition Board usually becomes aware that parties to a notifiable merger have failed to comply with the standstill obligation upon receiving a complaint or on an *ex officio* basis. There are a number of examples in the Competition Board's decisional practice where fines were levied on undertakings for violations of the suspension requirement (eg, see *BMW/Daimler/Ford/Porsche/Ionity* (Decision 20-36/483-211 of 28 July 2020); *Brookfield/JCI* (Decision 20-21/278-132 of 30 April 2020); *A-Tex/Labelon* (Decision 16-42/693-311 of 6 December 2016); *Ersoy/Sesli* (Decision 14-22/422-186 of 25 June 2014); *Electro World* (Decision 13-50/717-304 of 5 September 2013); *Tekno İnşaat* (Decision 12-08/224-55 of 23 February 2012); *Zhejiang/Kiri* (Decision 11-33/723-226 of 2 June 2011); *Ajans Press/Inter Press* (Decision 10-66/1402-523 of 21 October 2010); *Mesa Mesken/TOBB* (Decision 10-56/1088-408 of 26 August 2010); *CVRD Canada Inc* (Decision 10-49/949-332 of 8 July 2010); *Flir Systems Holding/Raymarine* (Decision 10-44/762-246 of 17 June 2010); *Batıçim/Borares* (Decision 10-38/641-217 of 27 May 2010); *TKS/Sarten* (Decision 10-31/471-175 of 15 April 2010); *Kansai Paint Co Ltd/Akzo Nobel Coatings* (Decision 09-34/791-194 of 5 August 2009); *Kiler/Yimpaş* (Decision 09-33/728-168 of 15 July 2009); *Verifone/Lipman* (Decision 09-14/300-73 of 13 April 2009); *Fina/Turkon* (Decision 09-02/19-12 of 14 January 2009); *Çallı/Turyağ* (Decision 08-63/1048-407 of 12 November 2008); *Eastpharma Sarl/Deva* (Decision 07-34/355-133 of 24 April 2007); *Harry's/Fresh Cake/BNP* (Decision 07-61/722-253 of 25 July 2007); *Doğuş Otomotiv/Katalonya* (Decision 07-66/813-308, 22 August 2007); *Total SA/CEPSA* (Decision 06-92/1186-355 of 20 December 2006); *Mauna/Tyco International* (Decision 06-46/586-159 of 29 June 2006); *Konfrut/Dinter* (Decision 05-84/1149-329 of 15 December 2005); *Doğan Yayın Holding/Turkish Daily News* (Decision 00-49/519-284 of 12 December 2000)).

The Amendment Law – Article 9(1) of Law 4054 – now states that if the Competition Board finds any infringement of Article 7 of Law 4054, it will inform the parties concerned, by way of resolution, of the behaviour required to re-establish competition and of any structural remedies that should be adopted, such as the transfer of certain activities, shareholdings or assets. However, the amendment has introduced a 'first behavioural, then structural remedies' rule for Article 7 violations; therefore, if the behavioural remedies are ultimately considered to be ineffective, the Competition Board will order structural remedies. Undertakings must comply with the structural remedies ordered by the Competition Board within at least six months.

7. 2. If there is a suspensory obligation, what sanctions may be imposed if the transaction closes while the review is ongoing?

Closing the transaction without the approval of the Competition Board will breach the suspension requirement, as explained in question 7.1.

7. 3. How is compliance with conditions of approval and sanctions monitored? What sanctions may be imposed for failure to comply?

Turkey
ELIG Gürkaynak Attorneys-at-Law

In terms of monitoring compliance with remedies submitted, there are no specific timeframes for filing with the Turkish Competition Authority (TCA). The remedies will include their own reporting/informing mechanisms, which will be approved or amended by the TCA.

8.Trends and predictions

8. 1. How would you describe the current merger control landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

Turkey
ELIG Gürkaynak Attorneys-at-Law

Current merger control landscape: In 2022, the Competition Board reviewed 245 transactions in total, including:

- 209 mergers and acquisitions that were approved unconditionally; and
- two transactions that were approved conditionally.

There were no prohibited transactions in 2022.

Thirty-four of the deals were outside the scope of merger control (ie, they either did not meet the turnover thresholds or fell outside the scope of the merger control system due to a lack of change in control).

Generally, the Turkish Competition Authority (TCA) pays special attention to 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, infrastructure, information technologies and platform services and energy – are scrutinised particularly closely. The consolidated statistics on merger cases in 2022 show that transactions were most prevalent in the chemical and mining sector, with 36 notifications; followed by the IT and platform services sector, with 30 notifications.

To the extent that these decisions were also supported by concerns over high levels of concentration, it would be prudent to assume that the TCA will closely scrutinise transactions leading to a concentration in any market for construction materials.

The sector reports published annually by the TCA also indicate current concentration trends. The TCA published a sector inquiry on the hazelnut sector in 2018 and on the exhibition sector in 2019. The TCA also made the following publications on the following dates:

- 5 February 2021 – preliminary report on its sector inquiry on the fast-moving consumer goods sector;
- 7 May 2021 – preliminary report on its sector inquiry on e-marketplace platforms;
- 9 December 2021 – review report on financial technology in payment services;
- 11 March 2022 – final report on its review of the fresh vegetable and fruit sector; and
- 14 April 2022 – final report on its review of the e-marketplace platforms sector.

Legislative reforms: As the most recent legislative development, on 4 March 2022, the TCA published the Amendment Communiqué, introducing new regulations concerning the Turkish merger control regime which have fundamentally affected the notification analysis of merger transactions and merger control notifications submitted to the TCA.

Two of the most significant developments that have resulted from the Amendment Communiqué are:

- a threshold exemption for undertakings active in certain markets/sectors; and
- an increase in the applicable turnover thresholds for concentrations that require mandatory merger control filing before the TCA.

The increased turnover thresholds and the threshold exemption introduced by the Amendment Communiqué have altered the scope of transactions that are notifiable to the TCA. In this regard, concentrations relating to the fields of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies are expected to be more closely scrutinised by the TCA (see question 1.2).

In addition, a proposal for an amendment to Law 4054 was approved by the Grand National Assembly of Turkey on 17 June 2020. The Amendment Law, which was published in the *Official Gazette* and entered into force on 24 June 2020, essentially:

- clarified certain provisions in Law 4054 which had previously led to a degree of legal uncertainty in practice; and
- introduced new provisions, such as those on:
    - the 'significant impediment of effective competition' (SIEC) test for mergers and acquisitions;
    - the *de minimis* principle for agreements;
    - concerted practices and decisions of association of undertakings (except hard-core violations);
    - behavioural and structural remedies for anti-competitive conduct;
    - commitments and settlement mechanisms;
    - the powers of the TCA in on-site inspections; and
    - the self-assessment procedure in the individual exemption mechanism.

Those amendments which directly relate to merger control are:

- the SIEC test; and
- the Competition Board's powers to apply behavioural and structural remedies for anti-competitive conduct.

Furthermore, the Competition Board has enacted secondary legislation through:

- the Communiqué on the Commitments to be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition and Abuse of Dominant Position, published on 16 March 2021; and
- the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position, published on 15 July 2021.

The TCA also published its Guidelines on the Examination of Digital Data during On-site Inspections on 8 October 2020, which set forth general principles with respect to the examination, processing and storage of data and documents held on companies' electronic media and information systems during on-site inspections.

Lastly, as per Communiqué 2021/3 on Agreements, Concerted Practices and Decisions and Practice of Associations of Undertakings That Do Not Significantly Restrict Competition, published in the *Official Gazette* on 16 March 2021, the *de minimis* principle will apply to the following agreements, which are not deemed to significantly restrict competition in the market:

- agreements between competing undertakings where the total market share of the parties to the agreement does not exceed 10% in any of the relevant markets affected by the agreement; and
- agreements between non-competing undertakings where the market share of each party does not exceed 15% in any of the relevant markets affected by the agreement.

Moreover, the *de minimis* principle does not apply to 'naked and hardcore violations' – that is:

- price fixing between competitors;
- allocation of customers, suppliers, regions or trade channels;
- restriction of supply amounts or imposition of quotas;
- collusive bidding in tenders;
- sharing of competitively sensitive information including future prices, output or sales amounts; and
- resale price maintenance between vertically related undertakings (ie, setting fixed or minimum resale price levels for purchasers).

Key Competition Board decisions: Several major merger control decisions on high-value transactions were issued in 2022.

One notable transaction concluded in 2022 was the *Ferro/Prince* Phase II review decision (Decision 22-10/144-59 of 24 February 2022). The transaction concerned the acquisition of sole control over Ferro by American Securities. Following the preliminary examination, the Competition Board decided to initiate a Phase II review in accordance with the first paragraph of Article 10 of Law 4054 based on concerns that the transaction could result in the significant impediment of effective competition in the market for glass coatings for white goods in Turkey.

The Competition Board defined the following product markets, in which competitive concerns were concentrated, and also defined as the affected markets:

- the porcelain enamel coatings market; and
- the glass coatings for white goods market

The Competition Board noted that the transaction would not cause competitive concerns in terms of coordination-inducing effects, considering that:

- the shares to be acquired by the merged entity as a result of the transaction in the porcelain enamel coatings market remained below the threshold set out in the Horizontal Guidelines;
- the increase in market share of the undertaking subject to the transaction would be limited in terms of volume and value;
- strong competition existed in the relevant markets;
- there were no significant barriers to entry to the market;
- there were no significant barriers to switching suppliers; and
- producers had sufficient capacity to meet the demand for porcelain enamel coatings.

The Competition Board also analysed the market shares in the market for glass coatings for white goods for 2020 and noted that the merging undertakings were among the five largest undertakings in the market. Therefore, the Competition Board noted that the possibility for undertakings to exert competitive pressure would be reduced following the merger between two of the five largest players in the market. The board observed that:

- the market in question had a concentrated structure even before the transaction;
- although there were also small suppliers in the market in addition to the five largest players, the parties to the transaction owned a large portion of the market; and
- after the notified transaction, the market share of an important rival undertaking would be eliminated and a market structure with four players and greater concentration would emerge.

Hence, the board concluded that this could lead to a significant restriction of competition in the market.

The merging parties had submitted commitments to the European Commission and the Competition Board concluded in summary that Prince would be divesting its porcelain enamel coating activities and the entire glass coatings business in Europe. Accordingly, the Competition Board ultimately conditionally approved the transaction subject to the implementation of these commitments, since they also removed the horizontal overlaps between the parties in the horizontally affected markets in Turkey.

In *Vinmar/Arısan* (Decision 22-10/155 of 24 February 2022), the Competition Board issued another eye-catching Phase II decision relating to non-compete and non-solicit clause assessments. The transaction concerned the acquisition of Arısan and Transol Arısan by Vinmar Group through Veser Kimya, which would have sole control over the target group. The board analysed the parties' fields of activity and concluded that the following activities of Vinmar Group conducted in Turkey through its subsidiaries could overlap with the activities of the target group:

- cosmetic chemicals (including chemicals for personal care products);
- household chemicals (including detergents and cleaning chemicals);
- food chemicals;
- pharmaceutical chemicals (including veterinary chemicals and active ingredients); and
- the sale of lubricant chemicals.

However, the Competition Board found that the market shares of the parties in the markets with horizontal overlap were low.

Moreover, the agreement included four-year non-compete and non-solicit obligations, which the parties stated reflected their mutual agreement. The parties further stated that these aimed to ensure a smooth transition to the new company structure after the transaction, and that the economic benefits expected from the transaction could not be fully realised if the non-compete and non-solicit obligations had a shorter duration. The parties also stated that a high level of know-how would be transferred, and that the aim was to establish long-term commercial relationships with buyers in the specialty chemicals market.

All in all, the Competition Board approved the transaction on the condition that the duration of non-compete and non-solicit obligations was reduced to three years, taking into account the market structure, customer loyalty and know-how.

Lastly, in *Alleghany/ Berkshire Hathaway* (Decision 22-42/625-261 of 15 September 2022), the Competition Board clarified that undertakings with turnover generated abroad in exempt sectors will be considered to fall within the scope of the exception in terms of the merger control thresholds if they have any activities in Turkey. To that end, the board concluded that Alleghany Corporation operated in the field of 'financial technologies' pursuant to Communiqué 2010/4, as it develops software to manage the systems of reinsurance companies and sells these products to third parties. Accordingly, the turnover threshold requirement of TL 250 million set out in Communiqué 2010/4 did not apply to Alleghany Corporation.

In addition, the Competition Board noted that whether Alleghany Corporation operated in Turkey in the field of 'financial technologies' had no effect on the assessment of the non-application of the turnover threshold requirement of TL 250 million set forth in Communiqué 2010/4; any activity of Alleghany Corporation in Turkey would suffice for the non-application of the relevant requirement.

In this context, the Competition Board concluded that the turnover threshold requirement of TL 250 million set forth in Communiqué 2010/4 will not be considered while determining whether a merger or acquisition is subject to the authorisation of the Competition Board if the target entity operates in "digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies" in any geographical market in the world and conducts any activity in Turkey.

9.Tips and traps

9. 1. What are your top tips for smooth merger clearance and what potential sticking points would you highlight?

Turkey
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It is important that a transaction is not closed until the approval of the Competition Board has been obtained, in order to avoid monetary fines and legal status risks, as explained in question 7.1. Therefore, although Law 4054 sets no specific deadline for filing, it is advisable to file the transaction at least 60 calendar days before closing.

For the sake of completeness, a case-by-case analysis is required to provide an estimate of the time it would take to put together the filing. Nevertheless, the timeframe required to prepare and finalize a notification form depends heavily on the effectiveness of the information flow and the responsiveness of the transaction parties.

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