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Merger Control

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Contributing Editors: **Nigel Parr & Steven Vaz**

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ELIG Gürkaynak Attorneys-at-Law

Overview of merger control activity during the last 12 months

The Turkish merger control regime is primarily regulated by the Law on Protection of Competition No. 4054 ("Law No. 4054") dated December 13, 1994, which was amended on June 24, 2020 ("Amendment Law"), and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("Merger Communiqué") published on October 7, 2010. The Merger Communiqué entered into force as of January 1, 2011 and was amended on February 1, 2013. Subsequently, on February 24, 2017, Communiqué No. 2010/4 was amended by Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 ("Communiqué No. 2017/2"). Finally, the Merger Communiqué was amended by Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 ("Amendment Communiqué"), which was published in the *Official Gazette* on March 4, 2022.

According to the annual statistics of the Mergers and Acquisitions Status Report for 2022, the Competition Board ("Board") reviewed 245 transactions in total, including: 209 M&As that were approved unconditionally; and two decisions that were approved conditionally upon the approval of commitments. 34 were out of the scope of merger control (*i.e.*, they either did not meet the turnover thresholds or fell outside the scope of the merger control system due to a lack of change in control). None of the notified transactions were rejected in 2022.

New developments in jurisdictional assessment or procedure

The primary development in the Turkish competition law regime is the Amendment Communiqué. The Amendment Communiqué entered into force on May 4, 2022. The Amendment Communiqué raised the Turkish merger control thresholds.

In accordance with the Amendment Communiqué, transactions that were closed (*i.e.*, the concentration will be realised) as of or after May 4, 2022 are required to be notified in Turkey if one of the following alternative turnover thresholds is met:

(i) the combined aggregate Turkish turnover of all the transaction parties exceeds TL 750 million (approximately EUR 43.2 million or USD 45.3 million) and the Turkish turnover of each of at least two of the transaction parties exceeds TL 250 million (approximately EUR 14.4 million or USD 15.1 million); or

(ii) the Turkish turnover of the transferred assets or businesses in acquisitions exceeds TL 250 million (approximately EUR 14.4 million or USD 15.1 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (approximately EUR 172.8 million or USD 181.3 million), or the Turkish turnover of any of the parties in mergers exceeds TL 250 million (approximately EUR 14.4 million or USD 15.1 million)

and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (approximately EUR 172.8 million or USD 181.3 million).

In summary, the Amendment Communiqué updated the Turkish merger control thresholds as follows:

(i) the previous threshold of TL 30 million has been raised to TL 250 million;
(ii) the previous threshold of TL 100 million has been raised to TL 750 million; and
(iii) the previous threshold of TL 500 million has been raised to TL 3 billion. (All currency conversions are based on the Turkish Central Bank's applicable average buying exchange rates for the financial year 2022.)

Due to rapid developments in the technology industry, the Amendment Communiqué has also introduced a new merger control regime for undertakings active in certain markets/sectors. Further to the Amendment Communiqué, the Turkish turnover threshold of TL 250 million mentioned above will not be sought for the acquired undertakings active in the numerous fields or assets related to these fields if they: (i) operate in the Turkish geographical market; (ii) conduct research and development activities in the Turkish geographical market; or (iii) provide services to Turkish users. The fields and related assets include: (i) digital platforms; (ii) software or gaming software; (iii) financial technologies; (iv) biotechnology; (v) pharmacology; (vi) agricultural chemicals; and (vii) health technologies.

In terms of the above threshold exemption for certain undertakings, reasoned decisions of the Board have begun to be published, slowly creating precedents on the issue. Of the approximately 10 decisions where the relevant exemption was applied, examples include: *IFGL/Cinven* (22-23/372-157, 18.05.2022), which concerned an undertaking active in the digital platform markets; *Airties/Providence* (22-25/403-167, 02.06.2022), which concerned a programming undertaking; *Affidea/GBL* (22-27/431-176, 16.06.2022), which concerned a biotechnology undertaking; *Clayton/TPG/Covetrus* (22-32/512-209, 07.07.2022), which concerned a pharmacology undertaking; *Astorg/Corden* (22-25/398-164, 02.06.2022), which concerned a pharmacology undertaking; *Biocon Viatris* (22-23/380-159, 18.05.2022), which concerned a pharmacology/molecular medicine undertaking; *Citrix/Tibco* (22-21/344-149, 12.05.2022), which concerned a software undertaking; and *Impala Bidco/HG Capital/EQT Fund/TA* (22-21/354-152, 12.05.2022), which concerned technology undertakings.

The Amendment Communiqué also updated the rules that apply to the calculation of turnover of financial institutions in accordance with recent changes to financial regulations. The recent updates to Article 9 of Communiqué No. 2010/4 are as follows: the calculation of financial institutions' turnovers. The Amendment Communiqué aligns the wording and terms in view of the applicable banking and financial regulation – namely, it excludes the term "participation banks" and refers to the term "banks" in general, which covers all legal forms of banks; and the names and references of the relevant regulations issued by the Banking Regulatory and Supervisory Agency and the Capital Markets Board.

Under Communiqué No. 2010/4, the notification form and its attached documents are submitted to the Competition Authority's ("Authority") headquarters in Ankara by physical delivery. The recent updates allow notifying parties to submit the notification form via e-Devlet, an elaborate system of web-based services, one of which is electronic submission. e-Devlet was already available for submissions, with increased usage during the pandemic period. Communiqué No. 2010/4 explicitly mentions this alternative method of submission in order to make it official.

In June 2020, the dominance test applicable to the review of mergers was reformulated from the "creation or strengthening of a dominant position, thereby significantly lessening of competition" test into the significant impediment of effective competition ("SIEC")

test. In order to align with this modification in the underlying regulation, the Amendment Communiqué now provides that: "Mergers and acquisitions which would result in a significant lessening of effective competition within the entirety or a portion of the country, particularly in the form of creating or strengthening a dominant position are prohibited." This reflects the recently introduced SIEC test, as the wording "one or more undertakings with a view to creating a dominant position" has been replaced with "particularly in the form of creating dominant position".

The Amendment Communiqué also revises the structure and content of the notification form, which is annexed to the Amendment Communiqué. In terms of the definition of "affected markets", the Amendment Communiqué excludes the expression "possibly affected by the transaction subject to the notification"; instead, it provides that "in Turkey affected markets consist of all the relevant product markets and geographical markets where a) two or more of the parties are engaged in commercial activities in the same product market (horizontal relationship), b) At least one of the parties are engaged in commercial activities in the downstream or upstream market of any product market in which the other operates (vertical relationship)".

Communiqué No. 2010/4 provided that the information requested under sections 6, 7 and 8 of the notification form (*e.g.*, import conditions, supply structure, demand structure, market entry conditions and potential competition and efficiency gains) was not required in cases where:

- the aggregate market share of the parties did not exceed 20% in terms of the horizontal relationships; and
- the market share of one of the parties did not exceed 25% in terms of the vertical relationships within the affected markets.

On the other hand, the new template form requires parties to provide some of the detailed information that was sought under sections 6, 7 and 8 of the template form in cases where there are affected markets in Turkey, irrespective of market shares held by the parties in such markets. Further, the Amendment Communiqué requires that information subject to a request for confidential treatment be highlighted in red, which was not necessary on the previous template notification form. The template form emphasises that the transaction value reflects the value of all assets and pecuniary and non-pecuniary benefits (denominated in Turkish lira) that the acquirer has acquired or will acquire from the seller within the scope of the transaction. In this respect, the transaction value now includes all pecuniary payments to be made within the scope of:

- the transaction;
- voting rights;
- securities;
- movable and immovable assets;
- conditional payments;
- additional payments for non-compete obligations (if any); and
- obligations of the acquirer.

Another major development in the Turkish competition law regime is the Amendment Law. The draft law was officially approved by the Turkish Parliament on June 16, 2020. The Amendment Law entered into force on June 24, 2020, on the day it was published in the *Official Gazette*. The Amendment Law aimed to achieve further compliance with the EU competition regime, on which it was closely modelled. The Amendment Law set out the main rules under Article 4 (concerning agreements, concerted practices and decisions restricting competition), Article 6 (concerning abuse of dominant position) and Article 7

(concerning M&A) of Law No. 4054. The amendments introduced: (i) efficient enhancing procedures and mechanisms; and (ii) clarified mechanisms to sustain legal certainty in practice, to a certain extent. To this extent, new mechanisms adopted in relation to a selection of cases include the following: (i) the substantive test applicable to merger control analysis; (ii) behavioural and structural remedies applicable to anticompetitive conduct; and (iii) procedural tools enabling the Board to end its proceedings in certain cases without going through the whole procedure when the parties opt for a commitment or settlement mechanism. Below are the key changes introduced by the Amendment Law:

- *De minimis* principle: The Board can decide not to launch a full-fledged investigation for agreements, concerted practices and/or decisions of associations of undertakings that do not exceed the market share and/or turnover thresholds to be determined by the Board.
- SIEC test: As noted above, in parallel with EU competition law, the dominance test was replaced by the SIEC test. Accordingly, M&A transactions significantly impeding competition can also be prohibited. On the other hand, the SIEC test was regarded to reduce over-enforcement as focus is placed on whether and how much competition is impeded as a result of a transaction.
- Behavioural and structural remedies: In cases where behavioural remedies have failed, structural remedies can be applied for anticompetitive conduct. Application of the remedy mechanism was introduced in Articles 4 and 6 of the Amendment Law, and replaced the mechanism previously applicable under Article 7. Accordingly, the new mechanism applicable for all anticompetitive conduct assessments set application/proof of ineffectiveness of behavioural remedies as a precondition for structural remedies.
- Settlement: The Board, *ex officio* or on the parties' request, can initiate a settlement procedure. Parties that admit to an infringement can apply for the settlement procedure up until the official notification of the investigation report.
- Commitment: Undertakings or associations of undertakings can voluntarily offer commitments during a preliminary investigation or full-fledged investigation to eliminate the Authority's competitive concerns in terms of Articles 4 and 6. Depending on the sufficiency and the timing of the commitments, the Board can decide not to launch a full-fledged investigation following the preliminary investigation or to end an ongoing investigation without completing the entire investigation procedure. In any event, the commitments will not be accepted for violations such as price-fixing between competitors, territory- or customer-sharing or restriction of supply.
- On-site inspections: This amendment confirms the current practice of case handlers, who inspect and make copies of all information and documents in companies' physical and electronic records.
- Self-assessment procedure: The amendment provided legal certainty to the individual exemption regime, as it is set forth that the "self-assessment" principle applies to certain agreements, concerted practices and decisions that potentially restrict competition.
- Time extension for additional opinions: The 15-day time period for submission of the Authority's additional opinion can be doubled if deemed necessary.

The Authority published its Guidelines on Examination of Digital Data during On-Site Inspections on October 8, 2020, which set forth the general principles regarding the examination, processing and storage of data and documents held in electronic media and information systems during on-site inspections.

Additionally, the secondary legislation (Communiqué No. 2021/3), which provides details on the process and procedure related to application of the *de minimis* principle, came into force on March 16, 2021. Furthermore, the Board enacted secondary legislation through the

Communiqué on the Commitments to be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition and Abuse of Dominant Position (Communiqué No. 2021/2), published on March 16, 2021 alongside the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position, published on July 15, 2021.

Furthermore, with the new amendment introduced by Communiqué No. 2021/4 on the Amendments to the Block Exemption Communiqué on Vertical Agreements ("Communiqué No. 2021/4"), promulgated in the Official Gazette No. 31650, dated November 5, 2021, the threshold regarding the supplier's market share(s) in contract goods market(s) has now been lowered to 30%. Pursuant to Communiqué No. 2021/4, a six-month transition period was implemented to ensure compliance with the new market share threshold, which would prevent the application of Article 4 of Law No. 4054 to vertical restraints. Accordingly, only agreements of undertakings that have market shares below 30% in the relevant product markets qualify for the block exemption under Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("Communiqué No. 2002/2"). Thus, where the relevant market shares of the undertakings in question exceed the 30% threshold, the agreement automatically falls outside the scope of the block exemption rules. In such a case, the relevant suppliers may not impose any kind of direct or indirect vertical restraint on buyers with respect to the goods or services covered by the agreements, unless an "individual exemption" is granted by decision of the Board.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

Traditionally, the Authority pays special attention to transactions that take place in sectors where competition infringements are frequently observed and the concentration level is high. Concentrations that concern strategic sectors important to the country's economy (such as automotive, construction, telecommunications, energy, food, health, etc.) also attract the Authority's special scrutiny. The sector reports published annually by the Authority might also be an indicator of the sectors that attract the attention of the Authority.

The last sector reports examined are the e-commerce platforms, fresh fruit and vegetables, financial technologies in payment services sectors, respectively. The Authority's case handlers are always extremely eager to issue information requests (thereby cutting the review period) in transactions relating to these sectors, and even transactions that raise low-level competition concerns are looked into very carefully. In some sectors, the Authority is also statutorily required to seek the written opinion of other Turkish governmental bodies (such as the Turkish Information Technologies and Communication Authority, pursuant to Section 7/2 of the Law on Electronic Communication No. 5809). In such instances, the statutory opinion usually becomes a hold-up item that slows down the review process of the notified transaction.

The consolidated statistics regarding merger cases in 2022 show that transactions were most prevalent in the chemical and mining sector, with 36 notifications, followed by information technologies and platform services sector, with 30 notifications.

The Board adopted many significant decisions in the past year, examples of which are summarised below.

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

(22-10/144-59, 24.02.2022). The transaction concerns the acquisition of sole control over Ferro by American Securities. Following the preliminary examination, the 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 may result in the significant impediment of effective competition in the market for glass coatings for white goods in Turkey.

The Board defined the following product markets, in which competitive concerns were concentrated and also defined as the affected markets:
- porcelain enamel coatings market; and
- glass coatings for white goods market.

The Board noted that the transaction subject to the notification will not cause competitive concerns in terms of coordination-inducing effects considering: shares to be acquired by the merged entity as a result of the transaction in the porcelain enamel coatings market remain below the threshold set out in the Horizontal Guidelines; the increase in the market share of the undertaking subject to the transaction will be limited in terms of volume and value; the existence of strong competitors in the relevant markets; there are no significant barriers to entry to the market; there are no barriers to switching suppliers; and the producers have sufficient capacity to meet the demand for porcelain enamel coatings.

The Board also analysed the market shares for the glass coatings for white goods market for 2020, and noted that the merging undertakings are amongst the largest five undertakings in the glass coating for white goods market. Therefore, the Board evaluated that the possibility for other undertakings to exert competitive pressure decreased following the merger of two of the five largest players in the market. Moreover, the Board observed that the market in question has a concentrated structure even before the transaction, and noted that although there are small suppliers in the market other than the five players, the parties to the transaction own a large portion of the market and after the notified transaction, the market share of an important rival undertaking will be eliminated and a market structure with four players and a more concentrated market structure will emerge. Hence, the Board concluded that this may lead to a significant restriction of competition in the market.

The merging parties submitted commitments to the European Commission, and the Board concluded, in summary, that the divestment of PRINCE's porcelain enamel coating activities and the entire glass coatings business in Europe is foreseen. Accordingly, the Board ultimately conditionally approved the transaction subject to the implementation of the commitments, since those commitments also removed the horizontal overlaps between the parties in the horizontally affected markets in Turkey.

In *Vinmar/Arısan* (22-10/155, 24.02.2022), another Phase II decision, another eye-catching trend of the Board in merger control assessments in 2022 was observed in non-compete or non-solicit clause assessments. Accordingly, the transaction concerns the acquisition of Arisan and Transol Arisan by Vinmar Group through Veser Kimya, and Veser Kimya will have sole control over the Target Group. The Board analysed the parties' fields of activity, and concluded that Vinmar Group's following activities in Turkey through its subsidiaries may overlap with the activities of the Target Group: (i) cosmetic chemicals (including chemicals for personal care products); (ii) household chemicals (including detergents and cleaning chemicals); (iii) food chemicals; (iv) pharmaceutical chemicals (including veterinary chemicals and active ingredients); and (v) the sale of lubricant chemicals. However, the Board assessed that the market shares of the parties in the markets with horizontal overlap are at low levels.

Moreover, the agreement included a four-year non-compete and non-solicit obligations terms for which the parties stated that they reflect mutual agreement; it aimed to ensure

a smooth transition to the company structure that would change after the transaction and that the economic benefits expected from the transaction could not be fully realised with a shorter non-competition obligation. The parties also stated that a high level of know-how was transferred and aimed to establish long-term commercial relationships with buyers in the specialty chemicals market.

All in all, the 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 knowhow.

Lastly, in *Alleghany/Berkshire Hathaway* (22-42/625-261 of September 15, 2022), the Board clarified that undertakings with turnovers generated abroad in sectors that have been exempted will be considered within the scope of the exception in terms of merger control thresholds if they have any activities in Turkey. To that end, the Board concluded that Alleghany Corporation operates in the field of "financial technologies" pursuant to Communiqué No. 2010/4, as it develops software to manage the systems of reinsurance companies and sells these products to third parties, and, accordingly, the turnover threshold requirement of TL 250 million set out in Communiqué No. 2010/4 will not apply to Alleghany Corporation.

In addition, the Board noted that whether or not Alleghany Corporation operates in Turkey in the field of "financial technologies" has no effect on the assessment of the non-application of the turnover threshold requirement of TL 250 million set forth in Communiqué No. 2010/4, and that it is determined that any activity of Alleghany Corporation in Turkey is sufficient for the non-application of the relevant requirement.

In this context, the Board concluded that the turnover threshold requirement of TL 250 million set forth in Communiqué No. 2010/4 will not be sought in determining whether a merger or acquisition transaction is subject to the authorisation of the Board in respect of undertakings operating in "digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies" in any geographical market in the world and carrying out any activity in Turkey or the assets related to these undertakings.

Key economic appraisal techniques applied, e.g., as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The Turkish merger control regime currently utilises a SIEC test in the evaluation of concentrations. In line with EU law, the Amendment Law replaced the dominance test with the SIEC test. Based on the new substantive test, M&As 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 for 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 may 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 how much competition is impeded as a result of a transaction. Thus, pro-competitive M&As may benefit from the test even though a transaction leads to significant market power based on, for instance, major efficiencies. Likewise, dominant undertakings contemplating transactions with *de minimis* impact may also benefit from this new approach.

As the amendments to Law No. 4054 have only recently come into force, although the Board has started to apply the relevant SIEC test in its decisions, it has not published detailed

assessments pertaining to the implementation of such test. However, as the guidelines and secondary legislation have not been revised and new guidelines have not been introduced as a result of the changes in the primary legislation, how the SIEC test will be incorporated remains unclear.

Within the previous implementation of the Law, pursuant to Article 13/II of the Merger Communiqué, M&As that do not create or strengthen a sole or joint dominant position, and that do not significantly impede effective competition in a relevant product market within the whole or part of Turkey, shall be cleared by the Board. Article 3 of Law No. 4054 defines a dominant position as: "*[T]he power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers.*" The Guideline on the Assessment of Horizontal Mergers and Acquisitions ("Horizontal Merger Guideline") states that market shares higher than 50% may be used as an indicator of a dominant position, whereas aggregate market shares below 25% may be used as a presumption that the transaction does not pose competition law concerns. In practice, market shares of about 40% and higher are generally considered, along with other factors such as vertical foreclosure or barriers to entry, as indicators of a dominant position in a relevant market. However, a merger or acquisition can only be blocked when the concentration not only creates or strengthens a dominant position, but also significantly impedes competition in the whole territory of Turkey or in a substantial part of it, pursuant to Article 7 of Law No. 4054.

On the other hand, there were a couple of exceptional cases in which the Board discussed the coordinated effects under a "*joint dominance test*" and rejected some transactions on those grounds. For instance, transactions for the sale of certain cement factories by the Savings Deposit Insurance Fund were rejected after the Board evaluated the coordinated effects of the mergers under a joint dominance test and blocked the transactions on the ground that they would lead to joint dominance in the relevant market. The Board took note of factors such as "*structural links between the undertakings in the market*" and "*past coordinative behaviour*", in addition to "*entry barriers*", "*transparency of the market*" and the "*structure of demand*". It concluded that certain factory sales would result in the creation of joint dominance by certain players in the market, whereby competition would be significantly impeded. Nonetheless, the High State Court overturned the Board's decision and decided that the dominance test does not cover joint dominance. This has been a very controversial topic ever since, as the Board has not prohibited any transaction on the grounds of joint dominance following the decision of the High State Court.

In terms of joint venture transactions, to qualify as a concentration subject to merger control, a joint venture must be of a full-function character, satisfying two criteria: (i) existence of joint control in the joint venture; and (ii) the joint venture being an independent economic entity established on a lasting basis (*i.e.*, having adequate capital, labour and an indefinite duration). If the transaction is a full-function joint venture, the standard SIEC test is applied. Additionally, regardless of whether the joint venture is full-function, it should not have as its object or effect the restriction of competition among the parties or between the parties and the joint venture itself.

Furthermore, economic analysis and econometric modelling has been seen more often in the last years. For instance, in the *AFM/Mars Cinema* case (11-57/1473-539, November 17, 2011), the Board used the OLS and 2SLS estimation models in order to define the price increases expected from the transaction. It also employed the *Breusch/Pagan*, *Breusch-Pagan/Godfrey/Cook-Weisberg*, *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 HHI and CRN 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 (*e.g.*, correlation analysis, SSNIP test, Elzinga-Hogarty test).

Approach to remedies (i) to avoid second stage investigation, and (ii) following second stage investigation

Pursuant to Article 10 of Law No. 4054, once the formal notification has been made, the Board, upon its preliminary review (Phase I) of the notification, will decide either to approve or to investigate the transaction further (Phase II). The Board notifies the parties of the outcome within 30 calendar days following a complete filing. Regarding the procedure and steps of a Phase II review, Law No. 4054 makes reference to the relevant articles governing the investigation procedures for cartel and abuse of dominance cases.

The Board may grant conditional clearances to concentrations. In the case of a conditional clearance, the parties comply with certain obligations such as divestments, licensing or behavioural commitments to help overcome potential competition issues. The Guidelines on Remedies that are Acceptable by the Authority in Merger/Acquisition Transactions provide guidance regarding remedies. The parties can close the transaction after the clearance and before the remedies have been complied with; however, the clearance becomes void if the parties do not fully comply with the remedy conditions.

As is evident from the above, the Merger Communiqué enables the parties to provide commitments to remedy substantive competition law issues that may result from a concentration. The parties may submit to the Board proposals for possible remedies either during the preliminary review (Phase I) or the investigation period (Phase II). If the parties decide to submit the commitment during the preliminary review period (Phase I), the notification is deemed filed only on the date of the submission of the commitment. The commitment can also be submitted together with the notification form. In such a case, a signed version of the commitment that contains detailed information on the context of the commitment should be attached to the notification form.

According to the Guidelines on Remedies, structural remedies take precedence over behavioural remedies, as they produce preferable and concrete results. Although there are few decisions in which behavioural remedies are accepted (see, for example: *EssilorLuxottica/Hal Holding*, 21-30/395-199, 10.06.2021; *Bekaert/Pirelli*, 15-04/52-25, 22.01.2015; *Obilet/Biletal*, 21-33/449-224, 01.07.2021; *Essilor/Luxottica,* 18-36/585-286, 01.10.2018; or *Migros/Anadolu Industry Holding*, 29/420-117, 09.07.2015), the majority of conditional clearance decisions are based on structural remedies (see, for example: *ÇimSA/Bilecik*, 08-36/481-169, 02.06.2008; *Mey İçki/Diageo*, 11-45/1043-356, 17.08.2011; *Burgaz Rakı/Mey İçki*, 10-49/900-314, 08.07.2010; *Essilor/Luxottica*, 18-36/585-286, 01.10.2018; or *Lesaffre/Dosu Maya*, 18-17/316-156, 31.05.2018).

The Authority does not have a clear preference on any particular type of remedies. The assessments are made on a case-by-case basis in view of the specific circumstances surrounding the concentration. Nevertheless, divestitures are the most common commitment procedure in the Turkish merger control regime.

Key policy developments

The major development in the Turkish competition law regime is the Amendment Communiqué, which, *inter alia*, raised the Turkish merger control thresholds and introduced

sector-specific turnover thresholds. During that period, the exchange and inflation rates increased significantly. Based on the USD and EUR equivalents of the applicable thresholds at the time of their introduction, the update will serve as an equaliser, as the new USD and EUR thresholds are close to the levels that were applicable when the previous updates were enacted. The previous update on notification thresholds was made in February 2013, which means that the national competition law enforcement regime used the same thresholds for more than nine years. Before the February 2013 amendments, the older figures had remained in use for only a little more than two years.

Another key development is the Amendment Law, which changed the substantive test by replacing the dominance test with the SIEC test. Accordingly, M&A transactions significantly impeding competition are prohibited. Having said that, the secondary legislation, which should be providing further insight into the application of the new SIEC test, is yet to change. Apart from the Amendment Law, the following guidelines promulgated prior to such Amendment Law are still in effect and serve as the most important documents in relation to the assessment of concentrations: (i) the Guideline on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions ("Guideline on Undertakings Concerned"); (ii) the Horizontal Merger Guideline; and (iii) the Guideline on the Assessment of Non-Horizontal Mergers ("Non-Horizontal Merger Guideline"). These Guidelines are in line with EU competition law regulations and seek to retain harmony between EU and Turkish competition law instruments.

The Board's approach to market shares and concentration levels is similar to the approach taken by the European Commission and enumerated in the Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2004/C 31/03). As the first factor discussed under the Horizontal Merger Guideline, market shares above 50% can be used as evidence of a dominant position. If the market share of the combined entity remains below 25%, this would not lead to a need for further investigation into the likelihood of harmful effects resulting from the combined entity. Although a brief mention of the Board's approach to market shares and HHI levels is provided, the Horizontal Merger Guideline's emphasis on an effects-based analysis (coordinated/non-coordinated effects), without further discussing the criteria to be used in evaluating the presence of dominant position, indicates that the dominant position analysis still remains subject to Article 7 of Law No. 4054.

Other than the market share and concentration level discussion, the Horizontal Merger Guideline covers the following main topics: the anticompetitive effects that a merger would have in the relevant markets; buyer power as a countervailing factor in anticompetitive effects resulting from the merger; the role of entry in maintaining effective competition in the relevant markets; efficiencies as a factor counteracting the harmful effects on competition which might otherwise result from the merger; and conditions of the failing company defence. The Horizontal Merger Guideline also discusses coordinated effects in the market that may arise from a merger of competitors via increasing concentration in the market, and may even lead to collective dominance. In its discussion of efficiencies, the Horizontal Merger Guideline indicates that the efficiencies should be verifiable and should provide a benefit to customers. Significantly, the Horizontal Merger Guideline provides that the failing firm defence has three conditions: (i) the allegedly failing firm will soon exit the market if not acquired by another firm; (ii) there is no less restrictive alternative to the transaction under review; and (iii) it should be the case that unless the transaction is cleared, the assets of the failing firm will inescapably exit the market.

The Non-Horizontal Merger Guideline confirms that non-horizontal mergers, where the post-merger market share of the new entity in each of the markets concerned is below 30% and the post-merger HHI is below 2,000 (except where special circumstances are present), are unlikely to raise competition law concerns, similar to that set out in the Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2008/C 265/07). Other than the Board's approach to market shares and concentration levels, the other two factors covered in the Non-Horizontal Merger Guideline include the effects arising from vertical mergers, and the effects of conglomerate mergers. The Non-Horizontal Merger Guideline also outlines certain other topics, such as customer restraints, general restrictive effects on competition in the market, and restriction of access to the downstream market.

Apart from the foregoing, the below communiqués and guidelines are the recent key legislative developments:

- The Guidelines on Examination of Digital Data during On-Site Inspections were accepted on October 8, 2020.
- Communiqué No. 2021/2 on the Commitments to be offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition and Abuse of Dominant Position came into force on March 16, 2021.
- Communiqué No. 2021/3 on *De Minimis* Applications for Agreements, Concerted Practices and Decisions of Associations of Undertakings came into force on March 16, 2021.
- Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position on July 15, 2021.
- Communiqué No. 2021/4 promulgated in the *Official Gazette* dated November 5, 2021.
- The Amendment Communiqué No. 2022/2 was published in the *Official Gazette* on March 4, 2022 and entered into force on May 4, 2022.

Reform proposals

With respect to legislative reforms, the newly introduced Amendment Law, which entered into force on June 24, 2020, aims to embody the Authority's more than 20 years of enforcement experience and bring Turkish competition law closer to EU competition law. It is designed to be more compatible with the way the law is being applied in practice and aims to further comply with EU competition law. The most prominent changes introduced by the Amendment Law are as follows:

- *de minimis* principle for agreements, concerted practices or decisions of association of undertakings;
- SIEC test for M&As;
- behavioural and structural remedies for anti-competitive 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 mechanisms.

Since the introduction of the Amendment Law, the majority of newly introduced mechanisms and investigation methods were clarified via the enactment of secondary legislation. The Competition Authority published its Guidelines on Examination of Digital Data during On-site Inspections on October 8, 2020, which set forth the general principles with respect to the examination, processing and storage of data and documents held in electronic media

and information systems during on-site inspections. Moreover, the Competition Authority published the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position on July 15, 2021, which set forth rules and procedures concerning the settlement process for undertakings that admit to the existence of a violation. Furthermore, the Authority published 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 on March 16, 2021, which set out principles and procedures in relation to commitments submitted by undertakings in order to eliminate competition problems. The Authority also published the Communiqué on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings That Do Not Significantly Restrict Competition on March 16, 2021, which set out the principles regarding criteria to be used to identify the practices of the undertakings which can be excluded from the scope of the investigation.

Lastly, with the new amendment introduced by Communiqué No. 2021/4 on the Amendments to the Block Exemption Communiqué on Vertical Agreements (Communiqué No. 2021/4), which was promulgated in the *Official Gazette* dated November 5, 2021, No. 31650, the threshold regarding the supplier's market share of the market(s) for the contract goods has now been lowered to 30%. Pursuant to Communiqué No. 2021/4, a six-month transition period will be implemented to ensure compliance with the new market share threshold, which would prevent Article 4 of the Competition Law applying to vertical restraints that currently benefit from the block exemption, based on the 40% market share threshold. These vertical restraints will continue to be exempted until May 5, 2022, after which the parties may need to modify the agreement to comply with the new regulation. Accordingly, only agreements of undertakings that have market shares below 30% in the relevant product markets qualify for the block exemption under Block Exemption Communiqué No. 2002/2 on Vertical Agreements. Thus, if the relevant market shares of the undertakings in question exceed the 30% threshold, the agreement automatically falls outside the scope of the block exemption rules. In that case, the relevant suppliers may not impose any kind of direct or indirect vertical restraints on buyers with respect to the goods or services covered by the agreements, unless an "individual exemption" is granted by a decision of the Board.

Dr. Gönenç Gürkaynak
Tel: +90 212 327 17 24 / Email: gonenc.gurkaynak@elig.com

Dr. Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 95 lawyers based in Istanbul, Turkey. Dr. Gürkaynak graduated from Ankara University, Faculty of Law in 1997 and was called to the Istanbul Bar in 1998. Dr. Gürkaynak received his LL.M. degree from Harvard Law School, and he has received his Doctor of Philosophy in Law (Ph.D.) degree from University College London (UCL) Faculty of Laws. Before founding ELIG Gürkaynak Attorneys-at-Law in 2005, Dr. Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years. He was admitted to: the American Bar Association in 2002; New York Bar in 2002 (currently non-practising; registered); Brussels Bar in 2003–2004 (B List; not maintained); and Law Society of England & Wales, 2004 (currently non-practising; registered).

Dr. Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 56 lawyers. He has unparalleled experience in Turkish competition law counselling issues, with more than 25 years of competition law experience, starting with the establishment of the Turkish Competition Authority.

Every year, Dr. Gürkaynak represents multinational companies and large domestic clients in more than 35 written and oral defences in investigations of the Turkish Competition Authority, around 15 antitrust appeal cases in the high administrative court, and over 85 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and European Cmissioncompetition law topics. Dr. Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 200 articles in English and Turkish with various international and local publishers.

Öznur İnanılır
Tel: +90 212 327 17 24 / Email: oznur.inanilir@elig.com

Ms. Öznur İnanılır joined ELIG Gürkaynak Attorneys-at-Law in 2008. She graduated from Başkent University, Faculty of Law in 2005 and following her practice at a reputable law firm in Ankara, she obtained her LL.M. degree in European Law from London Metropolitan University in 2008. She is a member of the Istanbul Bar. Ms. İnanılır became a partner within the Regulatory and Compliance department in 2016 and has extensive experience in all areas of competition law, in particular: compliance with competition law rules; defences in investigations alleging restrictive agreements; abuse of dominance cases; and complex merger control matters. She has represented various multinational and national companies before the Turkish Competition Authority. Ms. İnanılır has authored and co-authored articles published internationally and locally, in both English and Turkish, pertaining to her practice areas.

ELIG Gürkaynak Attorneys-at-Law

Çitlenbik Sokak, No:12, Yıldız Mahallesi 34349, Beşiktaş, İstanbul, Turkey/Türkiye
Tel: +90 212 327 17 24 / URL: www.elig.com

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