MERGER CONTROL

Turkey

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Merger Control

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Quick reference guide enabling side-by-side comparison of local insights into legislation and regulators; scope of legislation; thresholds, triggers and approvals; notification and clearance timetable; substantive assessment; remedies and ancillary restraints; involvement of other parties or authorities; judicial review; enforcement record and reform proposals; and recent trends.

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Key developments of the past year

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

What is the relevant legislation and who enforces it?

The relevant legislation on merger control is Law No. 4054 on the Protection of Competition dated 13 December 1994 (the Competition Law) and communiqués published by the Turkish Competition Authority (the Authority). In particular, article 7 of the Competition Law governs mergers and acquisitions.

The Authority is a legal entity with administrative and financial autonomy. The Authority comprises the Turkish Competition Board (the Board), presidency and service departments, including six divisions with a sector-specific work distribution that handle competition law enforcement work through approximately 160 case handlers. A research and economic analysis department as well as leniency, decisions, information technology, external relations, management services, strategy development, internal audit, consultancy, media and public relations, human resources, and cartel and on-site investigation support units assist the six technical divisions and the presidency in the completion of their tasks.

On 24 June 2020, Law No. 7246 on the Amendment to the Competition Law (the Amendment Law) was published in the Official Gazette and entered into force.

Article 7 of the Competition Law authorises the Board to regulate, through communiqués, which mergers and acquisitions should be notified to the Authority to gain validity. Further to this provision, Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4) was published on 7 October 2010, replacing Communiqué No. 1997/1 on Mergers and Acquisitions Requiring the Approval of the Competition Board as of 1 January 2011.

Communiqué No. 2010/4 is now the primary instrument for assessing merger cases in Turkey. It sets forth the types of mergers and acquisitions that are subject to the Board's review and approval, bringing about some significant changes to the Turkish merger control regime. The secondary legislation has not been revised and new secondary legislation has not been introduced in view of the Amendment Law as at the time of writing.

On 4 March 2022, the Authority published Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 (the Amendment Communiqué). The Amendment Communiqué introduced new rules concerning the Turkish merger control regime that fundamentally affect merger control notifications submitted to the Authority.

Pursuant to article 7 of the Amendment Communiqué, the changes introduced by the Amendment Communiqué became effective on 4 May 2022. One of the most significant developments that the Amendment Communiqué entails is the increase of the applicable turnover thresholds for concentrations that require mandatory merger control filing before the Authority and the introduction of threshold exemptions for undertakings that are active in certain markets or sectors.

Law stated - 03 May 2023

Scope of legislation

What kinds of mergers are caught?

The Amendment Law amends article 7 of the Competition Law and introduces the significant impediment to effective competition test, similar to the approach under the EU Merger Regulation (EUMR). Under the Amendment Law, the Authority 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.

Communiqué No. 2010/4 defines the scope of notifiable transactions in article 5 as follows:

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

Pursuant to article 6 of Communiqué No. 2010/4, the following transactions do not fall within the scope of article 7 of the Competition Law and therefore will not be subject to the approval of the Board:

- intra-group transactions and other transactions that do not lead to change in control;
- temporary possession of securities for resale purposes by undertakings whose normal activities are to conduct transactions with those 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 purposes; and
- acquisition by inheritance as provided for in article 5 of Communiqué No. 2010/4.

In addition to the above, the Authority also introduced Communiqué No. 2017/2 amending Communiqué No. 2010/4. One of the amendments introduced to Communiqué No. 2010/4 is that article 1 of Communiqué No. 2017/2 abolished article 7(2) of Communiqué No. 2010/4, which dictated that the 'thresholds . . . are re-determined by the Board biannually'.

As a result of this amendment, the Board no longer bears the duty to re-establish turnover thresholds for concentrations every two years. To that end, there is no specific timeline for the review of the jurisdictional turnover thresholds set forth by article 7(1) of Communiqué No. 2010/4.

In addition, article 2 of Communiqué No. 2017/2 modified article 8(5) of Communiqué No. 2010/4, so the Board is now in a position to evaluate the transactions realised by the same undertaking concerned in the same relevant product market within three years as a single transaction, as well as two transactions carried out between the same persons or parties within a three-year period.

Law stated - 03 May 2023

What types of joint ventures are caught?

According to article 5(3) of Communiqué No. 2010/4, joint ventures are subject to notification to, and approval of, the Board. To qualify as a concentration subject to merger control, a joint venture must be of a full-function character and satisfy two criteria:

- joint control in the joint venture exists; and
- the joint venture must be an independent economic entity established on a lasting basis (full-function joint venture).

Additionally, regardless of whether the joint venture is full-function, it should not have as its object or effect the restriction of competition among or between the parties and the joint venture itself within the meaning of article 4 of

the Competition Law, which prohibits restrictive agreements. If the parent undertakings of a joint venture operate in the same market, or the downstream, upstream or neighbouring market, as the joint venture, this could lead to coordination between independent undertakings that restricts competition within the meaning of article 4 of the Competition Law.

If the nature of the joint venture turns out to be non-full-function, although such joint ventures are not subject to a merger control filing obligation, they may fall under article 4 of the Competition Law. The parties can undertake a self-assessment individual exemption test, which is set out under article 5 of the Competition Law, on whether the joint venture meets the conditions for individual exemption (which are very similar to, if not the same as, the EU regime). Notifying the transaction for an individual exemption is not a positive duty of the parties, but it is an option granted to them.

Law stated - 03 May 2023

Is there a definition of 'control' and are minority and other interests less than control caught?

Communiqué No. 2010/4 provides a definition of 'control' that does not fall far from the definition of this term in article 3 of the EUMR. According to article 5(2) of Communiqué No. 2010/4:

> *'Control can be constituted by rights, agreements or any other means which, either separately or jointly, de facto or de jure, confer the possibility of exercising decisive influence on an undertaking. These rights or agreements are instruments which confer decisive influence in particular by ownership or right to use all or part of the assets of an undertaking, or by rights or agreements which confer decisive influence on the composition or decisions of the organs of an undertaking.'*

Pursuant to the presumption regulated under article 5(2) of Communiqué No. 2010/4, control shall be deemed to have been acquired by persons or undertakings that are the holders of rights, that are entitled to the rights under the agreements concerned, or, despite not being the holders of the rights or entitled to rights under those agreements, have de facto power to exercise these rights.

In short, much like the EU regime, mergers and acquisitions resulting in a change of control are subject to the approval of the Board under the Competition Law. Control is understood to be the right to exercise decisive influence over day-to-day management or on long-term strategic business decisions, and it can be exercised de jure or de facto; therefore, 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 the management of the company (eg, privileged shares conferring management powers), the nature of control could be deemed to have changed (eg, a change from sole to joint control) and the transaction could be subject to filing.

Law stated - 03 May 2023

Thresholds, triggers and approvals

What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Pursuant to the Amendment Communiqué, a transaction must be notified before the Authority if one of the following increased turnover thresholds is met:

- the aggregate Turkish turnover of the transaction parties exceeds 750 million liras, and the Turkish turnover of at

least two of the transaction parties each exceeds 250 million liras; or

- either:
  - the Turkish turnover of the transferred assets or businesses in the acquisition exceeds 250 million liras, and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion liras; or
  - the Turkish turnover of any of the parties in the merger exceeds 250 million lira, and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion liras.

Accordingly, the Amendment Communiqué increased the previous turnover thresholds of:

- 30 million liras to 250 million liras;
- 100 million liras to 750 million liras; and
- 500 million liras to 3 billion liras.

Furthermore, the Amendment Communiqué introduced a threshold exemption for undertakings that are active in certain markets or sectors. Pursuant to the Amendment Communiqué, the turnover threshold of 250 million liras will not apply to acquired undertakings that are active in, or assets related to, the fields of digital platforms, software or gaming software, financial technology, biotechnology, pharmacology, agricultural chemicals, or health technology (target companies) if they:

- operate in the Turkish geographical market;
- conduct research and development (R&D) activities in the Turkish geographical market; or
- provide services to users in the Turkish geographical market.

The Amendment Communiqué does not seek a Turkish nexus in terms of the activities that trigger the threshold exemption; in other words, it would be sufficient for the target company to be active in the fields of digital platforms, software or gaming software, financial technology, biotechnology, pharmacology, agricultural chemicals, or health technology (the specified fields) anywhere in the world for the threshold exemption to become applicable, provided that the target company:

- generates revenue from customers located in Turkey;
- conducts R&D activities in Turkey; or
- provides services to Turkish users in any fields other than the abovementioned ones.

Accordingly, for the exemption on the local turnover thresholds to become applicable, the Amendment Communiqué does not require revenue to be generated from customers located in Turkey, R&D activities to be conducted in Turkey or services to be provided to Turkish users concerning the specified fields.

The tests provided under article 7(b) of the Competition Law are two separate tests: article 7(b)(i) is applicable only in acquisition transactions (as well as joint ventures), while article 7(b)(ii) is applicable only in merger transactions.

Where the transaction does not meet the relevant thresholds, the transaction is not deemed notifiable. Furthermore, Communiqué No. 2010/4 does not seek the existence of an affected market in assessing whether a transaction triggers a notification requirement.

Law stated - 03 May 2023

Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Once the thresholds are exceeded, there is no exception for filing a notification cited in the Competition Law or its secondary legislation. There is no de minimis exception nor are there other exceptions under the Turkish merger control regime, except for a certain type of merger in the banking sector.

Law stated - 03 May 2023

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers are caught under Competition Law regardless of whether the transaction parties have a Turkish nexus or generate any Turkish turnover; in other words, whether transaction parties have a Turkish nexus is not relevant for the analysis of if the transaction is notifiable under the Turkish merger control regime. Additionally, according to Communiqué No. 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 competition assessment and the notification form.

Law stated - 03 May 2023

Are there also rules on foreign investment, special sectors or other relevant approvals?

Article 9 of Communiqué No. 2010/4, along with the general items to be taken into account in calculating the total turnover of the parties to the transaction, sets forth specific methods of turnover calculation for financial institutions. Those special methods of calculation apply to banks, financial leasing companies, factoring companies and insurance companies, etc.

Banking Law No. 5411 provides that the provisions of articles 7, 10 and 11 of the Competition Law shall not be applicable on the condition that the sectoral share of the total assets of the banks subject to merger or acquisition does not exceed 20 per cent. Turkish competition legislation provides no special regulation applicable to foreign investments.

The Amendment Communiqué introduced a threshold exemption for undertakings that are active in certain markets or sectors. Pursuant to the Amendment Communiqué, the turnover threshold of 250 million liras will not apply to target companies that are active in, or assets related to, the specified fields if they operate in the Turkish market, conduct R&D activities in the Turkish market or provide services to users in the Turkish market.

If the target company's activities fall into the specified fields, the thresholds that apply are as follows:

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

Accordingly, when an undertaking that falls within the definition and criteria above is being acquired, the transaction is notifiable if the aggregate Turkish turnover of the target company and the acquirer exceeds 750 million liras or the worldwide turnover of the acquirer exceeds 3.75 billion liras.

Law stated - 03 May 2023

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Deadlines for filing

Law No. 4054 on the Protection of Competition dated 13 December 1994 (the Competition Law) provides no specific deadline for filing. It is important that the transaction is not closed before the approval of the Turkish Competition Board (the Board) is granted.

Penalties for not filing

If the parties to a merger or acquisition that requires the approval of the Board realise the transaction without obtaining the approval of the Board, a monetary fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) shall be imposed on the incumbent undertakings (acquirers in the case of an acquisition, and both merging parties in the case of a merger), regardless of the outcome of the Board's review of the transaction.

The minimum fine is revised annually through a communiqué published each year. For 2023, the minimum fine is 105,688 liras.

Invalidity of the transaction

Another very important sanction, which is more of a legal than economic character, is set out under article 7 of the Competition Law and article 10 of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4): a notifiable merger or acquisition that is not notified to and approved by the Board shall be deemed legally invalid, with all its legal consequences.

Termination of infringement and interim measures

Article 9(1) of the Competition Law (introduced by Law No. 7246 on the Amendment to the Competition Law) states that, should the Board find any infringement of article 7, it shall inform the parties concerned through a resolution of the behaviour that should be followed or avoided to establish competition and of structural remedies, such as the transfer of certain activities, shareholdings or assets.

The amendment introduces a first behavioural, then structural remedy rule for article 7 violations; therefore, where the behavioural remedies are ultimately considered to be ineffective, the Board will order structural remedies. Undertakings must comply with the structural remedies ordered by the Board within a minimum period of six months.

Termination of transaction and turnover-based monetary fines

If, at the end of its review of a notifiable transaction that was not notified, the Board decides that the transaction falls within the prohibition provisions of article 7 (ie, the transaction significantly impedes effective competition), the undertakings shall be subject to fines of up to 10 per cent of their turnover generated in the financial year preceding the

date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Managers or employees of parties that had a determinant effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the applicable party.

In determining the monetary fines on the parties, the Board takes into consideration repetition of the infringement, the infringement's duration, the market power of the undertakings, the undertakings' decisive influence in the realisation of the infringement, whether the undertakings comply with the commitments given, whether the undertakings assisted the examination and the severity of the damage that occurred or is likely to occur.

In addition to the monetary sanction, the Board is authorised to:

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

Failure to notify correctly

If the information requested in the notification form is incorrect or incomplete, the notification is deemed to have been filed only on the date when the information is completed upon the Board's subsequent request for further data.

In addition, the Turkish Competition Authority (the Authority) will impose a turnover-based monetary fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) on natural persons or legal entities that qualify as an undertaking or as an association of undertakings, as well as the members of those associations in cases where incorrect or misleading information is provided by the undertakings or associations of undertakings in a notification filed for exemption, negative clearance or the approval of a merger or acquisition, or in connection with notifications and applications concerning agreements made before the Competition Law entered into force.

Law stated - 03 May 2023

Which parties are responsible for filing and are filing fees required?

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

There is no filing fee required in Turkish merger control proceedings.

Law stated - 03 May 2023

What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Board, upon its preliminary review (Phase I) of the notification, will decide either to approve or to investigate the transaction further (Phase II). It notifies the parties of the outcome within 30 days of a complete filing. In the absence of any such notification, the decision is deemed to be an approval through an implied approval mechanism introduced by article 10(2) of the Competition Law.

The Authority can send written information requests to the parties, any other party relating to the transaction, or third parties such as competitors, customers or suppliers. Any written request by the Authority for missing information will cut the review period and restart the 30-calendar-day period from the first day, counted as of the date on which the responses are submitted.

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

Law stated - 03 May 2023

Pre-clearance closing

What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

There is an explicit suspension requirement. If a merger or acquisition is closed before clearance, the substantive test is the main issue for the determination of the consequences. If the Board reaches a conclusion that the transaction significantly impedes effective competition in any relevant product market, the undertakings concerned as well as their employees and directors could be subject to monetary fines and sanctions. In any case, a notifiable merger or acquisition not notified to and approved by the Board shall be deemed legally invalid, with all its legal consequences.

The wording of article 16 of the Competition Law envisages imposing a monetary penalty if merger or acquisition transactions subject to approval are realised without the approval of the Board. The monetary fine is 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) in Turkey.

The liability for fines is on firms that are the acquirers in the case of an acquisition and on both merging parties in the case of a merger. The minimum fine for 2023 is 105,688 liras.

Law stated - 03 May 2023

Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The foreign-to-foreign nature of a transaction does not prevent imposition of any administrative monetary fine (either for suspension requirement or for violation of article 7 of the Competition Law) in and of itself. In the case of failure to notify (ie, closing before clearance), foreign-to-foreign mergers are caught under the Competition Law regardless of whether the transaction parties have a Turkish nexus or generate any Turkish turnover, and whether there is an affected market or not.

As an example, in the Sims Metal/Fairless decision (16 September 2009, No. 09-42/1057-269), where both parties were only exporters into Turkey, the Board imposed an administrative monetary fine on Sims Metal East LLC (the acquirer) subsequent to the first paragraph of article 16 of the Competition Law, totalling 0.1 per cent of Sims Metal East LLC's gross revenue generated in the 2009 fiscal year, because of closing the transaction before obtaining the approval of the Board.

Similarly, the Board's Longsheng (2 June 2011, No. 11-33/723-226), FLIR Systems Holding/Raymarine PLC (17 June 2010, No. 10-44/762-246) and CVRD Canada Inc (8 July 2010, No. 10-49/949-332) decisions are examples wherein the Board imposed turnover-based monetary fines based on violations of the suspension requirement in foreign-to-foreign transactions.

Law stated - 03 May 2023

What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Under article 10 of Communiqué No. 2010/4, a transaction is deemed to have been realised (ie, closed) on the date on which the change in control occurs. It remains to be seen whether this provision will be interpreted by the Authority in a way that allows the parties to a notification to carve out the Turkish jurisdiction with a hold-separate agreement.

This has been rejected by the Board so far (eg, the Board's Total SA decision dated 20 December 2006, No. 06-92/1186-355; and its CVR Inc-Inco Limited decision dated 1 February 2007, No. 07-11/71-23), with the Board arguing that a closing is sufficient for the suspension violation fine to be imposed and that further analysis of whether a change in control actually took effect in Turkey is unwarranted.

Law stated - 03 May 2023

Public takeovers

Are there any special merger control rules applicable to public takeover bids?

The notification process differs for privatisation tenders, with regard to which the Board's Communiqué No. 1998/4 was replaced with Communiqué No. 2013/2 on the Procedures and Principles to be Pursued in Pre-Notifications and Authorisation Applications to be Filed with the Competition Authority for Acquisitions via Privatisation to Become Legally Valid (Communiqué No. 2013/2).

According to Communiqué No. 2013/2, it is mandatory to file a pre-notification before the public announcement of tender and receive the opinion of the Board in cases where the turnover of the undertaking or the asset or service production unit to be privatised exceeds 250 million liras.

Further, Communiqué 2013/2 promulgates that for the acquisitions to become legally valid through privatisation, which requires pre-notification to the Authority, it is also mandatory to get approval from the Board. The application should be filed by all winning bidders after the tender but before the Privatisation Administration's decision on the final acquisition.

Law stated - 03 May 2023

Documentation

What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 (the Amendment Communiqué) requires a more complex notification form, which is similar to the European Commission's Form CO.

The Amendment Communiqué introduces a new sample notification form that aims to make the filings entirely digital. There has been an increase in the amount of information requested, including the global relevant product markets that the parties operate in, globally overlapping markets and market-sharing data regarding such globally overlapping activities, and data with respect to supply and demand structure, imports, potential competition and expected efficiencies.

Additionally, if a given transaction would give rise to an affected market or markets in Turkey, the new sample notification form requires the disclosure of information regarding import conditions, supply structure, demand structure, market entry conditions, and potential competition and efficiency gains.

Some additional documents are also required, such as the executed (or current copies and sworn Turkish translations) of some of the transaction documents and annual reports, including the balance sheets of the parties, detailed organisational structure charts and, if available, market research reports for the relevant market. Bearing in mind that each subsequent request by the Board for incorrect or incomplete information will prolong the waiting period, providing detailed and justified answers and information in the notification form is to the advantage of the parties. A turnover-based monetary fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) will be applied on natural persons or legal entities that qualify as an undertaking or as an association of undertakings, as well as the members of those associations in cases where incorrect or misleading information is provided by the undertakings or associations of undertakings in a notification filed for the approval of a merger or acquisition.

Law stated - 03 May 2023

Investigation phases and timetable

What are the typical steps and different phases of the investigation?

The Board, upon its preliminary review of the notification (ie, Phase I) will decide either to approve or to investigate the transaction further (ie, Phase II). It notifies the parties of the outcome within 30 calendar days of a complete filing.

In the absence of any such notification, the decision is deemed to be an approval through an implied approval mechanism introduced by the relevant legislation. Any written request by the Authority for missing information will stop the review process and restart the 30-calendar-day period on the date of the provision of that information.

If a notification leads to a Phase II review, it turns into a fully-fledged investigation. Under Turkish competition law, Phase II investigations take about six months. If necessary, the Board may extend this period once by up to six months.

Law stated - 03 May 2023

What is the statutory timetable for clearance? Can it be speeded up?

Pursuant to article 10 of the Competition Law, if the Board, upon its preliminary review of the notification, decides to further investigate the transaction, it shall notify the parties within 30 days of the filing and the transaction will be suspended, and additional precautionary actions deemed appropriate by the Board may be taken until the final decision is rendered.

Article 13(4) of Communiqué No. 2010/4 states that if the transaction needs to be further investigated (ie, Phase II review), the provisions of articles 40 to 59 of the Competition Law shall be applied to the extent that they are compatible with the relevant situation.

Regarding the procedure and steps of such an investigation, article 10 makes reference to sections IV (articles 40 to 55) and V (articles 56 to 59) of the Competition Law, which govern the investigation procedures and legal consequences of restriction of competition, respectively.

Neither the Competition Law nor Communiqué No. 2010/4 foresees a fast-track procedure to speed up the clearance process. Aside from close follow-up with the case handlers reviewing the transaction, the parties have no available means to speed up the review process.

Law stated - 03 May 2023

SUBSTANTIVE ASSESSMENT

Substantive test

What is the substantive test for clearance?

The substantive test is the significant impediment to effective competition (SIEC) test under article 9(1) of Law No. 4054 on the Protection of Competition dated 13 December 1994 (the Competition Law), introduced by Law No. 7246 on the Amendment to the Competition Law (the Amendment Law), similar to the approach under the EU Merger Regulation. With this test, the Turkish Competition Authority (the Authority) will be able to prohibit not only transactions that may create a dominant position or strengthen an existing dominant position, but also those that could significantly impede competition.

Although the Turkish Competition Board (the Board) has started to apply the SIEC test in its decisions, it has not published detailed assessments pertaining to the implementation of the test; however, as the guidelines and secondary legislation to the Competition Law have not been revised and new guidelines have not yet been introduced, how the SIEC test will be incorporated remains unclear.

Having said that, in terms of creating or strengthening a dominant position, article 3 of the Competition Law defines '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 of their competitors and purchasers in determining economic parameters, such as the amount of production, distribution, price and supply.

According to the Guidelines on Abuse of Dominance, the threshold of 40 per cent could only constitute a presumptive element for an undertaking having a dominant position; therefore, the Board also considers various market characteristics as indicators of competition pressures in the market, which can potentially set off or abate the effects of high market shares and concentration levels. Prominent examples of such factors are:

- the competitors' capacity to increase production in response to increases in price levels;
- the merged entity's capacity to impede the growth of competitors;
- countervailing buying power; and
- potential competition or lack of barriers to entry.

The test does not vary by sector.

Law stated - 03 May 2023

Is there a special substantive test for joint ventures?

The Board evaluates joint venture notifications according to two criteria: existence of joint control in the joint venture and the joint venture being an independent economic entity established on a lasting basis (ie, having adequate capital and labour, and an indefinite duration).

In recent years, the Board has consistently applied the full-function test when determining whether the joint venture is an independent economic entity. If the transaction is found to bring about a full-function joint venture in light of the two criteria mentioned above, the SIEC test will be 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 No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4) provides that the Board will

carry out an individual exemption review on notified joint ventures that emerge as independent economic units on a lasting basis but have as their object or effect the restriction of competition among the parties or between the parties and the joint venture itself. The wording of the standard notification form allows for such a review as well.

Law stated - 03 May 2023

Theories of harm

What are the 'theories of harm' that the authorities will investigate?

Unilateral effects have been the predominant criterion in the Authority's assessment of mergers and acquisitions in Turkey. That said, in recent years, there have been a couple of exceptional cases where the Board discussed the coordinated effects under a joint dominance test and rejected the transaction on those grounds (eg, the Board's Ladik decision dated 20 December 2005, No. 05-86/1188-340). Those cases related to the sale of certain cement factories by the Savings Deposit Insurance Fund.

The Board evaluated the coordinated effects of the mergers under a joint dominance test and blocked the transactions on the grounds that the transactions 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, the 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 whereby competition would be significantly lessened.

Regarding one such decision, when an appeal was made before the Council of State, the Council of State ruled by mentioning, among other things, that the Competition Law prohibited only single dominance and therefore stayed the execution of the decision by the Board, which was based on collective dominance. No transaction has been blocked on the grounds of vertical foreclosure or conglomerate effects, and few decisions discuss these theories of harm.

Although no transaction has been blocked on the grounds of vertical foreclosure or conglomerate effects, in the Toyota/Vive decision (6 April 2017, No. 17-12/143-63), the Board provided an assessment of the main factors that should be considered for the evaluation of the conglomerate concentrations. This decision is significant because the Board did not previously focus on conglomerate effects of transactions, although conglomerate effects were an important issue for the European Commission in 2017 (eg, Qualcomm/NXP and Bayer/Monsanto).

The transaction concerns the acquisition of sole control over Vive BV by Toyota. Although the parties to the transaction submitted that there would not be an affected market since their activities did not horizontally or vertically overlap in Turkey, the Board decided that the transaction would lead to a conglomerate concentration, given that the activities of the parties were complementary to and substitutable for each other. Accordingly, the Board asserted that foreclosing the market to competitors was realised through unilateral conduct in the form of tying, bundling and other exclusionary behaviours, and, in addition to the market shares of the parties, the incentive and the ability to foreclose a market should be considered when assessing the existence of conglomerate effects.

Upon its review process, the Board ultimately decided that the market shares of the transaction parties and the market structures of the two relevant product markets would not give the transaction parties the market power and ability to foreclose the market, and granted an unconditional approval to the transaction.

Conglomerate effects were also analysed in the scope of the Luxottica/Essilor decision (1 October 2018, No. 18-36/585-286) where the Board examined the possible leveraging effect of Luxottica's market power in the market for sunglasses and optical frames in the market for ophthalmic lenses. At the end of its review, the Board conditionally cleared the transaction based on certain structural commitments.

Pursuant to article 9(1) of the Competition Law, introduced by the Amendment Law, the SIEC test allows for a more reliable assessment of unilateral and cooperative effects that might arise as a result of mergers or acquisitions, as it

focuses more on whether and how much competition is impeded as a result of a transaction.

Law stated - 03 May 2023

Non-competition issues

To what extent are non-competition issues relevant in the review process?

Mergers and acquisitions are assessed on the basis of competition criteria rather than public interest or industrial policies. In view of that, the Authority has financial and administrative autonomy, and is independent in carrying out its duties. Pursuant to article 20 of the Competition Law, no organ, authority, entity or person can give orders or directives to affect the final decisions of the Board.

Law stated - 03 May 2023

Economic efficiencies

To what extent does the authority take into account economic efficiencies in the review process?

Efficiencies that result from a concentration may play a more important role in cases where the activities of the parties overlap in Turkey, regardless of their combined market shares. Unlike the previous sample notification form, the new form introduced by Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 does not allow for the omission of relevant sections of the notification form on efficiencies based on the parties' market shares in the affected markets.

The Board may take into account efficiencies in reviewing a concentration to the extent that they operate as a beneficial factor in terms of better-quality production or cost savings, such as reduced product development costs through the integration, and reduced procurement and production costs.

Law stated - 03 May 2023

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The powers of the Turkish Competition Board (the Board) during the investigation stage are very broad.

Article 9 of Law No. 4054 on the Protection of Competition dated 13 December 1994 (the Competition Law) provides that if the Board establishes that article 4, 6 or 7 of the Competition Law is infringed, it may notify the undertaking or associations of undertakings concerned of a decision with regard to the actions to be taken or avoided to establish competition and maintain the situation before infringement, and forward its opinion on how to terminate such an infringement or the behavioural or structural measures to be imposed. Article 9(1) of the Competition Law (introduced by Law No. 7246 on the Amendment to the Competition Law) introduces the first behavioural, then structural remedy rule for article 7 violations.

Mergers and acquisitions prohibited by the Board are not legally valid, and the transaction documents are not binding and enforceable even if the closing is done prior to the clearance.

Pursuant to article 13(5) of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4), authorisation granted by the Board concerning mergers and acquisitions also covers the limitations that are directly related and necessary to the implementation of transactions.

The principle is that parties to the transaction should determine whether the limitations introduced by the merger or acquisition exceed this framework.

Furthermore, articles 13(4) and 14(2) of Communiqué No. 2010/4 stipulate that in its authorisation decision, the Board may specify conditions and obligations aimed at ensuring that any such commitments are fulfilled.

The Board may at any time re-examine a clearance decision, and decide on the prohibition and application of other sanctions for a merger or acquisition if clearance was granted based on incorrect or misleading information from one of the undertakings or the obligations foreseen in the decision are not complied with. As a result of a re-examination, the Board may decide a prohibition and the application of pecuniary sanctions.

Law stated - 03 May 2023

Remedies and conditions

Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Board may grant conditional approvals to mergers and acquisitions, and those transactions may be implemented provided that measures deemed appropriate by the Board are taken and the parties comply with certain obligations.

In addition, the parties may present some additional divestment, licensing or behavioural commitments to help resolve potential issues that may be raised by the Board. These commitments are increasing in practice and may be foreseen in the transaction documents, or may be given during the review process or an investigation.

The parties can complete the merger before the remedies have been complied with; however, the merger gains legal validity after the remedies have been complied with.

Law stated - 03 May 2023

What are the basic conditions and timing issues applicable to a divestment or other remedy?

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 any competition concerns.

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

Although 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 Authority. The Guidelines on Remedies also provide a form that lists the necessary information and documents to be submitted in relation to the remedies.

Law stated - 03 May 2023

What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There have been several cases where the Board has accepted remedies or commitments (eg, divestments) proposed to, or imposed by, the European Commission when the remedies or commitments ease competition law concerns in Turkey (see, for example, Agilent-Varian dated 18 February 2010, No. 10-18/212-82; Cookson/Foseco dated 20 March 2008, No. 08-25/254-83; Bayer/Monsanto dated 8 May 2018, No. 18-14/261-126; and Synthomer dated 6

February 2020, No. 20-08/90-55).

Law stated - 03 May 2023

Ancillary restrictions

In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The conditions for successfully qualifying a restriction as an ancillary restraint are exactly the same as those applied in EU competition law; therefore, a restriction such as a non-compete obligation should be directly related and necessary to the concentration, restrictive only for the parties, and proportionate. As a result, for instance, a restriction may be viewed as ancillary if its nature, geographic scope, subject matter and duration are limited to what is necessary to protect the legitimate interests of the parties entering into the notified transaction.

The Board's approval decision will be deemed to cover only the directly related and necessary extent of restraints in competition brought by the concentration (non-compete, non-solicitation, confidentiality, etc). This will allow the parties to engage in self-assessment and the Board will no longer have to devote a separate part of its decision to the ancillary status of all restraints brought with the transaction. If the ancillary restrictions are not compliant, the parties may face article 4, 5 and 6 examinations under the Competition Law.

Law stated - 03 May 2023

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

Are customers and competitors involved in the review process and what rights do complainants have?

Pursuant to article 15 of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4), the Turkish Competition Board (the Board) may request information from third parties, including the customers, competitors and suppliers of the parties, and other persons related to the merger or acquisition. According to article 11(2) of Communiqué No. 2010/4, if the Turkish Competition Authority (the Authority) is required by legislation to ask for another public authority's opinion, this would cut the review period and restart it anew from day one.

Third parties, including the customers and competitors of the parties, and other persons related to the merger or acquisition may participate in a hearing held by the Board during the investigation, provided that they prove their legitimate interest.

Law stated - 03 May 2023

Publicity and confidentiality

What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Communiqué No. 2010/4 introduced a mechanism in which the Authority publishes the notified transactions on its official website, including only the names of the undertakings concerned and their areas of commercial activity; therefore, once notified to the Authority, the existence of a transaction is no longer a confidential matter.

If the Board decides to have a hearing during the investigation, hearings at the Authority are, in principle, open to the public. The Board may, on the grounds of the protection of public morality or trade secrets, decide that the hearing shall be held in private.

The main legislation that regulates the protection of commercial information is article 25(4) of Law No. 4054 on the Protection of Competition dated 13 December 1994, and Communiqué No. 2010/3 on Regulation of the Right to Access to File and the Protection of Commercial Secrets (Communiqué No. 2010/3), which was enacted in April 2010.

Communiqué No. 2010/3 puts the burden of identifying and justifying information or documents as commercial secrets on the undertakings; therefore, undertakings must request confidentiality from the Board and justify their reasons for the confidential nature of the information or documents that are requested to be treated as commercial secrets. This request must be made in writing.

Although the Board can also ex officio evaluate the information or documents, the general rule is that information or documents that are not requested to be treated as confidential are accepted as being not confidential.

The final decisions of the Board are published on the Authority's website after confidential business information has been taken out.

Under article 15(2) of Communiqué No. 2010/3, the Authority may not take into account confidentiality requests related to information and documents that are indispensable to be used as evidence for proving the infringement of Turkish competition law. In such cases, the Authority can disclose any information and documents that could be considered as trade secrets by taking into account the balance between public interest and private interest, and in accordance with the proportionality criterion.

Law stated - 03 May 2023

Cross-border regulatory cooperation

Do the authorities cooperate with antitrust authorities in other jurisdictions?

Article 43 of Decision No. 1/95 of the European Economic Community–Turkey Association Council (Decision No. 1/95) authorises the Authority to notify and request the Directorate-General for Competition at the European Commission to apply relevant measures if the Board believes that transactions realised in the territory of the European Union adversely affect competition in Turkey. Such provision grants reciprocal rights and obligations to the parties (ie, the European Union and Turkey); thus, the European Commission has the authority to request the Board to apply relevant measures to restore competition in relevant markets.

The European Commission has been reluctant to share any evidence or arguments with the Authority in the few cases where the Authority has explicitly asked for them.

Apart from that, the Authority has cooperation agreements in place with several antitrust authorities in other jurisdictions. It also develops training programmes for cooperation purposes. In recent years, programmes have been organised for the board members of the Competition Commission of Pakistan, top managers of the National Agency of the Kyrgyz Republic for Antimonopoly Policy and Development of Competition, members of the Mongolian Agency for Fair Competition and Consumer Protection, and board members of the competition authority in Northern Cyprus.

Similar programmes have also been developed in cooperation with the Azerbaijan State Service for Antimonopoly Policy and Consumer Rights Protection, Uzbekistan's Antimonopoly Committee, and the Antimonopoly Committee of Ukraine. These programmes were created according to the relevant bilateral cooperation agreements.

The Authority's cooperation agreements can be found on its website. The Authority has signed memorandums of understanding with Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Egypt, Mongolia, Portugal, Romania, Russia, South Korea and the Turkish Republic of Northern Cyprus. In addition, the Authority has signed memorandums of

cooperation with Albania, Azerbaijan, Georgia, Kazakhstan, Kosovo, Kyrgyzstan, Libya, Morocco, North Macedonia, Peru, Serbia, Tunisia and Ukraine.

As part of its general framework , the Authority has also organised the Istanbul Competition Forum in collaboration with the United Nations Conference on Trade and Development (UNCTAD) since 2019 to discuss and debate a wide range of key and emerging competition law issues. The Authority takes part in projects led by the Organisation for Economic Co-operation and Development (OECD), the UNCTAD, the International Competition Network (ICN), the World Trade Organization and the World Bank. In cooperation with the Statistical, Economic and Social Research and Training Centre for Islamic Countries (SESRIC), operating under the Organisation of Islamic Cooperation, the Authority provides technical assistance for the training of competition agency personnel from Islamic countries that have recently adopted competition legislation.

In 2021, the Authority participated in the following programmes:

- the 'National Competitiveness Barometer Project' webinar, organised by the Russian Federal Antimonopoly Service's Competition Council;
- the Competition Forum of the United Nations Economic and Social Commission for Western Asia, the UNCTAD and the OECD;
- the SESRIC programme titled 'Increasing the Capacity of Competition Authorities', organised by the Authority and the Tunisian Competition Council;
- a webinar titled 'South-South Sharing of Policy Experiences on Platform Domination', organised by the UNCTAD in collaboration with Public Citizen and Third World Network;
- online meetings of the Intergovernmental Expert Group on Competition Law and Policy, organised by the UNCTAD;
- a cartel workshop organised by the ICN Cartel Study Group; and
- the Global Forum, organised by the OECD.

As at May 2023, the Authority's Annual Activity Report for 2022 has not yet been published.

Law stated - 03 May 2023

JUDICIAL REVIEW

Available avenues

What are the opportunities for appeal or judicial review?

In accordance with Law No. 6352 , which took effect on 5 July 2012, the administrative sanctions decisions of the Turkish Competition Board (the Board) can be submitted for judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the reasoned decision of the Board. Decisions of the Board are considered as administrative acts; thus, legal actions against them shall be taken in accordance with the Administrative Procedural Law .

In accordance with article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Board; however, upon request of the plaintiff, the court, by providing its justifications, may decide to stay the execution if the execution of the decision is likely to cause irreparable damages and the decision is highly likely to have been taken contrary to the provisions of the Law.

A significant development in Turkish competition law enforcement was the change in the competent body for appeals against the Board's decisions. On 28 June 2014, legislation enacted by Law No. 6545 on the Amendment of the Turkish Criminal Law and Other Laws created a three-level appellate court system comprising administrative courts, regional

courts (appellate courts) and the High State Court. The regional courts will go through the case file both on procedural and substantive grounds, and investigate the case file and make their decision considering the merits of the case. The decision of the regional court will be subject to the High State Court's review in exceptional circumstances, which are set forth in article 46 of the Administrative Procedure Law.

Law stated - 03 May 2023

Time frame

What is the usual time frame for appeal or judicial review?

The time frame for appeal to the Council of State against final decisions of the Board is 60 days starting from the receipt of the reasoned decision. The judicial review period before the administrative courts usually takes about eight to 12 months.

After exhausting the litigation process before the administrative courts of Ankara, the final step for the judicial review is to initiate an appeal against the administrative courts' decision before the regional courts. The appeal request for the administrative courts' decisions will be submitted to the regional courts within 30 calendar days of the official service of the justified (reasoned) decision of the administrative court.

Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by general procedural laws and usually lasts for 24 to 30 months.

Law stated - 03 May 2023

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

What is the recent enforcement record and what are the current enforcement concerns of the authorities?

According to the Merger and Acquisition Status Report 2020 of the Turkish Competition Authority (the Authority), the Turkish Competition Board (the Board) reviewed a total of 220 transactions. The transactions included 190 mergers and acquisitions that were approved unconditionally, one decision that was approved conditionally and one decision that was not approved. Twenty-eight were out of the scope of the merger control regime (ie, they either did not meet the turnover thresholds or fell outside the scope of the merger control system owing to a lack of change in control). Among those transactions, three concentrations were taken into Phase II review, while two of these transactions were granted clearance after the submission of remedies and one was not granted clearance.

According to the Merger and Acquisition Status Report 2022 , the Board reviewed 245 transactions in total, including 209 mergers and acquisitions that were approved unconditionally, and two decisions that were approved conditionally. Thirty-four were out of the scope of the merger control regime (ie, they either did not meet the turnover thresholds or fell outside the scope of the merger control system owing to a lack of change in control).

Generally, the Authority pays special attention to transactions in sectors where infringements of competition law are frequently observed and the level of concentration is high. Concentrations that concern strategic sectors (eg, automotive, programming and broadcasting, financial services, construction, telecommunications and energy) are under particular scrutiny.

The consolidated statistics regarding merger cases in 2022 show that transactions in the generation, transmission and distribution of electricity sector took the lead (14 notifications) followed by computer programming, manufacture of plastic products and manufacture of other food products sectors (five notifications each). Sector reports published

annually by the Authority also indicate concentration trends.

The Authority handles transactions and possible concentrations in the Turkish cement and aviation sectors with particular scrutiny. There are a number of ongoing investigations in the cement sector. It would also be accurate to report that the Authority has a particular sensitivity regarding the markets for construction materials; in addition to cement, markets for construction iron, aerated concrete blocks and ready-mixed blocks were investigated, and offenders were fined by the Authority.

To the extent that these decisions were also supported by worries over high levels of concentration, it would be prudent to anticipate that the Authority will scrutinise notifications of transactions leading to a concentration in any one of the markets for construction materials.

The Authority also made the following publications on the following dates:

- 9 March 2022: its final report on financial technologies in the payment services sector;
- 11 March 2022: its final report on its review regarding the fresh fruit and vegetable sector;
- 14 April 2022: its final report on its review regarding e-marketplace platforms;
- 30 March 2023: its final report on its review regarding the fast-moving consumer goods retail sector;
- 7 April 2023: its preliminary report on its review regarding the online advertising sector; and
- 18 April 2023: its study titled 'Reflections of Digital Transformation on Competition Law'.

Law stated - 03 May 2023

Reform proposals

Are there current proposals to change the legislation?

The Authority is in the process of considering legislative action concerning digital markets. Its intent can also be found within its final report on its review regarding e-marketplace platforms published on 14 April 2022, which states that the Authority is working on digital market regulations and mentions Regulation (EU) 2022/1925 (the Digital Markets Act) as a basis for these regulations.

It is expected that regulations focusing on gatekeepers mentioned in the report will be incorporated as an addition to article 6 of Law No. 4054 on the Protection of Competition dated 13 December 1994, which regulates abuse of dominant position or possibly as a separate article, while also being reflected in secondary legislation. The amendment is expected to constitute the most drastic change to Turkish law on digital markets and is speculatively expected to reinforce the Digital Markets Act with increasing antitrust focus on digital markets; however, the proposed text of the Turkish act is not publicly available and its details remain unknown.

Law stated - 03 May 2023

UPDATE AND TRENDS

Key developments of the past year

What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Besides the publication of Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 on 4 March 2022, there were no significant changes to Turkish competition legislation in 2022. Notable merger control decisions of the past year include those outlined below.

Ferro/Prince

The Ferro/Prince Phase II review decision (No. 22-10/144-59) was concluded on 24 February 2022. The transaction concerned the acquisition of sole control over Ferro by Prince, a portfolio company of American Securities. Following a preliminary examination, the Turkish Competition Board (the Board) decided to initiate a Phase II review in accordance with the first paragraph of article 10 of Law No. 4054 on the Protection of Competition dated 13 December 1994 (the Competition Law), based on concerns that the transaction could result in a significant impediment to effective competition in the Turkish markets concerned.

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

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

The Board noted that the transaction would not cause competition 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 Board also analysed 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, it noted that the possibility for undertakings to exert pressure on competition 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.

As a result, 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 Board concluded in summary that Prince would be divesting its porcelain enamel coating activities and its entire glass coatings business in Europe. Accordingly, the Board 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.

Vinmar/Arısan

In Vinmar/Arısan (24 February 2022, No. 22-10/155), the Board issued another significant Phase II decision relating to non-compete and non-solicitation 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 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-solicitation obligations, which the parties stated reflected their mutual agreement. The parties further stated that these aimed to ensure a smooth transition to a 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-solicitation 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 Board approved the transaction on the condition that the durations of the non-compete and non-solicitation obligations were reduced to three years, taking into account the market structure, customer loyalty and know-how.

Alleghany/Berkshire Hathaway

In Alleghany/Berkshire Hathaway (15 September 2022, No. 22-42/625-261), the Board clarified that undertakings with turnover generated abroad in exempt sectors will be considered to fall within the scope of the exemption to the merger control thresholds if they have any activities in Turkey. To that end, it concluded that Alleghany Corporation operated in the field of financial technologies pursuant to Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 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 250 million liras set out in Communiqué No. 2010/4 did not apply to Alleghany Corporation.

In addition, the 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 250 million liras set forth in Communiqué No. 2010/4; any activity of Alleghany Corporation in Turkey would suffice for the non-application of the relevant requirement.

In this context, the Board concluded that the turnover threshold requirement of 250 million liras set forth in Communiqué No. 2010/4 will not be considered when determining whether a merger or acquisition is subject to the authorisation of the 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.

Law stated - 03 May 2023

Jurisdictions

Albania	Wolf Theiss
Australia	Allens
Austria	Freshfields Bruckhaus Deringer
Belgium	Freshfields Bruckhaus Deringer
Bosnia and Herzegovina	Wolf Theiss
Brazil	TozziniFreire Advogados
Bulgaria	Boyanov & Co
Canada	McMillan LLP
China	Freshfields Bruckhaus Deringer
Costa Rica	Zurcher Odio & Raven
Croatia	Wolf Theiss
Cyprus	Antoniou McCollum & Co LLC
Czech Republic	Nedelka Kubáč advokáti
Denmark	Kromann Reumert
Egypt	Zulficar & Partners
European Union	Freshfields Bruckhaus Deringer
Faroe Islands	Kromann Reumert
Finland	Roschier, Attorneys Ltd
France	Freshfields Bruckhaus Deringer
Germany	Freshfields Bruckhaus Deringer
Ghana	Bentsi-Enchill Letsa & Ankomah
Greece	Vainanidis Economou & Associates
Greenland	Kromann Reumert
Hong Kong	Freshfields Bruckhaus Deringer
India	Shardul Amarchand Mangaldas & Co

Italy	Freshfields Bruckhaus Deringer
Japan	Freshfields Bruckhaus Deringer
Liechtenstein	Sele Frommelt & Partner Attorneys at Law
Malta	Camilleri Preziosi
Mexico	Creel García-Cuéllar Aiza y Enriquez SC
Morocco	UGGC Avocats
Netherlands	Freshfields Bruckhaus Deringer
New Zealand	Russell McVeagh
Nigeria	G Elias
Norway	Wikborg Rein
Pakistan	Axis Law Chambers
Peru	Payet Rey Cauvi Pérez Abogados
Poland	WKB Wiercinski Kwiecinski Baehr
Portugal	Gomez-Acebo & Pombo Abogados
Romania	Wolf Theiss
Saudi Arabia	Freshfields Bruckhaus Deringer
Serbia	Wolf Theiss
Singapore	Drew & Napier LLC
Slovakia	Wolf Theiss
Slovenia	Wolf Theiss
South Korea	Bae, Kim & Lee LLC
Spain	Freshfields Bruckhaus Deringer
Sweden	Mannheimer Swartling
Switzerland	Lenz & Staehelin
Taiwan	Yangming Partners

Turkey	ELIG Gurkaynak Attorneys-at-Law
Ukraine	Asters
United Arab Emirates	Freshfields Bruckhaus Deringer
United Kingdom	Freshfields Bruckhaus Deringer
USA	Davis Polk & Wardwell LLP
Vietnam	Freshfields Bruckhaus Deringer
Zambia	Corpus Legal Practitioners