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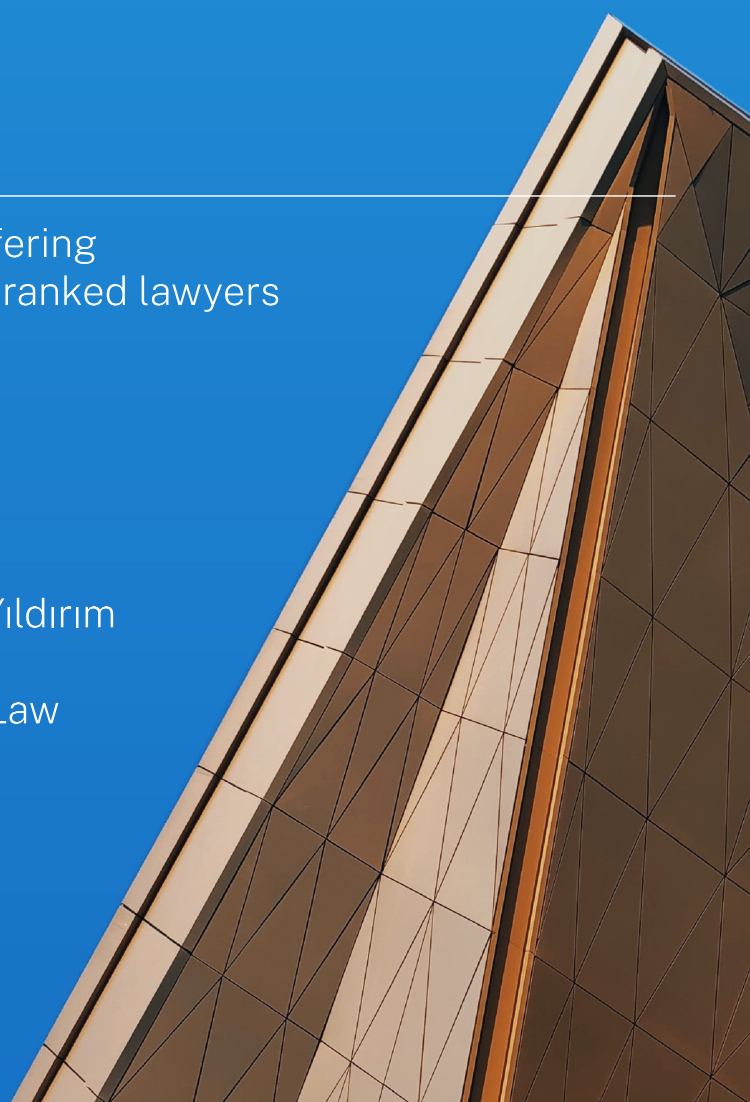

Turkey: Law & Practice
Gönenç Gürkaynak, K Korhan Yıldırım and Görkem Yardım
ELIG Gürkaynak Attorneys-at-Law

TURKEY

Law and Practice

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Contents

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ELIG Gürkaynak Attorneys-at-Law is a leading law firm of 95 lawyers based in Istanbul. Founded in 2005, the firm combines a solid knowledge of Turkish law with a business-minded approach to developing legal solutions that meet the ever-changing needs of its clients in their international and domestic operations. The competition law and regulatory department contains five partners, nine counsel and 40 associates. In addition to its unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience of defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases and leniency handlings – as well as before courts on issues of private enforcement of competition law and with appeals against administrative decisions by the Turkish Competition Authority. ELIG Gürkaynak represents multinational corporations, business associations, investment banks, partnerships and individuals in the widest variety of competition law matters, while also collaborating with many international law firms.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Article 7 of Law No 4054 on Protection of Competition (the "Competition Law") governs M&A, in particular, and mandates the Turkish Competition Board ("the Board") to regulate and establish a merger control regime. Accordingly, certain M&A are subject to the Turkish Competition Authority (TCA)'s review and approval in order to gain validity.

Law No 7246, the amendment to the Competition Law, was published in the Official Gazette and entered into force on 24 June 2020 (the "Amendment Law"). Furthermore, Communiqué No 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board ("Communiqué No 2010/4") is the primary legal instrument that establishes the Turkish merger control regime. On 4 March 2022, the TCA published Communiqué No 2022/2 on the Amendment of Communiqué No 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board ("Communiqué No 2022/2"). Communiqué No 2022/2 introduces certain new regulations concerning the Turkish merger control regime, which has fundamentally affected the notifiability analysis of merger transactions and the merger control notifications submitted to the TCA.

Other guidelines adopted by the TCA on merger control matters are:

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

1.2 Legislation Relating to Particular Sectors

No other legislation is applicable to foreign transactions or investment in Turkey as far as the merger control rules are concerned. However, there are specific merger control rules for mergers concerning banks, privatisation tenders and certain other sectors.

Banks

Banking Law No 5411 (the "Banking Law") provides that mergers in the banking industry fall outside the merger control regime, subject to the condition that the sectoral share of the total assets of the banks does not exceed 20%. The Competition Law does not apply to foreign acquiring banks already operating in Turkey if the conditions for the application of the Banking Law exception are fulfilled.

Privatisation Tenders

Communiqué No 2013/2 prescribes an additional pre-notification process that applies to privatisations in which the turnover of the undertaking, asset or unit intended for the production of goods or services to be privatised exceeds TRY30 million. Statutory sales to public institutions and organisations, including local governments, are excluded for the purposes of this calculation. If the threshold is met, a pre-notification should be filed with the TCA before the public announcement of the tender specifications.

The Board will issue an opinion that will serve as the basis for the preparation of the tender specifications. This opinion does not mean that the transaction will be cleared. Following the tender, the winning bidder will still have to make a merger filing and obtain clearance before the Privatisation Administration's decision on the final acquisition.

Other Sector-Specific Rules

There are various sector-specific rules alongside the merger control rules for sectors such as media, telecommunications, energy and petrochemicals. By way of an example, in the energy sector, approval from the relevant authority is required for share transfers of more than 10% (5% in case of publicly traded company shares) in an electricity or natural gas company. In the broadcasting sector, Law No 6112 states that a transfer of shares of a joint stock company holding a broadcasting licence should be notified to the Turkish Radio and Television Supreme Council.

1.3 Enforcement Authorities

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

The Main Services Unit comprises:

- six supervision and enforcement departments;
- a department of decisions;
- an economic analysis and research department;
- an information technologies department;
- an external relations and competition advocacy department;
- a strategy development department; and
- a cartels on-site inspections support division.

There is a "sectoral" job definition of each supervision and enforcement department.

Other authorities may get involved in the review of mergers in certain sectors. By way of an example, the TCA is statutorily required to get the opinion of the Turkish Information Technologies Authority for mergers concerning the telecommunication sector and of the Turkish Energy Markets Regulatory Authority in energy mergers.

2. Jurisdiction

2.1 Notification

Article 7 of Communiqué No 2010/4 amended by the Communiqué No 2022/2 provides for a number of notification thresholds.

A transaction must be notified in Turkey if one of the following increased turnover thresholds is met:

- the aggregate Turkish turnover of the transaction parties exceeds TRY750 million and the Turkish turnover of at least two of the transaction parties each exceeds TRY250 million;
- the Turkish turnover of the transferred assets or businesses in acquisitions exceeds TRY250 million and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY3 billion; or

- the Turkish turnover of any of the parties in mergers exceeds TRY250 million and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY3 billion.

Communiqué No 2022/2 introduced a thresholds exemption for undertakings active in certain markets/sectors. Pursuant to Communiqué No 2022/2, the above-mentioned "TRY250million Turkish turnover thresholds" will not be sought for the acquired undertakings active in or assets related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies, if they:

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

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

Once the above-mentioned thresholds are exceeded, the parties are obliged to notify the transaction.

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

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

Another exception pertains to the Turkish Wealth Fund, which was incorporated as a national wealth and investment fund company under Law No 6741. Transactions performed by the Turkish Wealth Fund and/or companies established by the Turkish Wealth Fund are not subject to merger control rules.

2.2 Failure to Notify

Competition Law

The Competition Law introduces penalties for failing to notify or for closing the transaction before clearance. Where the parties to a merger or acquisition that requires the Board's approval close the transaction without or before obtaining the Board's approval, the Board imposes a turnover-based monetary fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision on the relevant undertaking(s). In acquisitions, the fine is levied on the acquirer – whereas in mergers it is levied on all merging parties. This monetary fine does not depend on whether or not the TCA ultimately clears the transaction.

The minimum amount of this fine is revised each year. For 2023, it is set at TRY105,688.

Article 7 Violations

If the parties close a transaction that violates Article 7 (ie, transactions that significantly impede competition – in particular, by creating a dominant position or strengthening an existing dominant position), the Board will impose a turnover-based monetary fine of up to 10% of the parties' turnovers generated in the financial year preceding the date of the fining decision. Employees and managers that had a determining effect on the creation of the violation may also be fined up to 5% of the fine imposed on the undertakings.

If the parties close a notifiable merger or acquisition without or before the approval of the Board, the transaction will be deemed legally invalid (with all attendant legal consequences in Turkey), pending clearance.

If the Board finds that the transaction violates Article 7, it shall issue a board resolution ordering:

- the parties concerned to follow or avoid certain behaviours in order to establish competition; and
- structural remedies such as transfer of certain activities or shareholdings.

However, the relevant amendment introduces "first behavioural, then structural remedy" rule for Article 7 violations. Therefore, in cases where behavioural remedies are ultimately considered to be ineffective, the Board will order structural remedies. Undertakings shall comply with the structural remedies within a minimum of six months. If there is a possibility of serious and irreparable damages occurring, the Board is authorised to take interim measures until the final resolution on the matter.

There have been many cases where companies have been fined for failing to file a notifiable transaction (TAIF/SIBUR, 21-55/776-383, 11 November 2021; BMW/Daimler/Ford/Porsche/Ionity, 20-36/483-211, 28 July 2020; Brookfield/JCI, 20-21/278-132, 30 April 2020; A-Tex Holding/Labelon Group, 16-42/693-311, 6 December 2016; Tekno İnşaat, 12-08/224-55, 23 February 2012; Zhejiang/Kiri, 11-33/723-226, 2 June 2011, etc). The penalties are publicly announced via the Board's reasoned decisions, which are published on the TCA's official website.

2.3 Types of Transactions

Notifiable transactions are as follows:

- a merger of two or more undertakings;
- the acquisition of direct/indirect control on a lasting basis over all (or part) of one or more undertakings by one or more undertakings – or by persons who currently control at least one undertaking – through the purchase of assets or all (or part) of its shares, an agreement or other instruments; and
- the formation of a full-function joint venture.

These transactions are caught if they exceed the applicable thresholds (see **2.1 Notification**).

Operations that do not involve the transfer of shares or assets can be caught if they result in a change of control and the parties' turnovers surpass the applicable thresholds.

2.4 Definition of "Control"

Communiqué No 2010/4 provides the definition of "control", which is akin to the definition in Article 3 of Council Regulation No 139/2004.

According to Article 5(2) of Communiqué No 2010/4, control can be constituted by:

- rights, agreements or any other means that – either separately or jointly, de facto or de jure – confer the opportunity to exercise a decisive influence on an undertaking (particularly by ownership or the right to use all or part of the assets of an undertaking); or
- rights or agreements that confer decisive influence on the composition or decisions of the organs of an undertaking.

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

2.5 Jurisdictional Thresholds

Please see **2.1 Notification** for further details of jurisdictional thresholds, including a threshold exemption for undertakings active in certain markets/sectors.

2.6 Calculations of Jurisdictional Thresholds

Communiqué No 2010/4 sets out detailed rules for turnover calculation. The calculation methods can be summarised as follows:

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

However, there are certain special turnover calculation methods for entities such as banks, financial institutions, leasing companies, factoring companies, securities agents, insurance companies, etc.

Communiqué No 2022/2 also updates the rules that apply to the calculation of turnover of the financial institutions in accordance with the recent changes to the financial regulations. The recent updates of Article 9 of Communiqué No 2010/4 are as follows.

- For the calculation of financial institutions' turnovers, Communiqué No 2022/2 aligns the wordings and terms in view of the applicable banking and financial regulations – ie, it excludes the term “participation banks” and refers to the term “banks” in general, which covers all legal forms of banks.
- Communiqué No 2022/2 updates the names and references of the relevant regulations issued by the Banking Regulatory and Supervisory Agency and the Capital Markets Board referred in Article 9 of Communiqué No 2010/4.

In respect of various financial institutions, the turnover determined by the special turnover calculation method consists of the sum of the following.

- Banks and participation banks – as included within the income statement requested under the Communiqué Concerning the Financial Tables to be Disclosed to the Public by Banks, and Related Explanations and Footnotes (Banking Regulatory and Supervisory Agency, 10/2/2007, 26430):
  - (a) interest and profit-sharing income;
  - (b) collected fees and commissions;
  - (c) dividend income;
  - (d) commercial profits/losses (net); and
  - (e) other operational income.
- Financial leasing, factoring and funding companies – real operating income and other operating income, as included within the income statement requested under the Communiqué Concerning the Uniform Accounting Plan to be Implemented by Financial Leasing, Factoring and Funding Companies and the Explanation Note Thereof, and Concerning the Format and Content of the Financial Tables to be Disclosed to the Public (the Banking Regulatory and Supervisory Agency, 17/5/2007, 26525).
- Intermediary institutions and portfolio management companies – as included within the detailed income statement requested under the Communiqué Concerning the Principles on Financial Reporting within the Capital Market (the Banking Regulatory and Supervisory Agency, 9/4/2008, 26842):
  - (a) sales income;
  - (b) interests;
  - (c) fees;
  - (d) premiums;
  - (e) commissions and other income;
  - (f) other operating income;
  - (g) shares in the profits/losses of the investments valued via the equity method; and
  - (h) financial income other than operating income.
- Insurance, reassurance and pension companies – in accordance with the last financial statements or data either (i) published by the Undersecretariat of the Treasury, the Association of Insurance and Reinsurance Companies of Turkey, or the Pension Monitoring Centre or (ii) disclosed to the public by the companies related to the merger or acquisition (to be confirmed by the Undersecretariat of Treasury):
  - (a) domestic direct premium production for insurance companies (gross);
  - (b) domestic direct premium production for reassurance companies (gross);
  - (c) the total amount of contributions and the total amount of funds in pension companies, as well as domestic direct premium production (gross) for those pension companies that also operate in life insurance.
- Other financial institutions – interest and similar income, income generated from securities, commissions, net profit generated from financial activities, and other operating income.

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

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

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

See **2.6 Calculations of Jurisdictional Thresholds**.

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

The Board will only consider the changes in the business during the reference period if they are reflected in the relevant balance sheets of the businesses in question.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control if the turnover thresholds are triggered. The Competition Law states that the criterion to apply is whether or not the undertakings concerned affect the goods and services markets in Turkey. Even if the relevant undertakings do not have local subsidiaries, branches, sales outlets, etc, in Turkey, the transaction may still be subject to merger control if the relevant undertakings have sales in Turkey and thus have effects on the relevant Turkish market.

The likelihood of the Board discovering a transaction is relatively high, as it closely follows M&A in the local and international press, and also the case practice of the EC and other important competition authorities. It may also examine the notifiability of past transactions in the context of a new notification.

Even transactions concerning the formation of a joint venture that will not be active in Turkey in the foreseeable future could trigger a mandatory merger control filing if the parents trigger the applicable thresholds.

Board Decisions

There have been some cases where the Board has cleared decisions regarding joint ventures that do not involve sales in Turkey and considered them notifiable. Recent cases include Tricon/Chemieuro-JV (22-15/248-107, 31 March 2022), Baker Hughes/Dussur-Baker Petrolite (22-28/451-182, 23 June 2022), Itochu/Isuzu-ILS/UMAX/UDFS (22-27/435-178, 16 June 2022), Hg/Montagu-Sigma (22-18/298-132, 21 April 2022), Blackstone/CPP Investments-Advarra (22-29/485-194, 30 June 202), Phillips 66/H2 Energy Europe (22-20/313-137, 28 April 2022), OCP/Koch-JFC (22-18/297-131, 21 April 2022), Daimler/Traton/Volvo (22-20/320-142, 28 April 2022), Porsche/Lufthansa (22-12/177-72, 10 March 2022), PSA/TIL-PNIT (22-08/115-45, 10 February 2022).

2.9 Market Share Jurisdictional Threshold

Article 7 of Communiqué No 2010/4 provides turnover-based thresholds and does not seek a market share threshold when assessing whether or not a notification is required for a transaction.

2.10 Joint Ventures

In the case of a full-function joint venture, the transaction is subject to merger control once the turnover thresholds are exceeded. In order to qualify as a full-function joint venture, there must be joint control over the joint venture and it must be an independent economic entity established on a lasting basis.

The Guidelines on the Concept of Control explain the concept of “full functionality”. The following elements should be considered:

- sufficient resources to operate independently;
- activities that go beyond one specific function for the parents;
- independence from the parents in sale and purchase activities; and
- operations on a lasting basis.

Please refer to **2.8 Foreign-to-Foreign Transactions** for details of the Board's approach to joint venture cases.

2.11 Power of Authorities to Investigate a Transaction

If a transaction raises substantive competition law concerns and is viewed as problematic under the SIEC ("significant impediment to effective competition") test, the TCA may still investigate the transaction either upon complaint or on its own initiative – even where the transaction does not meet the jurisdictional thresholds. The applicable limitation period is eight years, pursuant to Article 20(3) of the Law on Misdemeanours No 5326.

2.12 Requirement for Clearance Before Implementation

The Turkish competition law regime features a suspension requirement, whereby implementation of a notifiable concentration is prohibited until approval by the Board (Sections 7, 10, 11 and 16 of the Competition Law) (see **2.13 Penalties for the Implementation of a Transaction Before Clearance**). The implementation of a notifiable transaction is suspended until clearance by the Board is obtained. Therefore, a notifiable merger or acquisition is not legally valid until the approval of the Board is received, and such notifiable transaction cannot be closed in Turkey before the clearance of the Board.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Pursuant to Article 16 of the Competition Law, if the parties to a notifiable transaction violate the suspension requirement, a turnover-based monetary fine (based on the local turnover generated in the financial year preceding the date of the fining decision at a rate of 0.1%) will be imposed on the incumbent firms – ie, the acquirer(s), in the case of an acquisition, or both merging parties in the case of a merger. A monetary fine imposed for a violation of the suspension requirement will be no less than TRY105,688 in 2023. The wording of Article 16 does not give the Board discretion as to whether or not to impose a monetary fine for a violation of the suspension requirement – rather, once the violation of the suspension requirement is detected, the monetary fine will be imposed automatically.

These penalties are applied frequently in practice. In recent years, examples have included:

- TAIF/SIBUR, 21-55/776-383, 11 November 2021;
- BMW/Daimler/Ford/Porsche/Ionity, 20-36/483-211, 28 July 2020;
- Brookfield, 20-21/278-132, 30 April 2020;
- A-Tex Holding/Labelon Group, 16-42/693-311, 6 December 2016;
- Tekno İnşaat, 12-08/224-55, 23 February 2012;
- Zhejiang/Kiri, 11-33/723-226, 2 June 2011; and
- Ajans Press-İnterpress Medya/Mustafa Emrah Fandaklı/Ziya Açıkça, 10-66/1402-523, 21 October 2010.

2.14 Exceptions to Suspensive Effect

If the control is acquired from various sellers through a series of securities transactions in the stock exchange, the concentration could be notified to the Board after the transaction is realised, provided that the following conditions are satisfied:

- the concentration is notified to the Board without delay; and
- the voting rights attached to the acquired securities are not exercised or the voting rights are exercised only upon an exception

provided by the Board that ensures the full value of the investment is protected.

Apart from this, there are no general exceptions to the suspensive effect and it is not possible to seek a waiver or obtain derogation from the suspensive effect.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

The Board would not permit closing before the clearance decision. There is no specific regulation allowing or disallowing carve-out or hold-separate arrangements. However, the Board has so far consistently rejected all carve-out or hold separate arrangements proposed by undertakings (eg, Total SA, 20 December 2006, 06-92/1186-355; CVR Inc-Inco Limited, 1 February 2007, 07-11/71-23). The Board argued that a closing is sufficient for it to impose a suspension violation fine and an analysis of whether change in control actually took effect in Turkey is unwarranted. The Board therefore considers the "carve-out" concept to be unconvincing.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is no specific deadline for filing in Turkey. However, the filing should be made and approval should be obtained before the closing. In practice, it is recommendable to file the transaction at least 60 calendar days before the projected closing.

For details of penalties in the case of failure to do so, please see **2.13 Penalties for the Implementation of a Transaction Before Clearance**.

3.2 Type of Agreement Required Prior to Notification

A binding agreement is not required prior to notification. Parties can file on the basis of a less formal agreement, such as a letter of intent, a memorandum of understanding or a non-binding term sheet. There are some cases where the parties merely enclosed a letter of intent and/or a memorandum of understanding (Opel-Saft, 20-08/78-45, 6 February 2020; Greenbriar/BDP, 18-43/680-333, 15 November 2018; JIM/Terratec, 18-31/529-260, 12 September 2018 and Jihong/Grammer AG, 17-35/541-232, 26 October 2017). However, Communiqué No 2010/4 requires the submission of a written document prior to notification. A filing thus cannot be made where there is nothing in writing (eg, based on a good-faith intention to reach an agreement).

3.3 Filing Fees

No filing fees are required under the Turkish merger control regime.

3.4 Parties Responsible for Filing

Pursuant to Article 10 of Communiqué No 2010/4, a filing can be made solely by one of the parties or jointly by some or all of the parties. The filing can be submitted by the parties' authorised representatives. In the event of filing by just one of the parties, the filing party should notify the other party.

3.5 Information Included in a Filing

The notification form is similar to Form CO. The Board requires one hard copy and an electronic copy of the notification form to be submitted in Turkish. The recent updates allow notifying parties to submit the notification form via "e-Devlet", which is an elaborate system of web-based services that includes electronic submission. E-Devlet had already been made available for submissions, especially during the pandemic period. However, Communiqué No 2010/4 explicitly mentions this alternative form of submission now to make it official.

Additional documents are also required, such as:

- the executed or current copies and sworn Turkish translations of the transaction document(s) that brings about the transaction;
- financial statements (including the balance sheets of the parties); and
- market research reports for the relevant market (if available).

A signed and notarised (and apostilled, if applicable) power of attorney is also required.

3.6 Penalties/Consequences of Incomplete Notification

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

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

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Where incorrect or misleading information is provided by the parties, the TCA imposes a turnover-based monetary fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision (Brookfield, 20-21/278-132, 30 April 2020; Akzo Nobel, 10-24/339-123, 18 March 2010). If this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision.

3.8 Review Process

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

The Board notifies the parties of the outcome within 30 days following a complete filing. There is an implied approval mechanism where a tacit approval is deemed if the Board does not react within 30 calendar days upon a complete filing. However, in practice, the Board almost always reacts within the 30-day period – either by sending a written request for information or, very rarely, by rendering its decision within the original 30-day period. The TCA also frequently asks formal questions and adds more time to the review process, as it is advisable to notify the filing at least 60 calendar days before the projected closing.

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

3.9 Pre-notification Discussions With Authorities

Other than privatisation tenders, the Turkish merger control rules do not have a pre-notification mechanism. Also, in practice, a filing is seen as a one-sided review by the TCA once a formal one-shot notification is made. The TCA may issue various information requests, but it will only do so after the notification is made (see **3.6 Penalties/Consequences of Incomplete Notification** and **3.8 Review Process**).

3.10 Requests for Information During the Review Process

It is common practice for the TCA to send written requests to the parties involved in the transaction, to any other party related to the transaction, or to third parties such as competitors, customers or suppliers.

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

3.11 Accelerated Procedure

Communiqué No 2010/4 also brought a modified notification form that will replace the current notification form as of 4 May 2022. According to the modified notification form, there is a short-form notification (without a fast-track procedure) if a transition from joint control to sole control is at stake or if there are no affected markets within Turkey.

The Turkish merger control regime does not include a fast-track procedure to speed up the clearance process. Apart from close follow-up with the case-handlers reviewing the transaction, the parties have no other possible way to speed up the review process.

4. Substance of the Review

4.1 Substantive Test

The substantive test is a SIEC test under the Amendment Law, similar to the approach under EU Merger Regulation. Hereby, the TCA 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. There is no case law or secondary legislation, as of the time of writing (May 2023), regarding how the SIEC test will be applied.

In terms of creating or strengthening a dominant position, Article 3 of the Competition Law defines a dominant position as "any position enjoyed in a certain market by one or more undertakings by virtue of which those undertakings have the power to act independently from their competitors and purchasers in determining economic parameters such as the amount of production, distribution, price and supply". Market shares of about 40% and higher are considered an indication of a dominant position in a relevant product market – as are other factors such as vertical foreclosure or barriers to entry.

4.2 Markets Affected by a Transaction

Pursuant to Communiqué No 2010/4, the relevant product markets are those that might be affected by the notified transaction where:

- two or more of the parties are commercially active in the same product market (horizontal relationship); or
- at least one of the parties is commercially active in the downstream or upstream market of any product market in which another party operates (vertical relationship).

4.3 Reliance on Case Law

The TCA closely follows the EC's decisions (eg, L'Oréal SA v The Body Shop, 06-41/515-136, 7 June 2006; IBM Danmark v Maersk Data, 04-69/983-239, 27 October 2004; Flir Systems v Raymarine, 10-44/762-246, 17 June 2010; Efes Pazarlama, 05-48/696-184, 21 July 2005), as well as the CJEU's precedents, and regularly incorporates them into its decisions.

The Board has also referred to the US Federal Trade Commission decisions (eg, Google, 16-39/638-284, 16 November 2016), as well as the French and German competition authorities' precedents (eg, BSH Ev Aletleri, 17-27/454-195, 22 August 2017; Yemeksepeti, 16-20/347-156, 9 June 2016).

4.4 Competition Concerns

The TCA primarily focuses on unilateral effects, but may also consider co-ordinated effects (Ladik, 20 December 2005, 05-86/1188-340) and vertical effects (Migros, 9 July 2015, 15-29/420-117 – in which the transaction was conditionally cleared). However, the TCA has not yet prohibited a transaction on the grounds of "conglomerate effects".

4.5 Economic Efficiencies

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

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 with the Communiqué No 2022/2 does not provide the freedom to skip the relevant sections of the notification form on efficiencies based on the parties' market shares in the affected markets.

4.6 Non-competition Issues

The TCA does not take non-competition issues such as industrial policies, national security, foreign investment, employment or other public interest issues into account when assessing a merger. Therefore, the TCA is independent while carrying out its duties. Article 20 of the Competition Law implies that no organ, authority, entity or person can give orders or directives to affect the final decisions of the Board.

The TCA has so far kept its independence and impartiality in its enforcement activities in respect of both local and foreign investors. The merger control regulations also apply to foreign direct investments, given that there are no separate merger control regulations for foreign direct investments in Turkey.

4.7 Special Consideration for Joint Ventures

Special consideration is given to joint ventures under the Turkish merger control regime. A joint venture must not have the object or effect of restricting competition between the parties and itself. Article 5 of the Competition Law defines that the parties may notify the non-full-function joint venture to the Board for individual exemption. Communiqué No 2010/4 provides individual exemption for full-function joint ventures if the joint venture has the object or effect of restricting competition between the parties and the joint venture.

The standard SIEC test applies to the full-function joint venture. In addition, the notification form includes a certain section that is aimed at collecting information to assess whether the joint venture will lead to co-ordination. Article 13/3 of Communiqué No 2010/4 provides that the Board should carry out an individual exemption review on notified joint ventures that emerge as an independent economic unit 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 also allows for such a review.

Non-full-function joint ventures are not subject to merger control but may fall under Article 4, which prohibits restrictive agreements. The parties may conduct a self-assessment to see if the non-full-function joint venture fulfils the conditions for individual exemption.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

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

The Board has broad powers during the investigation stage. If it determines that the transaction may violate the Competition Law, the Board may notify the undertaking (or associations of undertakings) concerned of a decision regarding the actions to be taken or avoided so as to establish and maintain competition before infringement occurs. The Board may also forward its opinion on how to terminate such infringement.

The Board can re-examine a clearance decision at any time. It may subsequently decide on prohibition and the application of other sanctions for a merger or acquisition if:

- the clearance was granted based on incorrect or misleading information from one of the undertakings; or
- the obligations provided in the decision are not complied with.

For there to be a prohibition decision, the Board must show that the transaction could significantly impede competition. In cases of conditional clearance, the Board must show that the transaction would produce these effects in the absence of the relevant structural and/or behavioural remedies.

5.2 Parties' Ability to Negotiate Remedies

The parties are able to negotiate remedies according to Article 14 of Communiqué No 2010/4, which enables the parties to provide commitments to remedy substantive competition law issues of a concentration under Article 7.

The Remedy Guidelines require that the parties should submit detailed information on how the remedy would be applied and how it would resolve the competition concerns. The guidelines state that behavioural or structural remedies may be submitted by the parties and outline the acceptable remedies, which include:

- divestment in order to cease all kinds of connection with the competitors;
- remedies that enable undertakings to access certain infrastructure issues (eg, networks, IP, essential facilities); and
- remedies in respect of concluding/amending long-term exclusive agreements.

5.3 Legal Standard

Pursuant to the Remedy Guidelines, the parties must take the following principles into account when submitting proposed remedies.

- Parties must base their remedies on the legal and economic principles specific to the transaction at hand. Solutions must aim to protect the market from the potential effects of the transaction through the protection of the market's competitive structure.
- The main aim of a remedy is to protect the pre-transaction level of competition.
- The remedy must protect competition, rather than protect the competitors.
- The conditions of the remedy must be clear and feasible.

The Board should only accept remedies that have been shown to eliminate the problem of significant restriction on competition. In addition, the Remedy Guidelines require the remedies to be capable of being implemented effectively as soon as possible, as market conditions may change before the implementation of the proposed remedy.

5.4 Typical Remedies

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

Remedy Guidelines

The Remedy Guidelines include all steps and conditions for the enforcement of remedies.

The intended effect of the divestiture will take place only if the divestment business is assigned to a purchaser that can create an effective competitive power in the market. To make sure that the business will be divested to a suitable purchaser, the proposed remedy must include the elements that define the suitability of the purchaser.

The approval of a possible purchaser by the Board is dependent on the following requirements.

- The purchaser must be independent of and not connected to the parties.
- The purchaser must have the financial resources, business experience and ability to become an effective competitor in the market through the divestment business.
- The transfer transaction to be carried out with the purchaser must not cause a new competitive problem. In the event that such a problem exists, a new remedy proposal will not be accepted.
- The transfer to the purchaser must not risk delaying the implementation of the commitments. The purchaser must be capable of obtaining all the necessary authorisations from the relevant regulatory authorities concerning the transfer of the divestment business.

The conditions may be revised on a case-by-case basis. In some cases, for example, an obligation may be imposed such that the purchaser is active in the sector rather than seeking financial investment.

As per the Remedy Guidelines, there are two methods that are accepted by the Board. The first is for a purchaser fulfilling the aforementioned conditions to acquire the divested business within a period of time following the authorisation decision and upon the approval of the Board. The second is the signing of a sales contract with a suitable purchaser before the authorisation decision ("fix-it-first").

5.5 Negotiating Remedies With Authorities

The parties may submit proposals for possible remedies during either the preliminary review or the investigation process.

There have been several cases where the Board has accepted remedies or commitments (such as divestments) proposed to or imposed by the EC, as long as these remedies or commitments ease competition law concerns in Turkey (eg, Bayer/Monsanto, 18-14/261-126, 8 March 2018; Nidec/Embraco, 19-16/231-103, 18 April 2019; Synthomer plc/OMNOVA Solutions, 20-08/90-55, 6 February 2020, Obilet/Biletal, 21-33/449-224, 01.07.2021, American Securities/Ferro, 22-10/144-59, 24.02.2022).

For further details, see **5.1 Authorities' Ability to Prohibit or Interfere With Transactions**.

5.6 Conditions and Timing for Divestitures

The Board may condition its approval decision on the observance of the remedies. The characteristics of the remedies are important when determining whether the parties may complete the transaction before the remedies are complied with. The remedies are different in nature – some a condition precedent for the closing, some an obligation that could only be complied with after closure – and the parties cannot complete the transaction unless the remedies are complied with before the closing.

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

5.7 Issuance of Decisions

The Board serves the final decisions to the representative(s) of the notifying party/parties. Following the removal of any confidential business information, final decisions are also published on the website of the TCA.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

In an example of a conditional clearance case (Synthomer plc/OMNOVA Solution, 20-08/90-55, 6 February 2020), the Board granted its conditional approval to the transaction based on the commitments provided by the parties to EC during its Phase II review. Moreover, in Nidec/Embraco (19-16/231-103, 18 April 2019), Bayer Aktiengesellschaft (18-14/261-126, 8 May 2018) and NV Bekaert (15-04/52-25, 22 January 2015), the Board granted its conditional approval to the transactions based on the commitments provided by the parties during its Phase II review. The Board also prohibited the acquisition of Beta Marina and Pendik Turizm by Setur (a subsidiary of Koç Holding, Turkey's largest industrial conglomerate).

There are a few decisions in which behavioural remedies were recognised (eg, Bekaert/Pirelli, 22 January 2015, 15-04/52-25; Migros/Anadolu, 9 July 2015, 29/420-117). Nonetheless, the great majority of conditional clearance decisions rely on structural remedies (eg, Harris Corporation/L3 Technologies, 20 June 2019, 19-22/327-145; Nidec/Embraco, 18 April 2019, 19-16/231-103).

In some of these cases (eg, Cadbury/Schweppes, 07-67/836-314, 23 August 2007), the parties initially proposed purely behavioural remedies, which ultimately failed. However, in Luxoticca/Essilor (1 October 2018, 18-36/585-286), certain structural and behavioural remedies were submitted to the TCA and the Board approved the transaction.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

The Board's approval of the transaction must also cover the restraints that are directly related to and necessary to enforce the transaction (Article 13(5) of Communiqué No 2010/4). Therefore, a restraint shall be covered to the extent that its nature, subject matter, geographic scope, and duration are limited to what is necessary to enforce the transaction.

General rules on ancillary restraints are defined in the Guidelines on Undertakings Concerned. The parties make a self-assessment as to whether a certain restriction could be deemed ancillary; therefore, the Board will not allocate a separate part in its decision to explaining the ancillary status of all the restraints. The Board may review the restraints per the parties' request and, if the ancillary restrictions are not compliant with the merger control regulation, may launch an Article 4 investigation.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

The Board is authorised to request information from third parties such as customers, competitors, complainants and other persons related to the transaction. During the review process, third parties may submit complaints about a transaction and request a hearing from the Board, provided that they prove their legitimate interest to do so. They may also challenge the Board's decision regarding the transaction before the competent judicial tribunal – again, provided that they prove their legitimate interest.

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

7.2 Contacting Third Parties

The Board frequently contacts third parties as part of its review process, where needed. This is usually in a written form; oral communication with third parties only takes place in exceptional circumstances. There are a limited number of decisions where the Board has applied a market test to the proposed remedies (eg, Mars Sinema v AFM, 11-57/1473-539, 17 November 2011). Although the Board does not tend to conduct a proper economic analysis, it does make a comprehensive assessment based on the content of the proposed remedies nonetheless (eg, Anadolu v Moonlight Capital, 15-29/420-117, 9 July 2015).

7.3 Confidentiality

Communiqué No 2010/4 introduces a mechanism that requires the TCA to publish notified transactions on its official website, including only the names of the undertakings concerned and their areas of commercial activity. Once the parties have notified a transaction to the TCA, the existence of a transaction is no longer a confidential matter.

Communiqué No 2010/3 on the Regulation of Right to Access to File and Protection of Commercial Secrets ("Communiqué No 2010/3") is the main legislation that regulates the protection of commercial information. Pursuant to Communiqué No 2010/3, undertakings must identify and justify information or documents as commercial secrets.

Undertakings are obligated to request confidentiality from the Board in writing and to justify their reasons for the confidential treatment of the information or documents. The general rule is that if confidentiality is not requested, then the information and documents are accepted as non-confidential.

As mentioned in **5.7 Issuance of Decisions**, the reasoned decisions of the Board are published on the website of the TCA once confidential business information has been removed. Moreover, the Board and personnel of the TCA are bound by a legal obligation not to disclose any trade secrets or confidential information they have acknowledged during the course of their work.

In the event that the Board decides to have a hearing during the investigation, hearings at the TCA are – in principle – open to the public. However, in order to protect public morality or trade secrets, the Board may decide that the hearing must be held in camera.

Article 15(2) of Communiqué No 2010/3 implies that the TCA may not consider confidentiality requests related to information and documents that are necessary evidence to prove the infringement of competition. In such cases, the TCA can disclose information and documents that could be classed as trade secrets – provided it takes into account the balance between public interest and private interest and makes the disclosure in accordance with the proportionality criterion.

7.4 Co-operation With Other Jurisdictions

The TCA is authorised to contact certain regulatory authorities around the world, including the EC, in order to exchange information. Authorities are not obliged to seek the parties' permission to share information with each other.

Article 43 of Decision No 1/95 of the EC-Turkey Association Council (Decision No 1/95) empowers the TCA to notify the EC and request that the Directorate-General for Competition applies relevant measures if the Board believes that transactions realised in EU territory adversely affect competition in Turkey. This provision grants reciprocal rights and obligations to the parties (EU–Turkey) and, thus, the EC has the authority to ask the Board to apply the necessary measures to restore competition in the relevant markets.

In addition, the TCA's research department makes periodical consultations with relevant domestic and foreign institutions and organisations. In the past, the EC has been reluctant to share any evidence or arguments that the TCA had explicitly requested on a limited number of occasions.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Parties can appeal the Board's final decisions before the administrative courts of Ankara, including decisions on interim measures and fines. Third parties can also challenge a Board decision before the competent administrative courts, provided that they have a legitimate interest. Decisions by the Board are classed as administrative acts and, as such, legal actions against them shall be pursued in accordance with Turkish administrative procedural law. The judicial review comprises both procedural and substantive review.

Filing an administrative action does not automatically stay the execution of the Board's decision. However, at the request of the plaintiff, the court may – by providing its justifications – decide on a stay of execution if the execution of the Board's decision is highly likely to:

- cause serious and irreparable damages; and/or
- be against the law (ie, upon showing of a prima facie case).

Judicial Review Period

Administrative litigation cases are subject to judicial review before the regional courts. This creates a three-level appellate court system consisting of administrative courts, regional courts and the High State Court.

Regional Courts

The regional courts will investigate the case file, on both procedural and substantive grounds, and make their decision based on the merits of the case. The regional court's decision will be considered final in nature.

Pursuant to Article 46 of the Administrative Procedure Law, the decision of the regional court will be subject to the High State Court's review in exceptional circumstances. In such a case, the High State Court may decide to uphold or reverse the regional court's decision. If the decision is reversed by the High State Court, it will be remanded back to the deciding regional court, which will in turn issue a new decision that takes the High State Court's decision into account.

8.2 Typical Timeline for Appeals

The parties should file an appeal case within 60 calendar days of receiving the reasoned decision of the Board. The judicial review period before the Ankara administrative courts of first instance usually takes about 12 to 24 months. The appeal period before the High State Court usually takes about 24 to 36 months. Court decisions in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts 24 to 30 months.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties can challenge a Board decision before the competent administrative courts, provided they have a legitimate interest.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

As previously mentioned in **4.6 Non-competition Issues**, merger control regulations under the Turkish competition law regime are also applicable to foreign direct investments. There are no separate merger control regulations for foreign direct investments.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

Communiqué No 2022/2 was published in the Official Gazette on 4 March 2022 and entered into force on 4 May 2022. Communiqué No 2022/2 raised the jurisdictional turnover thresholds under Article 7 of Communiqué No 2010/4.

Two of the most significant developments resulting from Communiqué No 2022/2 are the introduction of a threshold exemption for undertakings active in certain markets/sectors and an increase in the applicable turnover thresholds that trigger mandatory merger control filing before the TCA.

Communiqué No 2022/2 does not seek a Turkish nexus in terms of the activities that render the threshold exemption. In other words, the threshold exemption would apply to a target company that is active in the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies anywhere in the world, provided that the target company either:

- 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 above-mentioned ones.

Accordingly, for the exemption on the local turnover thresholds to become applicable, Communiqué No 2022/2 does not require the target company to:

- generate revenue from customers located in Turkey;
- conduct R&D activities in Turkey; or
- provide services to the Turkish users concerning the above-mentioned fields.

Concentrations related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies are expected to be more closely scrutinised by the TCA. For further details, please see the Turkey Trends & Developments chapter in this guide.

10.2 Recent Enforcement Record

Enforcement actions by the Board are very frequent in the merger control field. There are several cases where the Board levied monetary fines against the parties for failing to notify in foreign-to-foreign transactions. The same is true for conditional clearances. So far, only a few transactions have been blocked altogether (eg, Setur, 15-29/421-118, 9 July 2015).

10.3 Current Competition Concerns

The Board adopted many significant decisions in 2022.

The Ferro/Prince Phase II review decision (Decision 22-10/144-59 of 24 February 2022) concerned 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. This was based on concerns that the transaction could result in the significant impediment of effective competition in the market for glass coatings for white goods in Turkey.

The Board identified two specific product markets in which competitive concerns were concentrated and designated them as the affected markets. These markets are the porcelain enamel coatings market and the glass coatings for white goods market.

The Board concluded that the transaction would not give rise to competitive concerns in terms of inducing co-ordination. This conclusion was based on the following factors:

- the shares in the porcelain enamel coatings market to be acquired by the merged entity remained below the threshold specified in the EC's Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements (the "Horizontal Guidelines");
- the increase in market share of the undertaking involved in the transaction would be limited both in terms of volume and value;
- there was already strong competition present in the relevant markets;
- there were no significant barriers preventing new companies from entering the market;
- there were no significant obstacles for customers to switch suppliers; and
- producers possessed sufficient capacity to fulfil the demand for porcelain enamel coatings.

After analysing the market shares in the glass coatings for white goods market in 2020, the Board determined that the merging companies – which were among the top five players in the market – were planning to merge. As a result, the Board concluded that this merger would lead to a reduction in competitive pressure, as two of the five major players would combine.

During their assessment, the board made several observations. Initially, they noted that the market in question already had a concentrated structure, even prior to the merger. In addition to the five largest players, there were also smaller suppliers operating in the market. However, the merging parties held a significant portion of the market share. Furthermore, after the completion of the merger, the market structure would consist of four players and a substantial competitor's market share would be eliminated, resulting in increased concentration.

The merging companies had submitted commitments to the EC and, based on these commitments, the Board concluded that Prince would divest its porcelain enamel coating activities and the entire glass coatings business in Europe. Consequently, the Board conditionally approved the transaction, subject to the fulfilment of these commitments. This approval was granted because the commitments also addressed the horizontal overlaps between the merging parties in the affected markets in Turkey.

The Board, in Vinmar/Arısan (Decision 22-10/155 of 24 February 2022), issued an important Phase II decision concerning the assessment of non-compete and non-solicitation clauses. The case involved the acquisition of Arısan and Transol Arısan by Vinmar Group through Veser Kimya, granting sole control over the target group. The Board examined the parties' respective fields of activity and determined that Vinmar Group's activities in Turkey, carried out through its subsidiaries, could potentially overlap with the activities of the target group. These activities encompassed cosmetic chemicals (including chemicals for personal care products), household chemicals (including detergents and cleaning chemicals), food chemicals, and pharmaceutical chemicals (including veterinary chemicals and active ingredients) – as well as the sale of lubricant chemicals. Nevertheless, the Board observed that the parties had low market shares in the overlapping markets.

Furthermore, the agreement included four-year non-compete and non-solicitation obligations, which the parties mutually agreed upon. They argued that these obligations aimed to facilitate a smooth transition to the new company structure following the transaction and that the expected economic benefits from the transaction would not be fully realised if the non-compete and non-solicit obligations had a shorter duration. The parties also emphasised the transfer of significant know-how and the intention to establish long-term commercial relationships with buyers in the specialty chemicals market.

Consequently, the Board approved the transaction on the condition that the duration of the non-compete and non-solicit obligations be reduced to three years. This decision took into account factors such as market structure, customer loyalty, and know-how.

Throughout 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 beyond the scope of merger control – 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.

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