The Merger Control Review

Fourteenth Edition

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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions such as Malaysia are continuing to consider imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, the international business community had a wake-up call when, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is imperative, therefore, that counsel develop a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file a notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 25 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely developments.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers and nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard (China having consolidated its three antitrust agencies into one agency in 2018). Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany amended its law to ensure that it has the opportunity to review transactions in which, although the parties' turnovers do not reach the threshold, the value of the transaction is significant (e.g., social media, new economy, internet transactions). Other jurisdictions are also focused on ensuring that acquisitions involving smaller internet, online and data companies or, in other high-technology settings, a nascent competitor, do not escape review.

Newly adopted laws have tried to vest jurisdiction on these transactions by focusing on the 'value of the consideration' rather than turnover for acquisitions of nascent firms, particularly in the digital economy (e.g., in Austria and Germany). Some jurisdictions have also adopted a process to call in transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability to review and take action in non-reportable transactions (see discussion of *Google/Fitbit* in the International Merger Remedies and Japan chapters), and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time. To provide the ability to review acquisitions of nascent but potentially important rivals, the European Commission (EC) has adopted potentially the most significant change in its rules: to use the referral process from Member States to vest jurisdiction in transactions that fall below its thresholds but that could have Community-wide significance. In one such matter, *Illumina/GRAIL*, the EC invited national competition authorities to request a referral of the transaction, even though it did not meet the review thresholds of the EU Merger Regulation or any national merger control rules (in fact, GRAIL had no sales at all in the European Union). At the time of writing, according to reports, the EC has since accepted Article 22 referral requests in three other cases (*Meta/Kustomer*, *Viasat/Inmarsat* and *Cochlear/Oticon Medical*), although in each of these the transaction triggered the national merger control thresholds in at least one EU Member State.

There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction; however, there are some that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be any effect on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there is similarly no 'local' effect required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a self-assessment of whether the transaction will meet certain levels and, if so, should notify the agency to avoid a potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa have been in connection with these considerations. Notably, the current leadership at the US antitrust authorities have similarly suggested that their mandate under the antitrust laws is broader than the traditional focus on consumers and consumer welfare to include impact on labour, diversity and other considerations. It is unclear at this point how this shift will affect enforcement decisions and judicial challenges. Although a growing number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that the merger could potentially affect national security.

Some jurisdictions are exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands, where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing firm defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed owing to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even when the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriarche group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing. In 2021, Morocco similarly imposed a fine for failure to notify a transaction in excess of US$1 million.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for late notifications (e.g., Bosnia and Herzegovina, Indonesia and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the EC both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as gun-jumping, even fining companies that are found to be in violation. For example, the EC imposed a €124.5 million fine on Altice and, in 2023, fined Illumina €432 million for its closing of the *Grail* transaction. Other jurisdictions have become increasingly aggressive in the imposition of fines. Brazil, for instance, issued its first gun-jumping fine in 2014 and later issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority; however, in Canada – like the United States – the Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction; however, the KFTC continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. This list of jurisdictions is illustrative rather than comprehensive and is consistent with the overarching concerns expressed above regarding catching transactions that may have fallen below the radar but are subsequently deemed problematic. In the same spirit, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, it fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based on the size of the transaction; however, some jurisdictions determine the fee after filing or provide different fees based on the complexity of the transaction.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the JFTC announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Even within the EC, there remain some jurisdictions that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria. Finally, some jurisdictions have developed a fast-track process for transactions that are unlikely to raise antitrust concerns (e.g., because the parties' combined shares of potential relevant markets are all below a certain threshold or because of the size of the transaction). China and the EC are two such regimes in which the adoption of this fast-track process can make a significant difference to the review period.

The role of third parties also varies across jurisdictions. In some (e.g., Japan), there is no explicit right of intervention by third parties but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal; the

Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In other jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was fined by the antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). In Hong Kong, the authority has six months post-consummation to challenge a transaction. Norway is also a bit unusual in that the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

In large cross-border transactions raising competition concerns, it is becoming the norm for the US, Canadian, Mexican, EC and UK authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's competition authority, which, in turn, has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the EC in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including, most recently, Peru and India. China has consulted with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the US Federal Trade Commission and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have raised the size threshold at which filings are mandated (e.g., Austria), others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an acquisition of control. Many of these jurisdictions, however, will include, as a reportable situation, the creation of joint control, negative (e.g., veto) control rights to the extent that they may give rise to *de jure* or de facto control (e.g., Turkey), or a change from joint control to sole control (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which an interest of only 10 per cent or less is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use as the benchmark the effect that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has material influence (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers have also been the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an acquisition subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute, to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that structural remedies are preferable to behavioural conditions, a number of jurisdictions in the past few years have imposed a variety of behavioural remedies (e.g., China, the EC, France, Italy, Japan, the Netherlands, Norway, South Africa, Ukraine and Vietnam). This is particularly the case when non-compete or exclusive dealing relationships raise concerns (e.g., in Mexico and the United States). Some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's Ministry of Commerce remedy in *Glencore/Xstrata* and France's decision in the *Numericable/SFR* transaction). It is important to note, however, that one of the areas flagged for change by the new leadership at the US antitrust authorities is the willingness to consider behavioural remedies, or, for that matter, any remedies, rather than bringing enforcement actions to challenge the transaction itself.

In many of the key enforcement regimes (e.g., the United States, Canada, China and the United Kingdom), we are at a potentially transformational point in competition policy enforcement; however, this book should provide a useful starting point in navigating cross-border transactions in this changing enforcement environment.

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Chapter 25

TURKEY

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I INTRODUCTION

The national competition agency for enforcing merger control rules in Turkey is the Turkish Competition Authority (the Authority), a legal entity with administrative and financial autonomy. The Authority consists of the Competition Board (the Board), the office of the Presidency, main service units, auxiliary service units and advisory units. As the competent decision-making body of the Authority, the Board is responsible for, inter alia, reviewing and resolving merger and acquisition notifications. The Board consists of seven members and is seated in Ankara. The main service units comprise six supervision and enforcement departments plus the decisions department, the economic analysis and research department, the information technologies department, the external relations and competition advocacy department, the strategy development department, the regulation and budget department, and the cartel and on-site inspections support divisions. There is a 'sectoral' job definition for each of the supervision and enforcement departments.

The relevant legislation on merger control comprises Law No. 4054 on Protection of Competition, which was last amended on 24 June 2020 (the Amendment Law) and Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board, which was last amended on 4 March 2022 (Communiqué No. 2010/4).

Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board (Communiqué No. 2022/2), which entered into force on 4 March 2022, introduced certain new regulations concerning the Turkish merger control regime that will fundamentally affect the notifiability analysis of merger transactions and the merger control notifications submitted to the Authority.

The Authority has also issued many guidelines to supplement and provide guidance on the enforcement of Turkish merger control rules, including:

a the Guideline on Market Definition, which applies, inter alia, to merger control matters. It was issued in 2008 and is closely modelled on the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law;[2]

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2 97/C372/03.

b the Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions, which covers certain topics and questions about the concepts of undertakings concerned, turnover calculations and ancillary restraints. It is closely modelled on Council Regulation (EC) No. 139/2004 on the Control of Concentrations between Undertakings;

c the Guideline on Remedies Acceptable to the Turkish Competition Authority in Mergers and Acquisitions (the Guidelines on Remedies), which is an almost exact Turkish translation of the Commission Notice on Remedies Acceptable Under Council Regulation (EC) No. 139/2004 and Under Commission Regulation (EC) No. 802/2004; and

d the Guidelines on Horizontal Mergers and Acquisitions (the Horizontal Guidelines) and the Guidelines on Non-Horizontal Mergers and Acquisitions (the Non-Horizontal Guidelines), which are in line with EU competition law regulations and seek to retain harmony between European Union and Turkish competition law instruments.

The Board also released the Guidelines on Merger and Acquisition Transactions and the Concept of Control, also closely modelled on the respective European Commission (EC) guidelines.

Turkey is a jurisdiction with a suspensory pre-merger notification and approval requirement. Much like the EC regime, concentrations that result in a change of control on a lasting basis are subject to the Board's approval, provided that they reach the applicable turnover thresholds. 'Control' is defined as the right to exercise decisive influence over day-to-day management or the long-term strategic business decisions of a company, and it can be exercised *de jure* or *de facto*.

Two of the most significant developments that Communiqué No. 2022/2 entails are the introduction of a threshold exemption for undertakings active in certain markets and sectors, and the increase of the applicable turnover thresholds for the concentrations that require a mandatory merger control filing before the Authority.

Communiqué No. 2022/2 does not seek a Turkish nexus in terms of the activities that render 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 technologies, biotechnology, pharmacology, agricultural chemicals or health technologies anywhere in the world for the threshold exemption to become applicable, provided that the target company (1) generates revenue from customers located in Turkey, (2) conducts research and development (R&D) activities in Turkey or (3) provides services to Turkish users in any field other than those aforementioned. Accordingly, Communiqué No. 2022/2 does not require (1) revenue generated from customers located in Turkey, (2) R&D activities conducted in Turkey or (3) services provided to Turkish users concerning the fields listed above for the exemption on the local turnover thresholds to become applicable.

Concentrations relating to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies are expected to be scrutinised more closely by the Competition Authority.

Thresholds

Article 7 of Communiqué No. 2010/4, amended by Communiqué No. 2022/2, provides that a transaction will be required to be notified in Turkey if one of the following increased turnover thresholds is met (all currency conversions are based on the Turkish Central Bank's applicable average buying exchange rates for the financial year 2022):

a the aggregate Turkish turnover of the transaction parties exceeds 750 million Turkish lira and the Turkish turnover of at least two of the transaction parties each exceeds 250 million lira; or

b the Turkish turnover of the transferred assets or businesses in acquisitions exceeds 250 million lira and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion lira, or the Turkish turnover of any of the parties in mergers exceeds 250 million lira and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion lira.

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

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

Foreign-to-foreign transactions are caught if they exceed the applicable thresholds.

Acquisition of a minority shareholding can constitute a notifiable merger if and to the extent that it leads to a change in the control structure of the target entity. Joint ventures that emerge as independent economic entities possessing assets and labour to achieve their objectives are subject to notification to and the approval of the Board. As per Article 13 of Communiqué No. 2010/4, cooperative joint ventures will also be subject to a merger control notification and analysis in addition to an individual exemption analysis, if warranted.

The implementing regulations provide for important exemptions and special rules, in particular:

a Article 19 of Banking Law No. 5411 provides an exception from the application of merger control rules for mergers and acquisitions of banks. The exemption is subject to the condition that the market share of the total assets of the relevant banks does not exceed 20 per cent;

b mandatory acquisitions by public institutions as a result of financial distress, concordat and liquidation, etc., do not require a pre-merger notification;

c intra-corporate transactions that do not lead to a change in control are not notifiable;

d acquisitions by inheritance are not subject to merger control;

e acquisitions made by financial securities companies solely for investment purposes do not require a notification, subject to the condition that the securities company does not exercise control over the target entity in a manner that influences its competitive behaviour; and *f* two or more transactions carried out between the same persons or parties or within the same relevant product market by the same undertaking concerned within a period of three years are deemed a single transaction for turnover calculation purposes following the amendments introduced by Communiqué No. 2017/2. They warrant separate notifications if their cumulative effect exceeds the thresholds, regardless of whether the transactions are in the same market or sector, or whether they were previously notified.

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

There are also specific methods of turnover calculation for certain sectors. These special methods apply to banks, special financial institutions, leasing companies, factoring companies, securities agents, insurance companies and pension companies.

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

a 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, excluding the term 'participation banks' and referring to the term 'banks' in general, which covers all legal forms of banks; and

b 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, as referred to in Article 9 of Communiqué No. 2010/4.

Failing to file or closing the transaction before the Board's approval can result in a turnover-based monetary fine, which is imposed on the acquiring party. The fine is calculated according to the annual Turkish turnover of the acquirer generated in the financial year preceding the fining decision at a rate of 0.1 per cent. In the case of mergers, the fine will apply to both merging parties. In any event, the amount of any fine imposed in 2023 will be no less than 105,688 lira. This monetary fine does not depend on whether the Authority will ultimately clear the transaction.

If, however, there truly is a risk that the transaction is problematic under the significant impediment to effective competition (SIEC) test applicable in Turkey, the Authority may launch an investigation *ex officio* into the transaction, order structural and behavioural remedies to restore the situation to what it was before the closing (*restitutio in integrum*) and impose a turnover-based fine of up to 10 per cent of the parties' annual turnover. Executive members and employees of the undertakings concerned who are deemed to have played a significant part in the violation (failing to file or closing before the approval) may also receive monetary fines of up to 5 per cent of the fine imposed on the undertakings. The transaction will also be invalid and unenforceable in Turkey.

The Board has so far consistently rejected all carve-out or hold-separate arrangements proposed by merging undertakings. Communiqué No. 2010/4 provides that a transaction is deemed to be 'realised' (i.e., closed) 'on the date when the change in control occurs'. Although the wording allows some room to speculate that carve-out or hold-separate arrangements are now allowed, it remains to be seen whether the Authority will interpret this provision in such a way. This has so far been consistently rejected by the Board, which argues that a closing is sufficient for the suspension violation fine to be imposed, and that a further analysis of whether change in control actually took effect in Turkey is unwarranted.

II YEAR IN REVIEW

Pursuant to the Merger and Acquisition Insight Report of the Authority (the Report) for 2022, the Board reviewed a total of 245 transactions during that year. The number of assessments in 2022 was higher than the average number of assessments made between 2013 and 2020. Only one transaction was cleared at Phase II and only two were conditionally cleared. The Board did not prohibit any transactions in 2022.

The Board's most important merger control decisions during the year were the following.

The *Ferro/Prince* Phase II review decision[3] concerned the acquisition of sole control over Ferro by American Securities. The Board decided to initiate a Phase II review based on concerns that the transaction could result in a significant impediment to effective competition in the market for glass coatings for white goods in Turkey. The Board defined the affected product markets as (1) the porcelain enamel coatings market and (2) the glass coatings for white goods market. The Board noted that the transaction would not cause competitive concerns in terms of coordination-inducing effects, considering that:

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

The Board analysed the market shares in the market for glass coatings for white goods for 2020 and noted that the merging undertakings were among the five largest undertakings in the market. Therefore, the Board assessed whether the possibility for undertakings to exert competitive pressure would be reduced following the merger between two of the five largest players in the market. The Board observed that (1) the market had a concentrated structure even before the transaction, (2) 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 (3) 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. The Board concluded that this could lead to a significant restriction of competition in the market. The merging parties had submitted commitments to the EC and the Board concluded that Prince would be divesting its porcelain enamel coating activities and the entire glass coatings business in Europe. The Board ultimately conditionally approved the transaction subject to the implementation of these commitments, since they also removed the horizontal overlaps between the parties in the horizontally affected markets in Turkey.

3 Competition Board, Decision No. 22-10/144-59 (24 February 2022).

In *Vinmar/Arısan*,[4] the Board issued a Phase II decision concerning non-compete and non-solicitation clauses. 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 conducted by Vinmar Group in Turkey through its subsidiaries could overlap with the activities of the target group:

a cosmetic chemicals (including chemicals for personal care products);
b household chemicals (including detergents and cleaning chemicals);
c food chemicals;
d pharmaceutical chemicals (including veterinary chemicals and active ingredients); and
e 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-solicit obligations, which the parties stated reflected their mutual agreement. The parties stated that the aim was to ensure a smooth transition to the new company structure after the transaction, and that the economic benefits expected from the transaction could not be fully realised if the non-compete and non-solicit obligations had a shorter duration. The parties also stated that a high level of know-how would be transferred, and that the aim was to establish long-term commercial relationships with buyers in the speciality chemicals market. Consequently, the Board approved the transaction on the condition that the duration of non-compete and non-solicit obligations was reduced to three years, in consideration of the market structure, customer loyalty and know-how.

The approach of the Board to market shares and concentration levels is similar to that of the EC and in line with the approach enumerated in the Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings.[5] The first factor discussed under the Horizontal Guidelines is that market shares above 50 per cent can be considered an indication of a dominant position, whereas a market share of the combined entity remaining below 20 per cent would not require further enquiry into the likelihood of harmful effects resulting from the combined entity. Although a brief mention of the Board's approach to market shares and the Herfindahl–Hirschman Index (HHI) levels is provided, the Horizontal Guidelines' emphasis on an effects-based analysis (coordinated and uncoordinated effects) without further discussion of the criteria to be used in evaluating the presence of a dominant position indicates that the dominant position analysis still remains subject to Article 7 of Law No. 4054.

Other than market share and concentration level considerations, the Horizontal Guidelines cover the following main topics:

a the approach of the Board to market shares and concentration levels;
b the anticompetitive effects that a merger would have in the relevant markets;
c the buyer power as a countervailing factor to anticompetitive effects resulting from the merger;
d the role of entry in maintaining effective competition in the relevant markets;

4 Competition Board, Decision No. 22-10/155 (24 February 2022)
5 2004/C 31/03.

e efficiencies as a factor counteracting the harmful effects on competition that might otherwise result from the merger; and
f the conditions of a failing company defence.

The Horizontal Guidelines also discuss coordinated effects that might arise from a merger of competitors. They confirm that coordinated effects may increase the concentration levels and may even lead to collective dominance. As regards efficiencies, the Horizontal Guidelines indicate that efficiencies should be verifiable and that the passing-on effect should be evident.

The Non-Horizontal Guidelines confirm that non-horizontal mergers in which the post-merger market share of the new entity in each of the markets concerned is below 25 per cent, and the post-merger HHI is below 2,500 (except where special circumstances are present), are unlikely to raise competition law concerns, similar to the Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings.[6] Other than the Board's approach to market shares and concentration levels, the other two factors covered in the Non-Horizontal Guidelines include the effects arising from vertical mergers and the effects of conglomerate mergers. The Non-Horizontal Guidelines also outline certain other topics, such as customer restraints, general restrictive effects on competition in the market and restriction of access to the downstream market.

The Authority is expected to retain its well-established practice of paying close attention to developments in EU competition law and seeking to retain harmony between EU and Turkish competition law instruments.

In practice, there are indications that remedies and conditional clearances are becoming increasingly important in Turkish merger control enforcement. The number of cases in which the Board decided on divestment or licensing commitments, or other structural or behavioural remedies, has increased dramatically in recent years. Examples include some of the most important decisions in the history of Turkish merger control enforcement.[7]

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

III THE MERGER CONTROL REGIME

There is no specific deadline for making a notification in Turkey; however, there is a suspension requirement (i.e., a mandatory waiting period). A notifiable transaction (whether or not it is problematic under the applicable SIEC test) is invalid, with all the ensuing legal consequences, unless and until the Authority approves it.

6 2008/C 265/07.
7 *PSA/FCA*, 25 June 2020, 20-31/388-174; *Bekaert/Pirelli*, 22 January 2015, 15-04/52-25; *Migros/Anadolu*, 9 July 2015, 29/420-117; *Luxottica/Essilor*, 1 October 2018, 18-36/585-286; *AFM/Mars*, 17 November 2011, 11-57/1473-539; *Vatan/Doğan*, 10 March 2008, 08-23/237-75; *ÇimSA/Bilecik*, 2 June 2008, 08-36/481-169; *OYAK/Lafarge*, 18 November 2009, 09-56/1338-341; *THY/HAVAS*, 27 August 2009, 09-40/986-248; *Burgaz/Mey Icki*, 8 July 2010, 10-49/900-314.

The notification is deemed filed when the Authority receives it in its complete form. If the information provided to the Board is incorrect or incomplete, the notification is deemed filed only on the date when the information is completed upon the Board's subsequent request for further data. The notification is submitted in Turkish. Transaction parties are required to provide a sworn Turkish translation of the final, executed or current version of the transaction agreement. The notification form is similar to the EC's Form CO. One hard copy and an electronic copy of the merger notification form must be submitted to the Board.

Recent updates allow notifying parties to submit the notification form via e-Devlet, an elaborate system of web-based services, including electronic submission. Communiqué No. 2010/4 explicitly mentions this alternative way of submission, making it official.

The information requested includes data in respect of supply and demand structure, imports, potential competition and expected efficiencies. Some additional documents, such as the executed or current copies and sworn Turkish translations of the documents that bring about the transaction, annual reports (e.g., balance sheets of the parties) and, if available, market research reports for the relevant market, are also required.

Communiqué No. 2010/4 also introduced a modified notification form, which replaced the previous notification form as of 4 May 2022. According to the modified form, there is also 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 Board, upon its preliminary review of the notification (i.e., Phase I), will decide either to approve or to investigate the transaction further (i.e., 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 with the relevant legislation. Although the wording of the law implies that the Board should decide within 15 calendar days whether to proceed with Phase II, the Board generally takes more time to form its opinion concerning the substance of a notification. It is more sensitive to the 30-calendar-day deadline on announcement. Moreover, any written request by the Board for missing information will stop the review process and restart the 30-calendar-day period at the date the information is provided. In practice, the Authority is quite keen on asking formal questions and adding more time to the review process. Therefore, it is recommended that the filing be done at least 60 calendar days before the projected closing.

If a notification leads to a Phase II review, it turns into a full-fledged investigation. Under Turkish law, the Phase II investigation takes about six months. If necessary, the Board may extend this period, but only once, for an additional period of up to six months. In practice, only extremely exceptional cases require a Phase II review, and most notifications obtain a decision within 60 days of the original date of notification.

The filing process differs for privatisation tenders. Communiqué No. 2013/2 provides that a pre-notification is conducted before the public announcement of tender specifications. In the case of a public bid, the merger control filing can be performed when the documentation adequately proves the irreversible intention to finalise the contemplated transaction.

There is no special rule for hostile takeovers; the Board treats notifications for hostile transactions in the same manner as for other notifications. If the target does not cooperate, and if there is a genuine inability to provide information because of the one-sided nature of the transaction, the Authority tends to use most of its powers of investigation or information request under Articles 14 and 15 of Law No. 4054.

Aside from close follow-up with the case handlers reviewing the transaction, the parties have no available means to speed up the review process.

The Board may request information from third parties, including the customers, competitors and suppliers of the parties, and other persons connected with the merger or acquisition. The Board uses this power especially to define the market and determine the market shares of the parties. Third parties, including the customers and competitors of the parties, and other persons concerned with the merger or acquisition, may request a hearing from the Board during the investigation, subject to the condition that they prove their legitimate interest. They may also challenge the Board's decision on the transaction before the competent judicial tribunal, again subject to the condition that they prove their legitimate interest.

The Board may grant conditional clearance and make the clearance subject to the parties observing certain structural or behavioural remedies, such as divestiture, ownership unbundling, account separation and right of access. The number of conditional clearances has increased significantly in recent years.

Final decisions of the Board, including its decisions on interim measures and fines, can be submitted for judicial review before administrative courts. The appellants may make a submission by filing an appeal within 60 days of the parties' receipt of the Board's reasoned decision. Decisions of the Board are considered as administrative acts. Filing an appeal does not automatically stay the execution of the Board's decision; however, at the request of the plaintiff, the court may decide to stay the execution. The court will stay the execution of the challenged act only if execution of the decision is likely to cause irreparable damage and there is a prima facie reason to believe that the decision is highly likely to violate the law.

The appeal process may take two and a half years or more.

IV OTHER STRATEGIC CONSIDERATIONS

With the changes in Law No. 4054, the Board has geared up for a merger control regime that focuses much more on deterrents. As part of that trend, monetary fines for not filing, or for closing a transaction without the Board's approval, have increased significantly. It is now even more advisable for the transaction parties to observe the notification and suspension requirements and avoid potential violations. This is particularly important when transaction parties intend to put in place carve-out or hold-separate measures to override the operation of the notification and suspension requirements in foreign-to-foreign mergers. The Board is currently rather dismissive of carve-out and hold-separate arrangements, even though the wording of the new regulation allows some room to speculate that carve-out or hold-separate arrangements are now allowed. Because the position the Authority will take in interpreting this provision is not yet clear, such arrangements cannot be considered as safe early closing mechanisms recognised by the Board.

Many cross-border transactions meeting the jurisdictional thresholds of Communiqué No. 2010/4 will also require merger control approval in a number of other jurisdictions. Current indications suggest that the Board is willing to cooperate more with other jurisdictions in reviewing cross-border transactions.[8] Article 43 of Decision No. 1/95 of the EC–Turkey Association Council authorises the Authority to notify and request the EC (the Competition Directorate-General) to apply relevant measures.

8 The trend for more zealous inter-agency cooperation is even more apparent in leniency procedures for international cartels.

The Turkish merger control regime currently utilises an SIEC test in the evaluation of concentrations. In line with EU law, the Amendment Law has replaced the dominance test with the SIEC test. Based on the new substantive test, mergers and acquisitions that do not significantly impede effective competition in a relevant product market within the whole or part of Turkey would be cleared by the Board.

Article 3 of Law No. 4054 defines a dominant position as 'the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers'. The Horizontal Guidelines state that market shares of more than 50 per cent may be used as an indicator of a dominant position, whereas aggregate market shares below 25 per cent may be used as a presumption that the transaction does not pose competition law concerns. In practice, market shares of about 40 per cent and higher are generally considered, along with other factors such as vertical foreclosure or barriers to entry, as an indicator of a dominant position in a relevant market. However, a merger or acquisition can be blocked only when it significantly impedes competition in the whole territory of Turkey or in a substantial part of it, pursuant to Article 7 of Law No. 4054.

There have been exceptional cases in which the Board used a joint dominance test to discuss the coordinated effects arising out of transactions. In this regard, transactions concerning the sale of certain cement factories by the Savings Deposit Insurance Fund were rejected by the Board on the grounds that the relevant transactions would lead to joint dominance of the market. The Board considered factors such as structural links between the undertakings in the market, past coordinative behaviour, entry barriers, transparency of the market and the structure of demand.

Economic analysis and econometric modelling have also been seen more often in recent years. For example, in *AFM/Mars Cinema*, the Board employed the ordinary, least-squared and the two-staged, least-squared estimation models to determine price increases that would be expected as a result of the transaction. The Board also used the Breusch–Pagan, Breusch–Pagan/Godfrey/Cook–Weisberg and White/Koenker NR2 tests and the Arellano–Bond test on the simulation model. Economic analyses such as these are rare but are increasing in practice. Economic analyses that are used more often are the HHI and concentration ratio indices to analyse concentration levels. In 2019, the Board also published the *Handbook on Economic Analyses Used in Board Decisions*, which outlines the most prominent methods used by the Authority (e.g., correlation analysis, the small but significant and non-transitory increase in price test, and the Elzinga–Hogarty test).

V OUTLOOK AND CONCLUSIONS

Communiqué No. 2022/2 raises the jurisdictional turnover thresholds under Article 7 of Communiqué No. 2010/4. Two of the most significant developments that Communiqué No. 2022/2 entails are the introduction of a threshold exemption for undertakings active in certain markets and sectors, and the increase of the applicable turnover thresholds for the concentrations that require a mandatory merger control filing before the Authority. Concentrations relating to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies are expected to be scrutinised more closely by the Authority.