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ACTECON

Special Issue

Technology Undertakings from the Perspective of the Turkish Merger Control Regime

featuring a Q&A with Dr. Fevzi Toksoy and Bahadır Balkı

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Dear reader,

As a complementary to our quarterly publications, given the recent developments on the merger regime involving technology undertakings, we felt the necessity to compile this special issue of the Output®.

The Turkish Competition Authority has revised the merger control thresholds to be applicable as from May 2022. In addition to the increased turnover thresholds (to keep a step with the inflation in the country), a special local turnover threshold exception was introduced for concentrations involving technology undertakings.

The complication that comes with this (let's call it) the Turkish version of the "value of transaction" test to address the killer acquisitions is that it is rather vague and creates legal uncertainty as to the criteria of what constitutes a "technology undertaking" and hence, whether the transaction is notifiable. The TCA is left with the sole discretion in determining if you are a technology undertaking or not. Some guidance comes with the existing cases, although those are not sufficient yet.

We present the highlights of some of those cases to help you to understand the local threshold exception in Turkey better. The main conclusion that may be drawn from those is that when the target to a concentration generates turnover in Turkey by any means, it is highly recommended its activities in other jurisdictions be assessed carefully to verify if those fall under the technology undertaking definition. If there is the slightest chance that it may be viewed as a technology undertaking, it better be notified to the TCA.

The special issue of the Output® starts with a Q&A section, compiling our thoughts on the "technology undertaking" exception with concrete examples and moves onto the business articles from ACTECON team delving into Turkish merger control regime's thresholds, technology undertakings, substantive test and more.

We remain at your service if you would require any Turkey specific advice in the areas of competition rules, international trade, and regulations.

Sincerely,

Fevzi and Bahadır

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Q & A with Dr. Fevzi Toksoy and Bahadır Balkı

● ***What is the recently adopted "technology undertaking" exception to Turkey's merger control regime and what do you think about it?***

Dr. Fevzi Toksoy: With the adoption of this exception, the TCA exempts certain transactions involving a takeover of a technology undertaking from the target-wise turnover thresholds. The Authority's move is significant as it is a strong signal that the TCA is willing to be one of the frontrunner competition authorities around the world to regulate acquisitions involving technology start-ups. Competition authorities worldwide have long been discussing how to prevent the so-called "killer acquisitions". While the German and Austrian merger control regimes have introduced transaction value thresholds in addition to the turnover threshold to achieve similar goals, the TCA chose to make the unique amendment to catch "killer" acquisitions of technology undertakings that engage in the development of valuable products but do not have significant turnover yet.

In other words, the purpose behind the exception is to enable the TCA to review the mergers and acquisitions of start-ups in digital markets with the potential of initiating a disruptive innovation wave even if those start-ups do not generate a significant or any kind of turnover. This sui generis approach of the TCA, however, brings some question marks which are yet to be solved.

● ***What is the fundamental problem with the TCA's technology undertaking exception?***

Bahadır Balkı: We have uncertainties around what should be considered as a "technology undertaking" and the TCA's definition and enforcement so far have not clarified this point. Since the definition covers undertakings that are active in the areas of software and game software, this raised the question of whether the TCA will interpret the concept of being active in the area of software broadly to include companies in many sectors that develop their own software to cater services to their customers. Additionally, the definition includes "areas of activity" such as "biotechnology, pharmacology, and agrochemicals," which are unconventional sectors even for the busiest practitioners. The answer as to whether an activity by an undertaking would fall into these areas thus demands sufficient case law and (better) proper guidelines from the TCA. We are looking forward to an amendment to the guidelines.

● ***Can a traditional undertaking leveraging today's technological tools to serve its customers be considered as a "technology undertaking"?***

Dr. Fevzi Toksoy: Let me re-phrase your question; can you imagine classifying a restaurant as a technology undertaking for utilizing hand terminals and online platforms to sell its food? Well, the response is obviously "No". In Nielsen/Brookfield[1], the target was not viewed as a technology undertaking, even though the target used software as a tool in providing other services. It utilized data analytics tools to provide insights about market conditions and customer trends to their customers. Based on the TCA's approach in Nielsen/Brookfield, we have received a not-subject-to-authorization decision from the TCA under the NielsenIQ/GfK[2] decision by arguing this exact point in terms of the NielsenIQ and

[1] Decision No 22-24/395-BD dated 26 May 2022 in relation to concentration by way of acquisition of indirect joint control over Nielsen Holdings plc by funds and/or investment instruments.

[2] Decision No 22-45/665-BD dated 6 October 2022.

GfK combination. However, it is not always such a close call as in the restaurant example. Many undertakings are now developing proprietary software and countless types of consumer-facing panels leveraging all kinds of blessings enabled by technology, so each case requires a unique assessment and if we do have a question mark, we do have to knock on the TCA's door because of the lack of legal certainty in terms of the definition.

● ***Will a mainly traditional undertaking with negligible activities fall into the "technology undertaking definition"?***

Bahadır Balkı: The short response is unfortunately yes and let me explain this with a striking example. Imagine a cement producer operating in Turkey and Greece. This cement producer hires a computer engineer and develops proprietary software to track its vehicles and utilizes this software in Greece, not in Turkey. The software is found desirable, and another firm approaches the cement producer and buys the software from it. Considering the current wording and the enforcement so far, the TCA would deem the cement producer as a technology undertaking since it would be considered operating in the "software" field solely due to an extremely ancillary business that happens to involve sales of non-crucial software.

● ***So, are technology related activities outside of Turkey sufficient for the undertaking to be considered as a technology undertaking?***

Dr. Fevzi Toksoy: This is exactly the case. The TCA's Berkshire Hathaway decision establishes that even if the undertaking does not engage in activities, in Turkey, that would be considered a technology undertaking, the TCA can still consider the entity as a technology undertaking. Generating turnover from Turkey and engaging in activities in other jurisdictions that fall into the technology undertaking definition is sufficient enough for the TCA.

● ***Considering the lack of nexus under the exception rule, isn't its scope too large?***

Bahadır Balkı: This is a problematic aspect of the TCA's approach in my opinion. The technology undertaking exception brings about a global, technology undertaking specific due diligence burden for undertakings; which is not matched by any other jurisdiction: under this sui generis technology undertaking due diligence, undertakings must carefully examine if their activities in ANY jurisdiction across the globe fall into the TCA's technology undertaking definition. So, each transaction must be closely examined in terms of global operations with the TCA's technology undertaking definition in mind.

In the face of this, "technology undertaking" exception, undertakings with very few technology related activities in ANY jurisdiction other than Turkey would trigger notification obligation; which, in my opinion, is not totally in line with the rationale behind adopting such an exception. I can imagine that a number of undertakings may have already decided not to notify the TCA based on these kinds of grounds (i.e., limited involvement with the technology or the main business line being very conventional). But we must keep in mind that, the TCA is willing to act ex officio once it has adequate reason to believe that a notifiable transaction was closed without receiving its clearance decision and it regularly screens international outlets to check if its merger control regime is respected.

The most recent example is an administrative fine imposed on Elon Musk due to failure to notify the Twitter deal which was obviously a notifiable concentration given that the economic unit controlled by E. Musk exceeds the worldwide turnover thresholds and Twitter is a digital platform (i.e., technology undertaking) thus the transaction must be exempt from the target-wise thresholds and must have triggered notification obligation in Turkey. So, the ones deciding not to notify take on the risk of an administrative fine which lasts for the entire statute of limitations (i.e., 8 years).

● ***What should the undertakings expect from the enforcement in the upcoming future?***

Dr. Fevzi Toksoy: As explained, the adoption of the "technology undertaking" exception signifies a departure from the turnover-based merger control regime. This, I believe, reduces the legal certainty but at the same time enables the TCA to review transactions that may indeed be important for the competition policy enforcement. I believe that a fine balance will be eventually met by the Authority. Until then, we may receive mixed signals from the Authority.

So, the enforcement so far also must not be deemed as a definitive approach. That said, in such an uncertain landscape, the undertakings must assume the largest interpretation of the technology undertaking and knock on the door of the TCA in case they have questions in their minds. Negative clearance decisions are not easily obtained, and the TCA tends to issue RFIs to cross-check the undertakings' statements. In case of a problematic transaction, it is advisable to fight the good old jurisdictional barrier first with logical arguments, highlighting the TCA's rationale behind adopting such an exception.

Elon Musk Fined in Turkey Due to Failure to Notify the Twitter Deal

by B. Balkı and N. C. Acar

On 6 March 2023, the TCA announced its decision to fine Elon Musk due to failure to notify the USD 44 billion deal to acquire Twitter. The TCA's announcement in terms of the fining decision reads as following:

"As a result of ex officio examination of the transaction for the acquisition of sole control of Twitter Inc. by Elon R. MUSK in accordance with Article 11 of the Law on the Protection of Competition No. 4054, it was unanimously decided during the meeting of the Competition Board dated 02.03.2023, that;

- The transaction is subject to clearance within the scope of Article 7 of the Law No. 4054 and the Communiqué No. 2010/4 on Mergers and Acquisitions Requiring Permission from the Competition Board;
- Clearance must be granted as there is no significant reduction in effective competition as a result of the transaction,
- However, since the transaction was carried out without the clearance of the Competition Board, the transaction party in the position of the acquirer, Elon R. MUSK must be imposed with an administrative fine at the rate of one-thousandth of its gross income generated from Turkey in accordance with subparagraph (b) of the first paragraph of Article 16 of the Law on the Protection of Competition No. 4054.

The appeal may be made before Ankara Administrative Courts within 60 days from the notification of the reasoned decision."[1]

The analysis

Firstly, Elon Musk acquiring sole control over Twitter was a clearly notifiable transaction under the Turkish merger control regime since the buyer side notification threshold was met. For background information, the following concentrations require authorization from the TCA:

I. The transactions where total Turkey turnovers of transaction parties exceed TRY 750 million (approx. EUR[2] 43.15 million or USD[3] 45.28 million) and Turkey turnovers of at least two of the transaction parties separately exceed TRY 250 million (approx. EUR 14.38 million or USD 15.09 million); or

[1] https://www.rekabet.gov.tr/tr/Guncel/elon-r-musk-tarafindan-twitter-inc-in-te-7f3c2a3ff0bbed118eb0005056850339

[2] The EUR figures are converted using the exchange rate of EUR 1= TRY 17.38, based on the applicable Central Bank of the Republic of Turkey average buying rate for 2022.

[3] The USD figures are converted using the exchange rate of USD 1= TRY 16.56, based on the applicable Central Bank of the Republic of Turkey average buying rate for 2022.

II. In acquisitions: assets or operations that are subject to the acquisition and in mergers: Turkey turnover of at least one of the transaction parties exceed TRY 250 million (approx. EUR 14.38 million or USD 15.09 million) and the global turnover of at least one of the other transaction parties exceed TRY 3 billion (approx. EUR 172.61 million or USD 181.15 million). Turkey's merger control regime, however, provides for a "technology undertaking" provision that was introduced in March 2022. It stipulates an exception to certain thresholds to catch so-called "killer acquisitions". According to it, the TRY 250 million (approx. EUR 14.38 million or USD 15.09 million) thresholds are not applicable in the acquisitions of technology undertakings that (i) are active or (ii) have R&D activities, in the Turkish geographic market or (iii) that provide services to customers in Turkey. Technology undertakings are defined as undertakings active in areas of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals, and health technologies.

In terms of Twitter takeover, it is safe to state that the target is a digital/online platform that falls into "the technology undertaking" exception in the Turkish merger control regime; thus, there is no need to check Twitter's (Target) turnover in Turkey for the thresholds analysis. So, the only threshold that needed to be met for the Twitter deal to trigger a notification requirement before the TCA was on the buyer side, globally TRY 3 billion (approx. EUR 172.61 million or USD 181.15 million for 2022).

The fine

While assessing the transaction, the TCA must have deemed companies controlled by Musk as a single economic unit and must have concluded that the buyer-side notification threshold is met thus the Twitter deal was indeed a notifiable transaction. Consequently, in line with Article 16(b) of the Competition Law, the TCA ordered Musk to pay an administrative fine amounting to %0,1 of Musk's economic unit's gross income generated from Turkey.[4]

Since the TCA's decision considers the acquirer as the economic unit that is controlled by Elon Musk, which consists of companies controlled by Musk, the TCA's fine should not be interpreted as an administrative fine against Musk as an individual.

Details of the TCA's assessment in terms of Musk's economic unit are not disclosed within the TCA's announcement. However, (i) global threshold assessment for the buyer side as well as (ii) calculation of fine (based on Musk's economic unit's turnover generated from Turkey) requires the TCA to make an assessment in terms of the companies controlled by Musk. Accordingly, once the reasoned decision is published, the TCA's assessment in terms of the control structure of companies like SpaceX and Tesla led by Musk might be disclosed.

The lesson

The TCA's decision to fine Musk for failure to notify the concentration is an important decision showing once more that the TCA keeps a close eye on digital markets (previously, the TCA also reacted to conducts of Google and Meta and fined these undertakings. The TCA also published a DMA-like draft legislation). This decision is in line with the TCA's usual practice of fining missed notifications even for foreign-to-foreign concentrations. Obviously, the TCA is willing to act ex officio once it has adequate reason to believe that a notifiable transaction was closed without its clearance decision.

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[4] Article stipulates that in cases of failure to notify, acquirer shall be sanctioned with a monetary fine of 0.1% based on the turnover generated in the financial year preceding the date of the fining decision. In practice, the TCA calculates the fine over the Turkish turnover.

Wide Interpretation of the "Technology Undertaking" Exception (Berkshire Hathaway Case)

by B. Balkı, E. Aktekin, N. C. Acar and H. Yüksel

The interpretation of the exception brought for "technology undertakings" took a sudden turn with the TCA's Berkshire Hathaway decision.[1] It resolved that the local threshold exception shall be considered applicable, even if the activities of the target undertaking, which may be classified to fall under the definition of technology undertaking, are carried out in geographical markets other than Turkey.

Lack of geo dimension

For background information, as per the revised Merger Communiqué "the TRY 250 million (approx. EUR 14.38 million or USD 15.09 million) thresholds that are mentioned under (a) and (b) in the first paragraph, are not applicable in the acquisitions of technology undertakings that (i) are active or (ii) have R&D activities, in the Turkish geographic market or (iii) that provide services to customers in Turkey." The TCA defines technology undertakings as undertakings active in areas of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals and health technologies, or assets related to these undertakings. The lack of geographical dimension in this latter definition is at the roots of the disarray.

In Berkshire Hathaway, the TCA established that as long as the target was active in the above-mentioned areas anywhere in the globe and also was active or had R&D activities in the Turkish geographic market or provided services to customers [in any market] in Turkey, then the thresholds exemption would be applicable for that transaction.

This would mean that in an M&A transaction, as long as the target has some activities in areas of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals and health technologies anywhere in the globe and is also active in Turkey through any market or means (even if the activities in Turkey would not constitute a technology undertaking as a stand-alone business); the undertaking would be considered as a technology undertaking and the assessment of thresholds for that transaction should take into consideration of the local threshold exception.

Applicability of the local threshold exception

The TCA clarified in which circumstances the relevant exception shall be applicable. In Berkshire Hathaway, the TCA emphasized that Alleghany developed software to manage the systems of reinsurance companies and sold these products to third parties, thus, it was active in the field of financial technologies, which fell under the definition of "technology undertaking" within the meaning of the Merger Communique. The TCA further added that the requirement of being active in the Turkish geographical market was also met since the Target generated turnover in Turkey. Thus, the TCA concluded that the transaction involving the Target fell within the scope of technology undertaking exception, and that TRY 250 million (approx. EUR 14.38 million or USD 15.09 million) threshold was not applicable for the notified transaction. Alleghany develops software and sells it to third parties through TIRS, which is an operational application established to manage the systems of reinsurance companies, however, the company generates turnover in Turkey through its affiliate which operates in the field of design, production and service solutions for the trailer, private transport and mobilized business markets. To clarify, none of the Target's activities in Turkey can be considered as falling within the scope of the "technology undertaking" definition.

With this decision, the TCA indicates that irrespective of whether or not Alleghany operates in Turkey in the field of "financial technologies," it does not have any effect on the assessment whether the local turnover exception is applicable, since Alleghany's (which is considered as a technology undertaking as a result of its businesses in other jurisdictions) mere presence in Turkey is sufficient to apply that exception.

In other words, the "technology undertaking" exception can still be applicable for a transaction involving the acquisition of an undertaking, which has no activity in Turkey in the areas of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals and health technologies, or assets related to these undertakings, but has activities falling in those dimensions in other jurisdictions and also has a presence in any way in the Turkish markets.

Therefore, being active (i) in any jurisdiction other than Turkey in the fields listed under the definition and (ii) engaging with any activity in the Turkish geographic market, even if that activity cannot be considered as falling under the definition of "technology undertaking", would suffice to be covered by the exception.

[1] No 22-42/625-261 dated 15.09.2022 in relation to a concentration by way of indirect acquisition of Alleghany Corporation ("Alleghany" or the "Target") by Berkshire Hathaway Inc. The reasoned decision was published on 23.01.2023.

Final thoughts

The interpretation of the "technology undertaking" by the TCA in Berkshire Hathaway would mean that the TCA may be willing to expand the exception in an attempt to catch as many transactions as possible. However, from our perspective, this should not be the proper interpretation of the "technology undertaking" and the TCA's approach in Berkshire Hathaway decision does not align with the aim of introducing the exception in the first place.

Indeed, the purpose behind the exception regarding technology undertakings should be to enable the TCA to review the mergers and acquisitions of start-ups operating in Turkey with the potential of initiating a disruptive innovation wave in digital markets even if those start-ups do not generate a significant turnover. In contrast, the TCA's very literal interpretation of what it considers the "technology undertaking" in Berkshire Hathaway Decision would result in a significant number of well-established undertakings mainly operating in traditional fields to be subject to the threshold exemption.

Given already that the "technology undertaking" definition itself does not bear sufficient legal clarity in itself thanks to the rather vague wording it bears, further diminishing legal certainty & increased transaction cost are other major hurdles that undertakings will encounter due to Berkshire Hathaway. Indeed, the TCA's approach indicates that, if a target is active in Turkey, in any shape or form, the target's activities in other jurisdictions should be examined carefully to check if it falls into the fields listed under the TCA's definition which would greatly increase the transaction cost.

Furthermore, the TCA's approach both in terms of the "technology undertaking" definition as well as the interpretation it adopted via Berkshire Hathaway Decision would be in stark contrast with the legal certainty stated to be introduced in Turkey's merger control regime in light of para 2 of the Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions:

> "With Communiqué No 2010/4, the system of notification thresholds based on turnover replaces the market share threshold system in order to increase legal certainty for undertakings."

All in all, we still interpret the Berkshire Hathaway Decision to be a mishap. Once the serious implications of the decision would become clearer to the TCA, it will look to set the record straight. However, until such a correction is clearly made, it is advisable for undertakings to stay on the safe side and consider notifying transactions that at first sight look to fall under the turnover thresholds, however where the activities of the target - in Turkey or in another jurisdiction - resonate with those that are listed for "technology undertakings" in Communiqué No. 2010/4.

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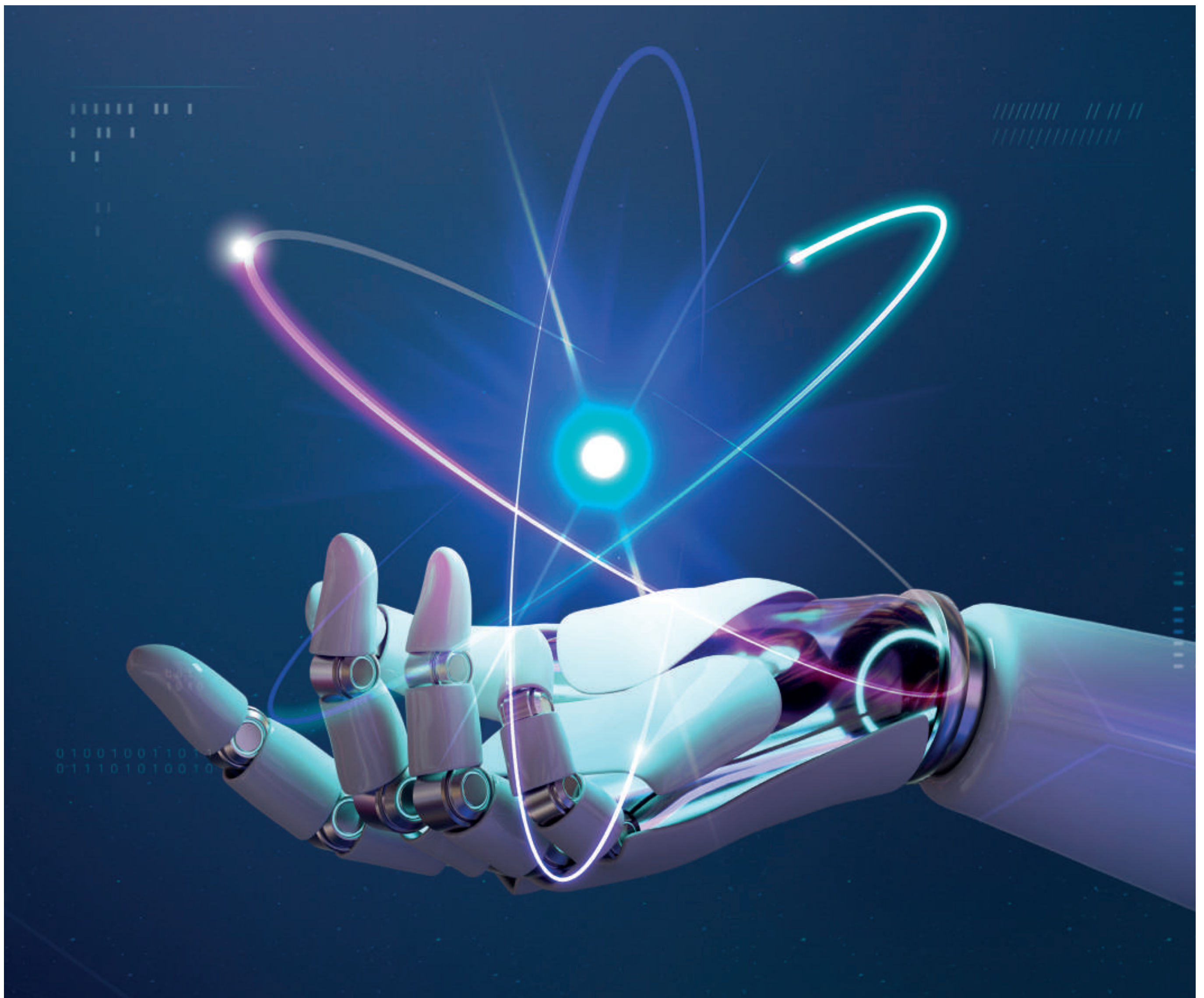


Do You Qualify as a Technology Undertaking?

by F. Toksoy, B. Balkı and H. Stakheyeva

As an equivalent of the value of transaction test in some jurisdictions, the Turkish Competition Authority applies a special threshold for the concentrations involving technology undertakings. In other words, the concentrations that involve technology undertakings are treated differently with regard to the Turkey related turnover threshold. This special local threshold exception aims at catching a greater number of transactions in the digital/high-tech markets with a view to preventing killer acquisitions. We have already witnessed the practical application of this in several cases, e.g., the Twitter deal and E. Musk's gun-jumping fine in Turkey. The case underlines that the notification requirement is also applicable to foreign-to-foreign transactions to the extent that the merger control thresholds are met. Below we provide you with what you should better know about the merger control thresholds in Turkey, particularly if there is the slightest chance that you may be qualified as a technology undertaking.

Thresholds in general - Legal framework

The Turkish Competition Law requires prior notification to the TCA of transactions, which involve a change of control on a lasting basis and if the financial thresholds are met. A concentration is notifiable[1] in Turkey where:

- the aggregate turnover of the transaction parties in Turkey exceeds TRY 750 million (approx. EUR 43.15 million or USD 45.28 million), and the turnover of at least two of the transaction parties each in Turkey exceeds TRY 250 million (approx. EUR 14.38 million or USD 15.09 million); or
- either the turnover in Turkey of: (i) the acquired assets or businesses in acquisitions, or of (ii) any of the transaction parties in mergers exceeds TRY 250 million (approx. EUR 14.38 million or USD 15.09 million), and the worldwide turnover of at least one of the other transaction parties to the transaction exceeds TRY 3 billion (approx. EUR 172.61 million or USD 181.15 million).

The Turkey related turnover threshold of TRY 250 million (approx. EUR 14.38 million or USD 15.09 million) shall not apply to concentrations having as target technology undertakings, which either operate or conduct research and development activities in the Turkish market, or alternatively provide services to Turkish users.

Understanding Technology Undertaking – Case law

Technology undertakings are defined[2] as undertakings that have activities in the areas of digital platforms, software and game software, financial technologies, biotechnology, pharmacology, agriculture chemicals and health technologies, or assets related thereto. The definition is rather broad. To understand it better, the TCA has issued several decisions demonstrating its interpretation of the technology undertaking exception. In the cases below the TCA examined concentrations that did not meet the notification thresholds, but it analysed the activities of the targets to see if they could be qualified as technology undertakings.

Citrix/TIBCO[3] was the very first decision applying the technology undertaking/local threshold exception. There were no doubts as to its application here since both companies were active in the development of software. Providing software services and Wi-Fi solutions qualified the target as a technology undertaking in Providence/Airties[4]. In Cinven Capital/International Financial[5] the TCA recognised using digital platforms as being active in the software sector. In particular, the target was active in providing savings and investment products through life insurance packages to individual investors. The undertaking did not have any subsidiaries or affiliates in Turkey. Its Turkish turnover was mainly derived from sales by a third-party distributor. The target was considered a technology undertaking as it provided services to its customers with digital access via digital platforms in the life insurance sector in Turkey.

Interestingly, in Nielsen/Brookfield[6] the target was not viewed as a technology undertaking, even though the target used software as a tool in providing other services. It utilized data analytics tools

[1] Communiqué No. 2010/4 on the Mergers and Acquisitions Calling for the Authorisation of the Competition Board, Article 7

[2] Article 4(1)(e) of the Merger Communique

[3] Decision No 22-21/344-149 dated 12 May 2022 in relation to a concentration by way of creating a joint venture with the companies Citrix and TIBCO, which were under the sole control of Vista Equity Partners Management, LLC.

[4] Decision No 22-25/403-167 dated 2 June 2022 in relation to concentration by way of acquisition of sole control over Airties Kablosuz İletişim San. ve Dış Tic. A.Ş.

[5] Decision No 22-23/372-157 dated 18 May 2022 in relation to concentration by way of acquisition of sole control over International Financial Group Limited by Cinven Capital Management General Partner Limited.

[6] Decision No 22-24/395-BD dated 26 May 2022 in relation to concentration by way of acquisition of indirect joint control over Nielsen Holdings plc by funds and/or investment instruments.

[7] Decision No 22-45/665-BD dated 6 October 2022.

[8] Decision No 22-25/398-164 dated 2 June 2022

[9] Decision No 22-27/431-176 dated 16 June 2022

[10] Decision No 22-32/512-209 dated 7 July 2022 regarding concentration by way of acquisition of joint control over Covetrus Inc.

[11] Decision No 22-42/625-261 dated 15.09.2022 in relation to the indirect acquisition of Alleghany Corporation by Berkshire Hathaway Inc. The company generated turnover in Turkey through its affiliate which operates in the field of design, production and service solutions for the trailer, private transport and mobilized business markets. None of the target's activities in Turkey were considered as falling within the scope of the technology undertaking definition.

to provide insights about market conditions and customer trends to their customers. Based on the TCA's approach in Nielsen/Brookfield, we have received a not-subject-to-authorization decision from the TCA under the NielsenIQ/GfK[7] decision by arguing this exact point in terms of the NielsenIQ and GfK combination. Producing application programming interfaces and ready-to-use pharmaceuticals was viewed as falling within the scope of the technology undertaking definition in Astorg/Corden[8] case. The TCA also considered sales of diagnostic imaging devices as technology undertaking activities in the biotechnology sector in Groupe Bruxelles/Affidea[9]. In CD&R-TPG/Covetrus[10] the TCA classified the target's activities in the pharmaceuticals for animals and software sector as "health technology" and "pharmacology", hence covered by the technology undertaking exemption.

In Berkshire Hathaway case[11] the technology undertaking threshold was applicable since the target/Alleghany Corporation was active in the market of financial technologies, i.e., it developed software to manage the systems of property and casualty reinsurance and sold those to third parties. The local threshold exception applied here even though the activities of the target company were carried out in geographical markets other than Turkey. The main takeaway of this decision is that if the target is a technology undertaking anywhere in the world and generates turnover in Turkey by any other means (not necessarily in the areas that constitute a technology undertaking), the concentration shall be assessed in the light of the special technology undertaking threshold.

Since Twitter is a digital/online platform, it must be subject to the local threshold exception. Thus, there was no need to check Twitter's (target) turnover in Turkey for the thresholds analysis in Elon Musk's takeover[12]. The only threshold that needed to be met for the Twitter deal was on the buyer side globally. Companies controlled by Elon Musk were deemed as a single economic unit, and it was concluded that the buyer-side notification threshold was met, thus the Twitter deal was indeed notifiable.

To conclude…

Concentrations involving technology undertakings are placed under a special focus/threshold in Turkey as of May 2022 with a view to catching all transactions in the digital/high-tech markets and preventing killer acquisitions. While it is different from the "value of transaction test" adopted by its peers in the EU, Germany, and Austria, it may be viewed as a unique Turkish equivalent of the "value of transaction test," or at least it is expected to bring about the same results from its application.

The advantage of this rule is that it enables the TCA to assess concentrations of promising start-ups that operate in Turkey and are likely to cause competition disruptions in the digital markets irrespective of the lack of significant turnover of those start-ups. However, since the definition of the technology undertaking provided in the Merger Communique is not exhaustive and rather vague, it may be broadened at the discretion of the TCA covering various sectors to catch as many transactions as possible. The existing case law is not enough yet to eliminate uncertainties in how to classify activities under the categories listed in the Merger Communique. All of which bring more legal uncertainty and transaction costs for the business.

Following the Berkshire case, if the target generates turnover in Turkey by any means, it is highly recommended the target's activities in other jurisdictions be assessed carefully to verify if those fall under the technology undertaking definition, and to notify the concentration to the TCA in case there is a slight probability of that. It seems that there will be more merger caseload and increased scrutiny in the technology markets in the upcoming years.

[12] *https://www.rekabet.gov.tr/en/Guncel/the-examination-about-the-acquisition-of-d384a31c4ebfed118eb0005056850339*

Mergers and Acquisitions – Cases on Technology Undertakings in the Focus

by B.Balkı, S.Erzene Yıldız and N. C. Acar

Following the introduction of the exception for the technology undertakings that came into force in May 2022, the TCA provided guidance via its decisions on the boundaries of the definition of technology undertaking. Technology undertakings are defined in the regime as undertakings or related assets operating in the fields of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals, and health technology.

One of the first implementations of the technology exception was in Citrix/TIBCO/Vista Equity Partners Management (Case 22-21/344-149). Considering that the concentration involved technology markets (transaction parties were active in the development of the software), the TCA did not test if the target had a turnover exceeding TRY 250 million (approx. EUR 14.38 million or USD 15.09 million). In Providence/Airties (Case 22-25/403-167), a provider of Wi-Fi solutions and software services that enable broadband operators to deliver and manage Wi-Fi networks to residential customers was considered as a technology undertaking. In Google/Mandiant (Case 22-26/425-174), the TCA evaluated Google's acquisition of sole control over Madiant. As Mandiant is a cyber security company, it is considered a technology undertaking operating in the field of software. Therefore, the TCA decided that the transaction should be evaluated under the relevant exception.

Sales of diagnostic imaging devices were also viewed as activities in the biotechnology sector according to Groupe Bruxelles/Affidea (Case 22-27/431-176). In Astorg/Corden (Case 22-25/398-164), the Corden Pharma Group produced application programming interfaces and ready-to-use pharmaceuticals. As the target's activities fell within the pharmacology sector, turnover of the target was not sought.

However, the determination of technology undertaking was not always straightforward. In Cinven Capital/International Financial (Case 22-23/372-157), the company was viewed as a technology undertaking since it provided a small number of its customers with digital access via digital platforms in the life insurance sector in Turkey.[1]

The main takeaway here is that a company could be considered a technology undertaking within the sense of the merger control regime, if it is active in the software market by way of utilising technological tools, such as digital platforms, in providing its services.

In Nielsen/Brookfield (Case 22-24/395-BD), there is a slightly different approach. Unlike Cinven Capital/International Financial, the TCA here found that using the software as a tool in providing services could not be considered the only proof to demonstrate that a company is active in the technology markets. Even though

[1] *IFGL was active in providing savings and investment products through life insurance packages to individual investors. The company's Turkish turnover was mainly derived from sales by a third-party distributor since the undertaking did not have any subsidiaries or affiliates in Turkey.*

[2] *Decision No 22-45/665-BD dated 6 October 2022.*

it utilised data analytics tools to provide its customers meaningful insights about market conditions and consumer trends, Nielsen was not considered a technology undertaking. Hence, the transaction was determined not to fall within the scope of the exception. By the same token, we have received a not-subject-to-authorization decision from the TCA under the NielsenIQ/GfK[2] decision by arguing this exact point in terms of the NielsenIQ and GfK combination.

In CD&R-TPG/Covetrus (Case 22-27/431-176), concerning the acquisition of joint control over Covetrus Inc., given that the activities of Covetrus are in the pharmaceuticals for animals and software sector, the TCA evaluated Covetrus' activities to be within the scope of "health technology" and "pharmacology," and therefore, the thresholds of the parties would be subject to the exception. It is interesting to observe that, although it produces software, the TCA did not consider Covertus as a software company but rather concluded that it "may" be in the health technology or pharmacology sectors.

In Ace Academy (Case 22-54/823-336), the TCA evaluated the acquisition of the joint control of Ace Academy Teknoloji AŞ by Playtika Holding Corp. through Playtika UK-House of Fun Limited. Since Ace Academy is active in the field of mobile gaming, it is considered a technology undertaking, and thus the transaction is subject to the notification. Ace Academy offers its mobile game in more than 70 countries including Turkey.

In Softline/Makronet (Case 22-50/733-305), the TCA evaluated the acquisition of the sole control of Makronet Bilgi Teknolojileri Sanayi ve Ticaret Anonim Şirketi by Softline Group through Softline International Technologies L.L.C. Makronet is engaged in the resale of cloud-based software products and licenses and the provision of information technology services related to these products in Turkey. Even though parties' turnover does not exceed the notification thresholds, as Makronet is a software company, it is considered a technology undertaking and thus the TCA decided that the transaction should be evaluated under the relevant exception. In AmerisourceBergen/Pharmalex (Case 22-52/775-319), the TCA evaluated the acquisition of sole control of Pharmalex Holding GmbH by AmerisourceBergen Corporation. PharmaLex's activities in Turkey are limited to pharmacovigilance services. In 2021, the undertaking provided pharmacovigilance services through its subsidiaries abroad. The services provided include pharmacovigilance project management, pharmacovigilance system installation, preparation of system master file and maintenance works, and pharmacovigilance audits. Since Pharmalex is a technology undertaking operating in the field of pharmacology, the transaction is considered to be a transaction subject to notification.

In Castik Capital/Klaravik (Case 22-41/582-242), the TCA evaluated the indirect acquisition of sole control of Klaravik Group AB by Castik Capital S.à r.l. Klaravik is an undertaking that operates an online auction platform for buying and selling a wide range of types of heavy machinery, equipment, vehicles and industrial products. It is considered that Castik and Klaravik operate in the field of digital platforms and thus are technology undertakings. Therefore, it is concluded that the transaction is subject to the notification.

In Google/Mandiant (Case 22-26/425-174), the TCA evaluated Google's acquisition of sole control over Mandiant. As Mandiant is a cyber security company, it is considered a technology undertaking operating in the field of software. Therefore, the TCA decided that the transaction should be evaluated under the relevant exception.
In Espro Investment/Oplog (Case 22-35/543-219), the TCA evaluated the acquisition of joint control of Oplog Operasyonel Lojistik A.Ş. by Espro Investment BV. According to the decision, Oplog provides warehousing, handling, boxing, packaging, and mailing services for its customers. The TCA also indicated that Oplog operates in the "e-commerce logistics" market. Thus, the TCA decided that the acquisition of Oplog should be evaluated under the "technology undertaking" exception.

The concept of the technology undertaking still lacks clarity. Precedents in this area will help the players to develop a better understanding and assessment, therefore leading to better practice. We expect more guidance from the TCA to increase legal certainty under the Turkish merger control regime. Until then, to be on the safer side, we recommend carefully assessing and notifying the transactions that may have a connection to the technology/ digital world.

Of SIEC-Test and Thresholds in Turkey

by F. Toksoy, B. Balkı and H. Stakheyeva

The substantial rules of the Turkish merger control are taken from the corresponding EU provisions. The amendments to the Turkish Competition Law[1] in 2020 introduced the SIEC test to improve the concentration control regime and harmonize it with the EU rules even further. The amended Merger Communique in 2022 revised the thresholds as a response to the national currency devaluation and rapid developments in technology/digital markets, intending to prevent killer acquisitions, as well as decreasing the TCA caseload. In this short article, we would like to provide you with the important aspects of merger control in Turkey, including the main changes that came into effect following the reform of the Turkish Competition Law in June 2020.

Welcoming the SIEC test in Turkey

Just like the EU, Turkey is also in a constant process of improving its legislation. In June 2020, Law No 7246 Amending the Law on the Protection of Competition ("Amendment Law") entered into force. The Amendment Law was aimed to: (i) harmonize the Turkish Competition Law with the EU legislation even further and (ii) eliminate certain problems encountered in practice. One of the most significant of these amendments relevant to concentration control was the adoption of the SIEC test, which replaced the dominance test for the examination of concentrations. The application of the SIEC test in merger control has been quite contested. For years Turkey considered switching to the SIEC test to ensure compliance with the EU legislation and used a more flexible standard in the detection of anticompetitive concentrations.[2] Following the intense discussions and studies, the SIEC test was eventually introduced into the Turkish Competition Law in 2020. Prior to the amendment, creating or strengthening a dominant position was deemed as a prerequisite to evaluating whether a concentration gave rise to competitive concerns. As of June 2020, Turkey applies the SIEC test for assessing concentrations. Article 7 of the Turkish Competition Law prohibits those merger or acquisition transactions that can result in significant impediment to competition in a relevant market.

With the help of the SIEC test the TCA is now able to track down the transactions that are missed by the dominance test.[2] As stated in the Preamble of the amending legislation:

> "In addition to the transactions resulting in the creation of a dominant position or the strengthening of the existing dominant position, transactions that have the ability to significantly impede the effective competition may also be prohibited."

[1] *https://www.resmigazete.gov.tr/eskiler/2020/06/20200624-1.htm*

[2] *This was desirable both to achieve harmonization with the EU and because the revised EU formulation provided a more flexible and refined standard for identifying anticompetitive transactions. // Turkey—Peer Review of Competition Law and Policy, OECD 2005, p. 69.*

Article 7 of the Turkish Competition Law

Former Version—Dominance Test	New Version—SIEC Test
Merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking—except by way of inheritance—of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, with a view to creating a dominant position or strengthening its/their dominant position, which would result in significant impediment of competition in a market for goods or services within the whole or a part of the country, is illegal and prohibited.	It is illegal and prohibited for one or more undertakings to merge, or for an undertaking or a person to acquire—except by inheritance—assets, or all or part of the partnership shares, or instruments conferring executive rights over another undertaking, where these would result in a significant impediment of effective competition within a market for goods or services in the entirety or a portion of the country, particularly in the form of creating or strengthening a dominant position.

There are already a few examples demonstrating the TCA's practical application of the SIEC test, for example, the case EssilorLuxottica/Grandvision[4]. The point that draws attention here is that EssilorLuxottica's dominance (or its absence) was not seen as a prerequisite for granting clearance but was considered a part of the economic analysis. There was a horizontal overlap in terms of retail sale activities of sunglasses, and a vertical overlap in terms of other activities.[5] The TCA assessed the dominant position within a range of different elements such as market shares, market entry conditions and buyer power. Accordingly, it was concluded that EssilorLuxottica was dominant in certain markets, plus there were some horizontal and vertical overlaps.

The TCA stated that concentrations can significantly impede competition in two ways, including by: (i) creating or strengthening a dominant position as a result of the transaction and (ii) cooperating with undertakings with which there was no coordination prior to the transaction. To eliminate these competition concerns, EssilorLuxottica made commitments about input and customer foreclosures, as well as the exchange of sensitive information, leading to a conditional clearance.

The remarkable point in the decision in terms of the SIEC test is the parties' submission of commitments regarding vertical markets, even though the dominant position was not determined. While the dominant position test was insufficient to go beyond the dominance evaluation, together with the economic evaluations made within the scope of the SIEC test, competitive concerns that could be observed even in the absence of a determination of a dominant position were put forward and the transaction was cleared conditionally.

Migros/Carrefour[6] can be cited as another example of the TCA's new practice. The TCA evaluated the transaction regarding the acquisition of the tenancy right of 34 stores of Carrefour by Migros. The TCA took into consideration the 40% market share as the critical threshold in its assessment in terms of market shares. However, the TCA's assessment was not limited to market shares and dominant position analysis. In this direction, it was stated that new entries to the market were possible and that there was no obstacle for competitors to increase their capacity. In addition to these, the TCA also examined whether there was a possibility of market foreclosure through input foreclosure and customer foreclosure. It was concluded that there would be no market foreclosure. Based on these considerations, the TCA concluded that there would be no significant impediment to effective competition and cleared the transaction. We can follow here how the TCA conducted the concentration review in light of the new legislation: although it was determined that a dominant position would not be created as a result of the transaction, the examination was not limited to this. The Marport[7] case is also among the very first examples in which the SIEC test was applied by the TCA within the scope of the amendment made in Article 7 of the Turkish Competition Law. It is also the first case that was blocked by the TCA due to the application of the SIEC test. The decision emphasized that the SIEC test may prohibit the transactions that significantly impede competition, within the evaluation of theories of harm, in addition to the transactions that result in the creation of a dominant position or the strengthening of the current dominant position. It was further stated that the main difference between the SIEC test from the dominance test may be seen in terms of the transactions that do not create a dominant position or strengthen an existing dominant position, but in which the undertakings can increase

the price unilaterally after the transaction. Although the opinion of the reporters within the scope of the examinations was that the transaction should be cleared, the TCA concluded that the transaction subject to the notification would result in a significant impediment to effective competition within the scope of Article 7 of the Turkish Competition Law and thus the transaction was not cleared.

Thresholds

The Turkish Competition Law requires prior notification to the TCA of transactions, which involve a change of control on a lasting basis if the following financial thresholds (applicable as of 4 May 2022) stated in Article 7 of Communiqué 2010/4 are met:

- the aggregate turnover of the transaction parties in Turkey exceeds TRY 750 million (approx. EUR 43.15 million or USD 45.28 million) and the turnover of at least two of the transaction parties each in Turkey exceeds TRY 250 million (approx. EUR 14.38 million or USD 15.09 million); or
- either the turnover in Turkey of: (i) the acquired assets or businesses in acquisitions, or of (ii) any of the transaction parties in mergers exceeds TRY 250 million (approx. EUR 14.38 million or USD 15.09 million), and the worldwide turnover of at least one of the other transaction parties to the transaction exceeds TRY 3 billion (approx. EUR 172.61 million or USD 181.15 million).

As an equivalent of the value of transaction test in some jurisdictions, in 2022 Turkey introduced a special threshold for the concentrations involving technology undertakings. In other words, there are special thresholds for the mergers that involve "technology undertakings," i.e. "undertakings that have activities in the areas of digital platforms, software and game software, financial technologies, biotechnology, pharmacology, agriculture chemicals and health technologies, or assets related thereto" (Article 4(1)(e) of the Merger Communique).

According to Article 7(2) of the Merger Communique, the TRY 250 million thresholds prescribed in Article 7(1) shall not apply to concentrations having as target technology undertakings, which either operate or conduct research and development activities in the Turkish market, or alternatively provide services to Turkish users. This aims at catching a greater number of transactions in the digital/high-tech markets with a view to preventing killer acquisitions.

It should be stressed that the notification requirement is also applicable to foreign-to-foreign transactions to the extent that the mentioned thresholds are met.

Concluding remarks

The important aspects of Turkish merger control discussed above, and the developments related to them allow a sounder and fairer control over domestic transactions, on the one hand, and constitute a significant step in the sense of international adaptation, on the other hand, where it allows global mergers to be evaluated with the same criteria applied in the EU. Additionally, concentrations involving technology undertakings are placed under a special focus/threshold in Turkey as of May 2022 with a view to catching all concentrations in the digital/high-tech markets and preventing killer acquisitions. While it is different from the "value of transaction test" adopted by its peers in the EU, Germany, and Austria, it may be viewed as a unique Turkish equivalent of the "value of transaction test," or at least it is expected to bring about the same results from its application. It seems that there will be more merger caseload and increased scrutiny in the technology markets in the upcoming years. This is yet to be seen how the

"technology undertaking" exception will be applied in practice. But it is clear already that for practical reasons it would be nice to have a piece of guidance clarifying the terms and principles (such as the description of financial technology services, the definition of the technology company, and what constitutes "operates or carries out R&D activities in Turkey").

[published by Kluwer Law International in "Merger Control in the EU and Turkey: A Comparative Guide", Second Edition, 2022, https://law-store.wolterskluwer.com/s/product/merger-control-in-the-eu-and-turkey-a-comparative-guide-2nd-edition/01t4R00000Ok30dQAB]

[3] Sesli, E. & Canbeyli, A. Shift of Paradigm in the Merger Control Regime: How Will Turkey Implement the Significant Impediment to Effective Competition (SIEC) Test?, 2021 // Available at https://www.mondaq.com/turkey/antitrust-eu-competition-/1073862/shift-of-paradigm-in-the-merger-control-regime-how-will-turkey-implement-the-significant-impediment-to-effective-competition-siec-test- (accessed November 2, 2021).

[4] The case is related to the acquisition of GrandVision N.V.'s ("Grandvision") sole control by EssilorLuxottica S.A. ("EssilorLuxottica"), see TCA Decision No 21-30/395-199 dated 10.6.2021.

[5] EssilorLuxottica, through its various subsidiaries, operates in the wholesale of sunglasses and optical frames; production and wholesale of ophthalmic lenses; production and distribution of ophthalmic machinery, equipment, and consumables; sales of spare parts and after-sales maintenance and repair services; and wholesale and retail sale of sunglasses. Grandvision operates in Turkey in the retail sale of sunglasses, prescription glasses (ophthalmic lenses and optical frames) and contact lenses via its subsidiary Atasun Optik Perakende Ticaret A.Ş. ("Atasun"). Relevant product markets were determined as "wholesale of stock lenses," "wholesale of semi-processed lenses (RX lenses)," "wholesale of branded sunglasses," "wholesale of branded and prescription optical eyeglass frames" and "production and distribution of ophthalmic machinery, equipment and consumables" markets.

[6] Decision No 21-25/307-140 and dated 4.5.2021

[7] Decision No 20-37/523-231 dated 13.8.2020. The concentration related to the acquisition of the sole control of Marport Liman İşletmeleri Sanayi ve Ticaret Anonim Şirketi ("Marport") by Terminal Investment Limited Sarl ("TIL").

Turkey Mergers and Acquisitions Overview Report 2022

by S. Erzene Yıldız, Ö. Başıböyük Coşkun and S. Turan

The TCA published its Mergers and Acquisitions Overview Report for 2022 ("Report") on 6 January 2023. For ease of reading, we will refer to M&As as mergers. The Report offers an overview of the TCA's work on mergers and provides comparisons with previous years in aspects such as (i) position of Turkish and foreign companies in the market, (ii) origins of the investors and (iii) total number and value of the transactions notified to the TCA based on sectors. As detailed below, the year of 2022 witnessed a decrease in the number of notified mergers while foreign investors maintained their interest in Turkish markets.

Merger Review in Numbers

In 2022, the average review period in which the notified mergers were decided upon was 15 days following the date of notification (in case of request for information, the day in which the requested data was submitted is considered as the date of notification). Comparing to the previous year, the review period of notifications increased by four days.

As can be seen in the Figure 1 below, number of notified mergers varies each year. In 2022, the TCA has reviewed a total of 245 mergers.

Figure 1: The Number of Mergers Notified to the TCA over the Past Ten Years

Numbers show that there have been 310 mergers reviewed in 2021. In 2022, with an approximate decrease of 21%, the total number of reviewed mergers is 245. The statistics reveal that this is still approximately 12% higher than the average number of mergers reviewed by the TCA within the past ten years.

In 2022, the total value of the notified transactions was approximately TRY 5.7 trillion (approx. EUR 328 billion), while this value was TRY 5.8 trillion (approx. EUR 554 billion) in 2021. Looking at these figures, the total value of the notified transactions seems to have remained similar in the currency of Turkish Lira. However, in terms of Euros, due to the fluctuations in the currency exchange, the value is much less than the previous year.

Among the merger filings received in 2022, the TCA identified 10 transactions that didn't involve a change of control. It reviewed 7 privatisation filings, same number of as the previous year.

Origin-Based Categorization of the Transaction Parties

In terms of the origins, the number of transactions realised solely between the Turkish companies in 2022 was 39, approximately 33% lower compared to 2021. In parallel, the number of foreign-to-foreign transactions that the TCA reviewed in 2022 decreased by an approximate of 12% compared to the previous year (154 in 2022 while 175 in 2021).

However, the biggest difference was seen in Turkish-to-foreign transactions, with an approximate drop of 49%. The TCA received notification for 34 Turkish-to-foreign transactions, while the corresponding number was 67 in 2021.

Figure 2: Transactions Based on the Origin of the Parties in 2021 and 2022

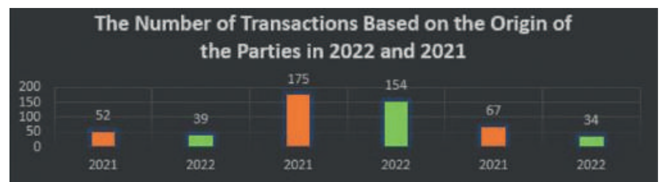
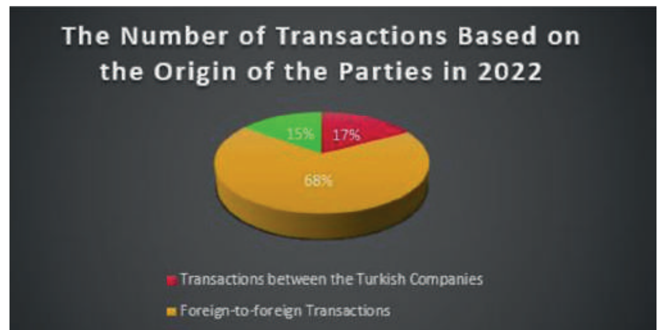


Figure 3: Percentage of Transactions Based on the Origin of the Parties in 2022



As shown in Figure 3 above, foreign-to-foreign transactions constituted 68% within all transactions and have by far the largest share. The percentage of purely local and Turkish-to-foreign transactions is almost identical.

In terms of Turkish-to-Turkish transactions, the value of the transactions increased from TRY 15.9 billion in 2021 to TRY 25.1 billion in 2022. Speaking in Euros, these figures respectively correspond to EUR 1.5 billion and EUR 1.4 billion. The value of Turkish-to-foreign transactions increased from TRY 29.9 billion in 2021 to TRY 36.2 billion in 2022. In Euros, these figures respectively correspond to an approximate of 2.9 billion and EUR 2.1 billion. Lastly, the total value of the foreign-to-foreign transactions slightly decreased from TRY 5.7 trillion in 2021 to TRY 5.6 trillion in 2022. Speaking in Euros, based on the fluctuations on the currency exchange, the figures correspond to an approximate of EUR 544 billion and EUR 322 billion.

As also stated above, the EUR figures above are converted using the Central Bank of Turkey's average buying exchange rate. This rate is calculated as EUR 1= TRY 10.47 for 2021 and EUR 1 = TRY 17.38 for 2022. Past two years have witnessed fluctuations in the exchange rate of Turkish Lira. This is the underlying reason for

the converted Euro rates to be much less than in the previous year, even though the Turkish value increase or remain similar.

Foreign Investments Maintain Significance in the Turkish Market!

As in previous years, foreign investors continued their interest in the Turkish market. On the other hand, (i) the number of countries from which investors were originated and (ii) number of foreign investors have slightly decreased when compared to 2021. Speaking of figures, investors from 16 different countries invested in Turkey in 2022, while the relevant number was 22 in 2021. Similarly, the number of foreign investors for Turkish companies was 50 in 2021 and this number was decreased to 36 in 2022.

The total value of the investment made by foreign investors was TRY 43 billion in 2022 while the corresponding value was TRY 22 billion in 2021. This means that, in terms of Turkish Lira currency, the total value of the foreign investments made to Turkish companies raised by an approximate of 95% in 2022 compared to 2021. Speaking in Euros, using the same currency exchange method as above, the figures correspond to an approximate of EUR 2.5 billion for 2022 and EUR 2.1 billion for 2021.

As per the ranks of foreign investors, the United Arab Emirates and the Netherlands are leaders with five transactions each. The United Kingdom follows with four transactions. In 2021, Luxembourg was the leading country with 10 transactions, followed by the United States of America with six transactions. It is worth mentioning that, in 2021, the TCA has only seen one investor originating from the United Arab Emirates (this number is 5 as of 2022). Also, investors originating from Czech Republic, Israel, Spain, Qatar, and Korea made investments in Turkey in 2022, although they did not have investments in 2021.

Production, Transmission and Distribution of Electricity is the Leading Market in terms of Single Transaction Value

Based on fields of activity, the production, transmission, and distribution of electricity was the market where the highest number of transactions took place. There were a total number of eight transactions and the total value of the transactions in this sector corresponds to 11% of the total value of the Turkish transactions[1] (except for privatisations). Similarly, to the general trend, number of transactions in this field decreased by almost a half (eight in 2022 as opposed to 14 in 2021).

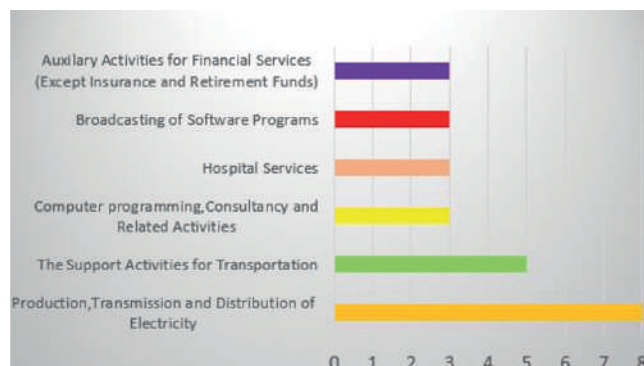
Transportation ranked the second area with five transactions in 2022. Fields of hospital services, broadcasting of software programmes, computer programming, consultancy, and related activities and auxiliary activities for financial services (except insurance and retirement funds) shared the third rank with three transactions realised in each.

In 2022; the single transaction with the highest value realised in the production, transmission, and distribution of electricity. It involved a Turkish target, and the transaction value was TRY 8.35 billion (approx. EUR 480 million). On the other hand, transportation market had the highest aggregated transaction value with a total of TRY 20.5 billion (approx. EUR 1.18 billion).

The value-based statistics for the notified 181 foreign transactions (36 with Turkish target and 145 foreign) give an overview about the most globally invested markets, which are:

- Wholesale, retail trade, and repair of motor vehicles and motorcycles
- Programming and publishing activities
- Installation and repair of machinery and equipment
- Manufacturing of essential pharmaceutical products
- Financial services
- Manufacturing of chemical products

Figure 4: Transactions Based on the Their Field of Activities in 2022



A More Detailed Analysis…

Among the total of 245 transactions that the TCA reviewed in 2022, only three were taken into the Phase-II. One of the relevant transactions was granted clearance while two of these are still under review.

Conclusion

The Report provides a picture of the TCA's merger control reviews conducted in 2022. While there is a decrease in the number of notified mergers, the TCA seems to have had a very active year, with 245 merger reviews among which three turned into Phase-II investigations. Statistics also support that the foreign investors remain interested in the Turkish market.

ACTECON's concluding remark:

Let's remember – in May 2022, the thresholds were substantially increased to match the fluctuations in the currency exchange. The decrease in merger filings should of course be evaluated along with the revision in the notification thresholds. Plus, the TCA introduced an exception for the mergers in the technology markets with a view to catch the killer acquisitions.

As the currency exchange tool, the TCA uses the Central Bank of Turkey's average buying exchange rate realised in the previous year. So, although the thresholds were increased in May 2022, the TCA continued to calculate the foreign currencies based on the 2021's average rate.

As of 2023, the thresholds are being calculated based on the Central Bank of Turkey's average buying exchange rate for 2022. This means that, while assessing if a transaction falls into the notification necessity, the exchange rate to be used, speaking for Euros will be 17.38, whereas the same was 10.47 while assessing transactions in 2022. For USD, the exchange rate was 8.89 in 2021 and the same is 16.56 for 2022. This alone shows that the TCA will be much busier with merger reviews in 2023. On the other hand, the exception for the technology markets will also lead the TCA to have an increased review workload for transactions involving a technology dimension. [Published by Concurrences on January 20, 2023]

[1]The transactions in which the target company was established under Turkish laws are referred to as Turkish transactions.

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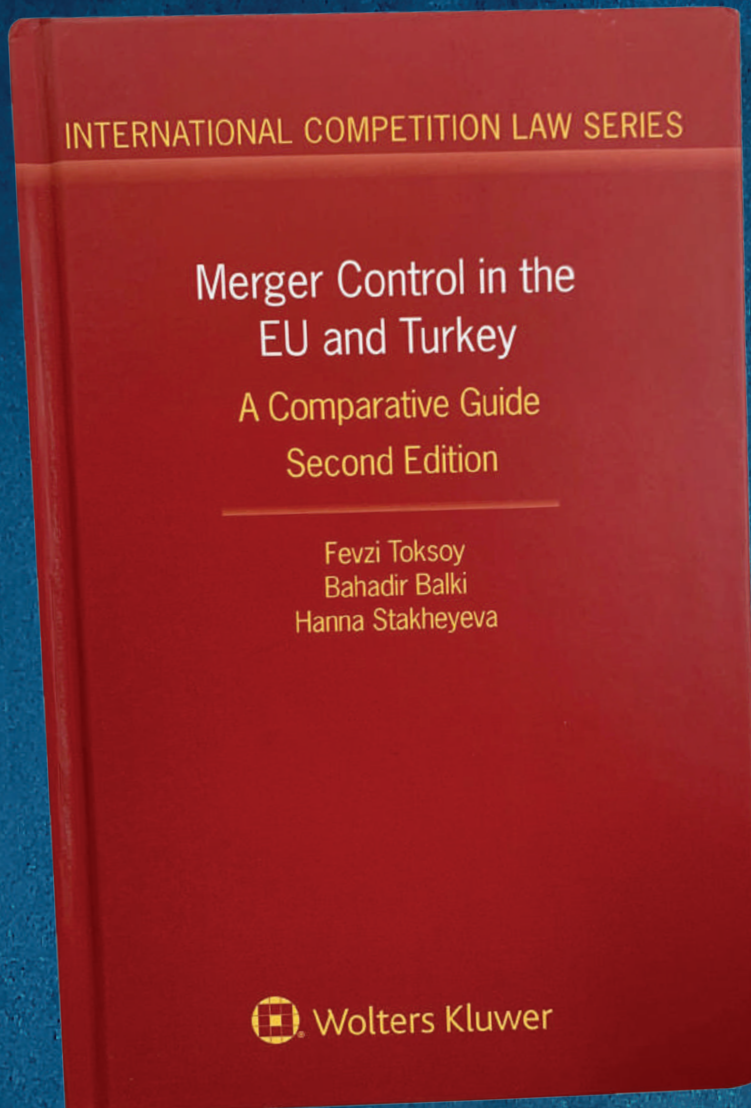
We are pleased to present the second edition of our book "Merger Control in the EU and Turkey: A Comparative Guide"



In the run up to the EU membership, Turkey follows the EU principles in establishing, implementing and where necessary revising its competition policy. So, as expected, Turkey's merger control regime is very similar to the EU. Nevertheless, the number of the multijurisdictional mergers submitted to the Turkish Competition Authority shows the key position of Turkey at the global merger control scale.

Since 2003, ACTECON has shown a strong presence in Turkey's competition law practice. Speaking of merger control, ACTECON delicately handled filing of a multitude of transactions. These include a great number of cross-border filings as well as significant local ones. Thanks to its unparalleled expertise, sector-specific know-how and hands-on approach, ACTECON has become the firm that clients and international firms would like to cooperate in handling competition law cases.

Published by prominent legal publisher Wolters Kluwer, this book compiles our expertise. It compares substantive, procedural, and jurisdictional issues and draws parallels on their regulation in the EU and Turkish merger control regime. The updated edition covers the amendments introduced to the Turkish merger control regime between 2020 and 2022, including (i) the introduction of the SIEC test; (ii) the revised thresholds as a response to the national currency devaluation and developments in technology/digital markets, with (iii) a special threshold for the concentrations involving technology undertakings effective as of May 2022. The book supports each issue under the discussion with the case law of the Turkish Competition Authority and the courts, with most of the Turkish decisions available in English for the first time.

We hope that our book will be of value for lawyers, clients, academics, and policymakers dealing with or interested in the multi-jurisdictional merger control.

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The Output® provides regular update on competition law developments with a particular focus on Turkey and practice of the Turkish Competition Authority. The Output® also includes international trade and regulatory issues. The Output® cannot be regarded as a provision of expert advice and should not be used as a substitute for it. Expert advice regarding any specific competition, international trade and regulatory matters may be obtained by directly contacting ACTECON.

ACTECON is a firm combining competition law, international trade remedies and regulatory affairs. We offer effective strategies from law & economics perspective, ensuring that strategic business objectives, practices, and economic activities comply with competition law, international trade rules and regulations.