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The interpretation of the exemption brought for “technology undertakings” took a sudden turn with the Turkish Competition Authority’s (“**TCA**”) recent *Berkshire Hathaway Decision* (15.09.2022, 22-42/625-261) which resolved that the exception brought to the merger control thresholds by the recent amendment for the technology undertakings shall be considered applicable, even if the activities of the target undertaking that can be classified to fall under the definition of technology undertaking, are carried out in other geographical markets than Turkey.

For background information, as per the renewed Communiqué No. 2010/4 on the Mergers and Acquisitions Calling for the Authorisation of the Competition Board (“**Communiqué No. 2010/4**”), “*the TRY 250 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 this recent disarray.

With the *Berkshire Hathaway Decision,* the TCA ruled that as long as the target is active in the above-mentioned areas in anywhere **in the globe and also** is active or has R&D activities in the Turkish geographic market or provides services to customers **[in any market]** in Turkey, then the thresholds exemption will 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 **in 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 exemption brought for the local TRY 250 million Turkish turnover.

In *Berkshire Hathaway Decision*, of which the reasoned decision has been published on 23.01.2023, concerning the indirect acquisition of Alleghany Corporation ("**Alleghany**" or the "**Target**") by Berkshire Hathaway Inc., the TCA clarified in which circumstances the relevant exception is applicable**.**

In the relevant case, the TCA emphasized that Alleghany develops software to manage the systems of reinsurance companies and sells these products to third parties, thus, it is active in the field of financial technologies, which falls under the definition of "technology undertaking" within the meaning of the Communiqué No. 2010/4.

The TCA further added that the requirement of being active in the Turkish geographical market is also met **since the Target generates turnover in Turkey**.

Thus, the TCA concluded that the transaction involving the Target falls within the scope of technology undertaking exception, and that TRY 250 million thresholds is 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 whether or not Alleghany operates in Turkey in the field of "financial technologies" does not have any effect on the assessment that the turnover exception is applicable since Alleghany's (which is considered as a technology undertaking as a result of its businesses anywhere in the globe) 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 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.

In light of the foregoing, the latest interpretation of the "technology undertaking" by the TCA 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 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 with 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 the 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 definitely 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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