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Q&A with Dr Fevzi Toksoy and Bahadir Balki

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What do you think about the 'technology undertaking' exception to Turkey's merger control regime?

With the adoption of this exception, the TCA exempts certain transactions involving a takeover of a technology undertaking from the target-wise turnover thresholds. Competition authorities worldwide have long been discussing about tackling 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. This *sui generis* approach of the TCA, however, brings along some question marks which are yet to be clarified.

What are the implications of the TCA's technology undertaking exception?

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.

Technology undertakings are defined as companies active in areas of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals, and health technologies. Since the definition also 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 software broadly to include companies in many sectors that develop their own software to cater services to their customers. The answer as to whether an activity by an undertaking would fall into these areas thus demands sufficient case law and guidance from the TCA.

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

Can you imagine classifying a restaurant as a technology undertaking for utilising 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 it used software as a tool in providing its services. It utilised 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-authorisation decision from the TCA under the *NielsenIQ/GfK*[2] decision by arguing this exact point in terms of the NielsenIQ and 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 suggest clarifying it with the TCA.

> **Each transaction must be closely examined in terms of global operations with the TCA's technology undertaking definition in mind.**

Will a mainly traditional undertaking with negligible technology activities fall into the 'technology undertaking definition'?

Let's 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 utilises 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 software.

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

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.

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

It is indeed very large. 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* 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.

Undertakings with even minor technology-related activities in ANY jurisdiction other than Turkey would trigger notification obligation. I can imagine that several undertakings may have already decided not to notify the TCA by narrowly interpreting the exception. 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 a fine imposed on Elon Musk due to failure to notify the Twitter deal.

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

The adoption of the 'technology undertaking' exception signifies a departure from the turnover-based merger control regime. This impacts the legal certainty but at the same time enables the TCA to review transactions that may indeed be important for the competition policy enforcement. A fine balance will be eventually met. Until then, we may receive mixed signals from the TCA.

In such a landscape, the undertakings must assume the largest interpretation of the technology undertaking and approach the TCA in case of uncertainty. It is also worth noting that enforcement so far also should not be deemed as definitive, and the TCA is open to communications. ■

Notes

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.**

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