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Special Issue

Illuminating Merger Control Contours in Türkiye

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Dear reader,

Merger control remains a cornerstone of competition policy, shaping the evolution of industries and safeguarding market dynamics against undue concentration. As global markets continue to integrate, Türkiye has emerged as an important jurisdiction in the multijurisdictional merger control landscape. With its strategic location bridging Europe and Asia, a growing digital economy, and an evolving regulatory framework, Türkiye's approach to merger oversight has garnered increasing attention from multinational corporations and legal practitioners alike.

This special issue of The Output® provides an in-depth analysis of the latest developments in Türkiye's merger control regime, offering insights into the regulatory shifts that impact both domestic and cross-border transactions. Among the most significant changes in recent years is the introduction of the "technology undertaking" exception—a novel and ambitious approach designed to capture transactions in digital and high-tech markets, preventing so-called killer acquisitions. This unique policy, implemented in May 2022, differentiates Türkiye from its counterparts in the European Union ("EU"), Germany, and Austria, where the "value of transaction" test serves a similar purpose.

Despite its ambitious scope, the application of the technology undertaking exception remains uncertain, raising fundamental questions for businesses and legal experts. The definition of a "technology undertaking" lacks precise delineation, leaving room for broad interpretation by the Turkish Competition Authority ("TCA"). Key terms are yet to be clarified, creating a degree of unpredictability in the notification process. This uncertainty has led to an increase in merger notifications and an expansion of regulatory scrutiny, particularly in digital markets. As Türkiye continues to refine its merger control framework, businesses must remain vigilant in assessing their notification obligations, especially in transactions involving digital platforms, software, fintech, biotech, and health technologies. The TCA's growing focus on foreign-to-foreign transactions further underscores the necessity of a comprehensive compliance strategy for global companies operating in or connected to Türkiye.

In this issue, we explore key questions surrounding the technology undertaking exception, the evolving interpretation of merger thresholds, and recent enforcement trends, such as the heightened scrutiny of gun-jumping, including by way of premature information sharing in M&A transactions. Our contributors provide expert analyses of landmark cases, and strategic considerations for navigating Türkiye's merger control landscape.

We invite you to delve into this special issue, which aims to illuminate the evolving contours of Turkish merger control and provide some degree of clarity amid ongoing regulatory uncertainties. We hope this edition serves as a valuable resource in this evolving legal environment.

Sincerely,

ACTECON Team

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Technology Undertaking Puzzle: Are You Caught in Türkiye's Merger Net?

By Fevzi Toksoy, Bahadır Balkı and Hanna Stakheyeva

As an equivalent of the value of transaction test in some jurisdictions, the Turkish Competition Authority applies a special threshold for concentrations involving technology undertakings. In other words, concentrations that involve technology undertakings are treated differently with regards to the Türkiye-related turnover threshold, which determines whether a transaction must be authorized by the TCA. The usual threshold for Türkiye-related turnover is irrelevant if you are regarded as a technology undertaking under Turkish merger control rules. This special local threshold exception aims at catching a greater number of transactions in the digital/high-tech markets, with a view to preventing acquisitions of innovative companies to eliminate them as a possible source of future competition ("killer acquisitions").

We have already witnessed the practical application of this turnover exception threshold in several cases, e.g., the Twitter deal as a result of which Elon Musk faced a gunjumping fine in Türkiye for failing to notify and obtain approval from the TCA. 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 and irrespective of nexus with Türkiye.

In this short article we provide what you should know about merger control thresholds in Türkiye, particularly if you may be qualified as a technology undertaking by the TCA.

I. Thresholds in General: Legal Framework

The notification procedure and time frame of merger control in Türkiye are broadly aligned with the corresponding procedure and time frame in the EU. The Turkish Competition Law requires prior notification to the TCA of transactions that involve a change of control on a lasting basis and that meet certain financial thresholds regarding the turnover of the parties to the transaction. As stated in Article 7 of the TCA's Communiqué No. 2010/4 (Merger Communique),[1] a concentration is notifiable in Türkiye where one of the below turnover thresholds are triggered:

■ The transactions where the aggregate Turkish turnover of the transaction parties exceeds TRY 750 million (approx. EUR 21.1 million or USD 22.8 million or GBP 17.9 million for 2024 financial year) and the Turkish turnovers of at least two of the transaction parties separately exceeds TRY 250 million (approx. EUR 7 million or USD 7.6 million or GBP 5.9 million for 2024 financial year).

or

■ In acquisitions: assets or operations that are subject to the acquisition, and in mergers: the Turkish turnover of at least one of the transaction parties exceeds TRY 250 million and global turnover of at least one of the other transaction parties exceeds TRY 3 billion (approx. EUR 84.5 million or USD 91.4 million or GBP 71.6 million for 2024 financial year).

According to Article 7(2) of the Merger Communique, the Türkiye-related turnover threshold of TRY 250 million prescribed in Article 7(1) shall not apply to concentrations with technology undertakings as their target if the technology undertakings either operate or conduct research and development activities in the Turkish market, or provide services to Turkish users.

II. Understanding Technology Undertakings: Case Law

The Merger Communique defines technology undertakings 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.[2] The definition is rather broad.

[1] *Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board.*

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

To understand it better, the TCA has issued several decisions demonstrating its interpretation of the technology undertaking exception.

The TCA examined concentrations that did not meet the notification thresholds, but it analyzed the activities of the targets to see if they could be qualified as technology undertakings.

Citrix/TIBCO[3] was the first decision applying the technology undertaking exemption. Both companies were active in the development of software, and hence there were no doubts as to the application of the technology undertaking exemption.

In Cinven Capital/International Financial[4] the TCA recognized using digital platforms as being active in the software market. In particular, the target was active in providing savings and investment products through life insurance packages to individual investors. The company's Turkish turnover was mainly derived from the sales by a third-party distributor since the undertaking did not have any subsidiaries or affiliates in Türkiye. 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 Türkiye.

However, in Nielsen/Brookfield,[5] 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.

Providing software services and Wi-Fi solutions qualified the target as a technology undertaking in Providence/Airties.[6]

Producing application programming interfaces and ready-to-use pharmaceuticals was viewed as falling within the scope of the technology undertaking definition in the Astorg/Corden[7] case. Similarly, in Groupe Bruxelles/Affidea,[8] the TCA also considered sales of diagnostic imaging devices as technology undertaking activities in the biotechnology sector.

In CD&R-TPG/Covetrus[9] the TCA classified the target's activities in the pharmaceuticals for animals and software sector as "health technology" and "pharmacology," and as a result, the concentration was covered by the technology undertaking exemption.

In Berkshire Hathaway,[10] 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 systems of property and casualty reinsurance and sold those to third parties. The exception applied here even though the activities of the target company were carried out in geographical markets other than Türkiye. The main takeaway of this decision is that if the target of the transaction is a technology undertaking anywhere in the world and generates turnover in Türkiye 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.

The Berkshire reasoning is also seen in the Twitter[11] gun-jumping case. Twitter is a digital/online platform that was recognised by the TCA as a technology undertaking, and hence subject to the threshold exception. Thus, there was no need to check Twitter's (target) turnover in Türkiye for the thresholds analysis. The only threshold that needed to be met for the Twitter deal was on the buyer side (globally TRY 3 billion [approx. EUR 142.6 million]

for 2022). Companies controlled by Elon Musk were deemed a single economic unit, and it was concluded that the buyer side notification threshold was met; thus, the Twitter deal was indeed notifiable.

III. Conclusion

Concentrations involving technology undertakings are placed under a special focus/threshold in Türkiye as of May 2022, with a view to catching all concentrations in the digital/high-tech markets and preventing killer acquisitions. While the technology undertaking exception from the turnover threshold for notification is different from the "value of transaction test" adopted by Türkiye's peers in the EU, Germany, and Austria, it may be viewed as a unique Turkish equivalent of that 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 Türkiye 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. There is not enough existing case law yet to eliminate uncertainties in how to classify activities under the categories listed in the Merger Communique, all of which brings more legal uncertainty and transaction costs for businesses.

Following the Berkshire case, if the target generates turnover in Türkiye 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.

[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 22-23/372-157 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

[5] 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.

[6] 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.

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

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

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

[11] The Examination about the Acquisition of the Sole Control of Twitter Inc. by Elon R. Musk" dated 6 March 2023.

Catalogue of Sectors Caught by Technology Undertaking Exception: Key Take-Aways from 2023-2024 Cases

By Ertuğrul Can Canbolat and Zeynep Karakuş

Digital markets have reshaped competition law and merger control in Türkiye, leading to the "technology undertakings" exception in 2022. This allows the Turkish Competition Authority to review mergers in sectors like digital platforms, software, gaming, fintech, and biotechnology—regardless of their Türkiye-related turnover—due to their potential for disruptive innovation.

Unlike Germany and Austria, which use transaction value thresholds, the TCA focuses solely on technology undertaking classification. Since the amendment, merger decisions in this sector have surged, rising from 31 in 2022 to 50 in 2023, with 31 already recorded in mid-2024.

This article explores key 2023 and 2024 case law, shedding light on the main sectors/industries that are considered to be caught by the technology undertaking exception.

Digital markets have been shaping competition law and merger control, in particular, in various jurisdictions, including Türkiye. The "technology undertakings" exception to the merger control thresholds was introduced in Türkiye in 2022[12]. The rationale for the exception concerning technology undertakings is to enable the Turkish Competition Authority to assess the mergers and acquisitions by undertakings holding substantial market influence in the sectors such as digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals, and health technologies—sectors capable of triggering disruptive innovation waves, even if a particular undertaking does not (currently) generate considerable turnover. If an undertaking is classified as a technology undertaking, the TCA stipulates that the concerned merger is subject to notification requirement, regardless of the Türkiye-related turnover thresholds that are normally evaluated. In that regard, the TCA requires all undertakings classified as technology undertaking to notify, without assessing their potential to trigger disruptive innovation waves.

Unlike the German and Austrian merger control frameworks, which have incorporated transaction value thresholds alongside turnover thresholds to pursue comparable objectives concerning the technology undertaking exception, the TCA has opted for this more distinct amendment. It has introduced an amendment that focuses solely on the nature of the undertaking as a technology undertaking, without considering its Türkiye-related turnover thresholds.

After the amendment, there were many published decisions regarding technology undertakings in 2023 and 2024. In fact, there has been an increase in the number of merger/acquisition decisions regarding undertakings operating in the technology sector. For example, as seen in the Decision Statistics of the TCA, the number of merger/acquisition decisions in the information technologies and platform services and telecommunications sectors increased from 31 in 2022[13] to 50 in 2023[14]. Notably, during the first six months of 2024, this number has already reached 31, indicating a continuation of this trend[15]. In that regard, numerous precedents have emerged within the designated categories, offering insight into how the TCA interprets and applies merger control thresholds in the realm of technology undertakings. This article provides an overview of the 2023 and 2024 case law for a better understanding of the main sectors that are considered as technology undertaking related.

I. Sectors in Which an Undertaking Must Operate to Be Considered As a Technology Undertaking

According to Article 4/c of the Communique No.2010/4, a "technology undertaking" is defined as the undertakings or their related assets which are operating in the fields of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals, and health technologies. Under this broad definition, it is clearly seen that regulating such various dynamic sectors, where technological innovations and market forces evolve rapidly, poses inherent complexities. This amendment also shows the proactive stance of the TCA in addressing the evolving needs of technology-related industries. The following merger clearance or rejection decisions of the TCA confirm that each of the undertakings operating in the mentioned sectors fall within the scope of the definition of a "technology undertaking":

a. Software

In 2023 and 2024, it is observed that most decisions by the TCA were made in connection with companies operating in the software sector[16] within the scope of technology undertakings. In this context, the following were considered as being in the scope of technology undertakings by the TCA:

- providing integrated PDF productivity and e-signature tools to the customers through a desktop-based software suite (NITRO case)[17],
- providing software services in areas such as multi-channel sales management, business partner management, mobile team management, warehouse and production management, collecting data from the field, supplying management for different needs of the sector (UNIVERA case)[18],
- programming software development, developing simulation code and digital twin and related R&D activities (SIMULARGE case)[19],
- operating in the field of fleet management services by providing services on safe and efficient driving and driver behaviour analysis (IUGO case)[20],
- operating in the field of software by providing computer and network security solutions for businesses (CYBEREASON case)[21],
- providing fixed wireless network hardware and related accessories to expand the network coverage area of such fixed wireless access solutions through wireless technology by connecting to the wired network, and developing a special application for the installation of a special management software and devices (MIMOSA case)[22],
- operating in the field of software by providing cyber security solutions (BEAM case)[23],
- verification and calibration of software, continuous monitoring of software (ELLAB case)[24],
- providing solutions as an end-to-end cloud-based service that enable companies to manage and improve the overall customer

experience by providing a view of their customers' interactions with them (such as support lines, sales emails and social media interactions) (QUALTRICS case)[25],

■ providing enterprise software and infrastructure software that allows customers to seamlessly route and integrate data flow within the scope of their operations (SOFTWARE AG case)[26],

■ conducting research and development activities on robotics and artificial intelligence/machine learning in the field of non-destructive testing, providing services with non-destructive testing solutions and systems in a wide range of industrial sectors such as power plants, storage facilities, energy production sectors, petroleum/fuel, natural gas through the Robotic Studies Business Line (AIS YAZILIM case)[27],

■ producing 2D animation and storyboarding software (TOON BOOM case)[28],

■ providing endpoint security software (TRAPMINE VARLIKLARI case)[29],

■ helping companies with large-scale OT networks realize the benefits of Internet of Things technology in the industrial field by reducing cyber risks and mitigating operational threats, specializing in cyber-physical security solutions in the software domain for OT and industrial control system products in various industries (SCADA case)[30],

■ operating in data labelling market for artificial intelligence companies (CO-ONE case)[31],

■ providing software services for warehouse operations (HAMUR-LABS case)[32],

■ providing software solutions to the travel industry (IBS case)[33],

■ providing security services and products such as DDoS mitigation, network security and SOC/SIEM services (LUMEN case)[34],

■ computing, cloud programming, industrial internet networking, 5G broadband, digital platform development, information systems operation and maintenance, data storage, artificial intelligence solutions and information security solutions (H3C case)[35],

■ operating in the field of software solutions for advanced scheduling, capacity planning, supply chain planning, optimisation solutions and workforce planning (ICRON case)[36],

■ operating in the supply of information technology operations management software and in the health and performance analytics segment, and to offer health and performance analytics solutions through a cloud-based software platform (NEW RELIC case)[37],

■ being an enterprise architecture management (EAM) software provider (LEAN IX case)[38],

■ operating in online learning software activities (KAHOOT case)[39],

■ developing digital accessibility solutions for undertakings to streamline and automate the process of creating and delivering an accessible online user experience for people with disabilities (NEOGAMES case)[40],

■ operating in the production market of software for use with agricultural equipment (including software that helps to plan, process, track and record all field operations so that farming data can be managed) and intelligent spraying systems (TRIMBLE SOLUTIONS case)[41],

■ providing solutions to help corporate users monitor the performance and security of their digital systems (SPLUNK case)[42],

■ providing information technology support to insurance companies, health institutions, pharmacies and bank funds, as well as providing labour leasing services to insurance companies for operational activities such as provisioning, compensation and contracted institution service management (COMPUGROUP MEDICAL case)[43],

■ operating in e-commerce integration software service activities (PROPARS case)[44],

■ operating in the fields of integrated energy management and software services and battery and battery technology production (INAVITAS case)[45],

■ providing tools for system application development and re-platforming of mainframe and other legacy IT technologies with a focus on modernization support (AMC case)[46],

■ providing a cloud-based mobile customer relationship management (Lead Management) software service that enables companies to manage their sales operations and customer portfolio from anywhere (LEADPORT case)[47],
■ being a software company offering PLM solutions with a focus on S&A software products (BETA case)[48],
■ providing consultancy services related to SAP (Systems Applications and Products) software program, providing SAP financial/logistics solutions, conducting localisation and roll-out projects, establishing system integration between SAP and non-SAP systems, conducting e-Invoice/e-Archive/e-Waybill/e-Ledger projects over the SAP platform, coding on the SAP program to perform the aforementioned services even if the software is not produced on its own (ARTENO case)[49],
■ developing and marketing medical imaging software used in the fields of radiation oncology, nuclear medicine and radiology (MIM case)[50],
■ providing software products to customers in brand development and authentication solution activities and high security development and authentication solution activities (ORCA BIDCO case)[51],
■ providing software services to clients in the Architecture, Engineering & Construction (AEC) sector globally to improve the energy efficiency/decarbonisation of complex buildings, supporting regulatory and voluntary compliance efforts and reduce lifetime building energy costs/carbon emissions (INTEGRATED case)[52], and
■ operating in the field of development of software solutions for displaying and analysing the data obtained in renewable energy facilities (BAXENERGY case)[53].

b. Game software

In the game software sector[54] the TCA decided that the following areas are to be captured within the definition of "technology undertaking":
■ game development and publishing, game distribution, sale of licensed products, online display advertising[55],
■ operating in the mobile games market, console games market and computer games market[56],
■ creation, development, and broadcasting of mobile games[57], and
■ providing content and technological solutions for the online gaming industry[58].

c. Digital platform

The TCA assessed the following companies operating in the digital platform sector[59] as being within the scope of the definition of "technology undertaking":
■ social networking, online advertising and data licensing services[60],
■ developing mobile-first game and publishing[61],
■ providing online platform services for real estate sales/rental activities[62],
■ operating in the market of online HSH tools, which are online educational resources made available to users via a mobile application or a desktop/mobile browser[63],
being a cryptocurrency exchange platform[64],
■ being a digital platform that helps health professionals such as doctors, veterinarians, dentists, physiotherapists, psychologists and dieticians to meet online with users anywhere in the world[65],
■ being an entertainment platform and media service provider providing services with real-time data streaming and subscription-based on-demand viewing model[66],
■ acquisition, development, maintenance and leasing of data centre facilities[67],
■ being an e-commerce platform that lists and sells products of different brands in the categories of clothing, shoes, bags and accessories on its website[68],
being a real estate information and marketing platform[69],
■ operating in the field of travel agency services, ticket reservation procedures and ticket sales for air, sea, land, railway transportation, wholesale or retail sales of travel, tour, transportation and accommodation services[70], and
■ being an online education platform that develops and delivers proprietary technology-focused courses in areas such as data science, artificial intelligence, cloud computing, cyber security[71].

d. Financial technology

Also, with respect to the financial technology sector, the TCA determined that the following activities would be captured as "technology undertakings"[72]:

- developing a digital finance application for international money transfers[73],
- serving as an interface provider within the scope of contracts to be concluded with banks, electronic money and payment services companies and organisations providing retail investment services, operating mainly in the fields of banking, crypto and financial investment services and insurance services as the designer and developer of relevant applications[74], and
- providing payment solutions including NFC, QR and other technologies; enabling merchants of all sizes to accept payments of any amount with contactless cards, mobile wallets and portable devices on their mobile devices; operating as a softPOS solution provider[75].

e. Health technologies

When the decisions in the health technologies sector are reviewed, the following are all considered to be in the scope of the definition of a "technology undertaking":

- developing and selling endoscopic devices for gastrointestinal applications[76],
- being a medical device company focused on developing, manufacturing, selling and providing procedural solutions for spine surgery, providing spine surgery solutions, including surgical access instruments, spinal implants, fixation systems, biologics and enabling technologies, as well as imaging, navigation and intraoperative products[77],
- developing drug-eluting balloon catheters and non-drug-eluting balloon catheters for patients with coronary and peripheral artery disease[78],
- making direct and indirect sales and after-sales services of products in Türkiye in the pharmaceutical, food, beverage and chemical sectors as well as filter and filtration technologies (medical device sector)[79],
- being a contract research and commercialization company which serves pharmaceutical and biotechnology companies[80],
- being a business line consisting of assets related to health technologies[81],
- being a healthcare company providing respiratory care services for personal and professional use, providing healthcare technology services by producing software and hardware solutions for respiratory diseases[82],
- operating in the field of dialysis equipment and dialysis consumables; producing and selling products such as dialysis devices, hemodialysis solutions, machine disinfectant, AV blood lines, AV fistula needles, sodium bicarbonate cartridge, cartridge citric acid disinfectant and blood circulators[83],
- providing sterilisation, disinfection, cleaning products and service solutions for medical and surgical instruments; manufacturing and distributing sterilisation, disinfection and cleaning products used for the reprocessing of reusable medical devices; manufacturing and distributing machine cleaning and sterilisation solutions for the prevention of contamination in the pharmaceutical and biotechnology sector[84],
- developing and commercialising medical devices used to treat bladder and bowel dysfunction in adults[85],
- developing, manufacturing and distributing devices and reagents in IVD segments such as molecular diagnostics, microbiology, biomedical systems and clinical chemistry[86], and
- selling over-the-counter (OTC) finished dose form pharmaceuticals and developing and selling consumer health products such as food supplements, medical devices and cosmetics; providing services in the field of development and sale of natural food supplements, cosmetics, skin care products, and wholesale distribution of finished dose form pharmaceuticals, natural food supplements, skin care and cosmetics[87].

f. Biotechnology

In the biotechnology sector[88], in 2023 and 2024, decisions confirmed that the following were considered "technology undertakings": selling diagnostic products (especially chemistry/

hematology equipment and reagents)[89], producing bioplastics and developing biochemical and bioproducts from renewable resources[90], and operating in the field of oncology medicines[91]. Additionally, providing medical diagnostic services and specialised diagnostic services for the human pharmaceuticals sector is regarded as operating in the biotechnology and health technologies sectors[92].

g. Pharmacology

In addition, the provision of generic and biosimilar medicines through business-to-business licensing and product supply agreements[93] and developing, producing, marketing and distributing high-dose vitamin C infusions and injections (Pascorbin product), homeopathic medicines, phytopharmaceuticals, nutritional supplements and natural cosmetics, and producing and selling products that can be categorised as pharmaceuticals (both prescription and non-prescription) such as food, medical devices and test strips[94] was classified under pharmacology sector[95].

h. Cross-sectors

Moreover, it is possible for the companies to operate across multiple sectors:

- a company that was operating through a set of portfolio companies active in areas such as automotive, welding technology, laser and photonic solutions, the purchase, processing, blending, and packaging of nuts and similar products, communication systems, software, and construction was considered to be operating in the software, digital platforms, biotechnology, pharmacology and health technologies sectors[96],
- a company that was operating in the production of pigments, dyes, optical brighteners, industrial nitrocellulose, solvents and organic main products was considered to be operating in the pharmacology and agrochemicals sector[97],
- a company that was operating through a set of portfolio companies such as an online platform providing reference information on entertainment and games; a digital platform that owns and operates certain global and regionally focused sports (particularly football) news websites; an online commerce website that builds branded commerce websites; an online commerce website that develops animation and storyboarding software for film, television, web animation, games, mobile devices, educational applications and education was considered to be operating in the digital platform and software sector[98],
- a company engaged in the research and development of products for the treatment of solid tumours was considered to be in the pharmacology and biotechnology sector[99], and
- a company that was operating in the fields of minimally invasive aesthetics, ophthalmology and aesthetics, skin / facial care and other services and products with a focus on minimally invasive aesthetics, and producing and sell various hyaluronic acid (HA) filling materials marketed under the names "saypha" and "Princess" in injection form in the field of minimally invasive aesthetics was considered to be operating in the pharmacology, health technologies and biotechnology sector[100].

i. Information technologies

Although the information technologies sector is not explicitly referenced in the Article 4/c of the Communique No. 2010/4, certain decisions of the TCA have categorized the following within this sector and considered them as technology undertakings:

- providing media intelligence and social analytics services through online news, social media, print, broadcast and podcasts on a global scale, analysing online documents and enabling public relations, communications and marketing professionals to make informed strategic decisions[101], and
- providing technologies for public meetings, events and hospitality services[102].

II. Conclusion

The amendments made in Communique No.2010/4 in 2022, specifically concerning technology undertakings, mark a significant shift in the TCA's approach towards regulating concentrations. By exempting technology undertakings from certain traditional turnover thresholds, the TCA aims to address the unique challenges posed by the rapidly evolving industries.

Throughout 2023 and 2024, numerous decisions were adopted within various technology sectors, shedding light on the TCA's interpretation and application of this regulation. Sectors such as software, game development, digital platforms, financial technology, health technologies, biotechnology, and pharmacology were all subject to examination under this framework. The TCA remains vigilant, closely following technological market developments globally. However, the definition of a technology undertaking still warrants further elaboration, requiring careful evaluation. It is important to note that even though the Turkish turnover of a target considered as a technology undertaking is negligible, the acquirer will be obliged to notify the transaction without considering whether there is a market share threshold or affected market presence. In this respect, if mergers and acquisitions subject to authorization are executed without obtaining the authorization of the TCA, administrative fines will be imposed on the undertakings.

Notably, the TCA's proactive interventions demonstrate a commitment to fostering competition and innovation while ensuring market stability in dynamic technological landscapes. The decisions rendered in 2023 and 2024 provide valuable insights for businesses operating within these sectors, emphasizing the importance of compliance and strategic considerations in navigating merger and acquisition activities in Türkiye's technology markets.

[12] Please refer to Communiqué No. 2010/4 on the Mergers and Acquisitions Calling for the Authorisation of the Competition Board: "the 250 million TRY 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 Türkiye."

[13] The TCA's Decision Statistics of 2022 can be accessed through the following link: https://www.rekabet.gov.tr/Dosya/2022-yillik-web-20230110153239393.pdf.

[14] The TCA's Decision Statistics of 2023 can be accessed through the following link: https://www.rekabet.gov.tr/Dosya/2023-yili-karar-istatistikleri-20240125134258896.pdf.

[15] The TCA's Decision Statistics of First 6 Months of 2024 can be accessed through the following link: https://www.rekabet.gov.tr/Dosya/2024-yili-ilk-6-ay-20240719101130102.pdf.

[16] In 2022, the TCA's decisions for technology undertakings in software sector were mainly in the following areas: stock and price optimisation solutions with cloud-based software; application modernisation and connectivity, application procurement and management, information technology operations management, cyber resilience, information management and governance; resale of cloud-based software products and licences and provision of information technology services related to these products; corporate cyber security consultancy in connection with incident response; providing residential WiFi solutions for broadband operators and provides software services that enable broadband operators to offer and manage WiFi networks to residential customers; navigation/location-based service software with mobile navigation map databases; providing software services related to electronic document management systems.

[17] TCA's decision, NITRO, numbered 23-01/22-9 and dated 5.01.2023.

[18] TCA's decision, UNIVERA, numbered 23-23/431-145 and dated 18.05.2023.

[19] TCA's decision, SIMULARGE, numbered 23-36/673-229 and dated 03.08.2023.

[20] TCA's decision, IUGO, numbered 23-18/352-120 and dated 13.04.2023.

[21] TCA's decision, CYBEREASON, numbered 23-20/381-132 and dated 05.05.2023.

[22] TCA's decision, MIMOSA, numbered 23-28/543-183 and dated 22.06.2023.

[23] TCA's decision, BEAM, numbered 23-28/546-186 and dated 22.06.2023.

[24] TCA's decision, ELLAB, numbered 23-37/698-242 dated 10.08.2023.

[25] TCA's decision, QUALTRICS, numbered 23-24/444-152 dated 25.05.2023.

[26] TCA's decision, SOFTWARE AG, numbered 23-26/490-168 and dated 7.06.2023.

[27] TCA's decision, AIS YAZILIM, numbered 23-34/645-217 and dated 26.07.2023.

[28] TCA's decision, TOON BOOM, numbered 23-37/693-239 and dated 10.08.2023.

[29] TCA's decision, TRAPMINE VARLIKLARI, numbered 23-40/780-273 and dated 31.08.2023.

[30] TCA's decision, SCADA, numbered 23-39/725-248 and dated 17.08.2023.

[31] TCA's decision, CO-ONE, numbered 23-39/726-249 and dated 17.08.2023.

[32] TCA's decision, HAMURLABS, numbered 23-36/672-228 and dated 03.08.2023.

[33] TCA's decision, IBS, numbered 23-31/593-203 and dated 13.07.2023.

[34] TCA's decision, LUMEN, numbered 23-34/654-220 and dated 26.07.2023.

[35] TCA's decision, H3C, numbered 23-51/985-359 and dated 02.11.2023.

[36] TCA's decision, ICRON, numbered 23-60/1161-416 and dated 21.12.2023.

[37] TCA's decision, NEW RELIC, numbered 23-49/939-333 and dated 19.10.2023.

[38] TCA's decision, LEAN IX, numbered 23-50/966-350 and dated 26.10.2023.

[39] TCA's decision, KAHOOT, numbered 23-43/817-289 and dated 14.09.2023.

[40] TCA's decision, USERWAY, numbered 24-08/143-59 and dated 15.02.2024.

[41] TCA's decision, TRIMBLE SOLUTIONS, numbered 24-14/283-117 and dated 21.03.2024.

[42] TCA's decision, SPLUNK, numbered 24-07/109-44 and dated 08.02.2024.

[43] TCA's decision, COMPUGROUP MEDICAL, numbered 24-11/174-69 and dated 29.02.2024.

[44] TCA's decision, PROPARS, numbered 24-15/312-127 and dated 28.3.2024.

[45] TCA's decision, INAVITAS, numbered 24-07/115-48 and dated 08.02.2024.

[46] TCA's decision, AMC, numbered 24-05/88-37 and dated 18.01.2024.

[47] TCA's decision, LEADPORT, numbered 24-11/173-68 and dated 29.02.2024.

[48] TCA's decision, BETA, numbered 24-16/357-137 and dated 04.04.2024.

[49] TCA's decision, ARTENO, numbered 24-16/358-138 and dated 04.04.2024.

[50] TCA's decision, MIM, numbered 24-13/257-107 and dated 14.03.2024.

[51] TCA's decision, ORCA BIDCO, numbered 24-19/406-162 and dated 18.04.2024.

[52] TCA's decision, INTEGRATED, numbered 24-23/524-219 and dated 21.05.2024.

[53] TCA's decision, BAXENERGY, numbered 24-29/688-289 and dated 11.07.2024.

[54] In 2022, the TCA's decisions for technology undertakings in game software sector were

mainly in the following areas: operating in the field of mobile games; developing and publishing of mobile games.

[55] TCA's decision, ACTIVISION BLIZZARD, numbered 23-31/592-202 and dated 13.07.2023.

[56] TCA's decision, OYUN PORTFÖYÜ, numbered 23-27/512-173 and dated 15.06.2023.

[57] TCA's decision, ROVIO, numbered 23-32/627-210 and dated 20.07.2023.

[58] TCA's decision, NEOGAMES, numbered 23-45/845-298 and dated 21.09.2023.

[59] In 2022, the TCA's decisions for technology undertakings in digital platforms sector were mainly in the following areas: operating an online auction platform for the purchase and sale of used heavy machinery, equipment, vehicles and industrial products (construction vehicles, loaders, loaders, tracks, excavators), agricultural vehicles (harvesters, tractors, rakes, seeders), gardening vehicles and machinery (lawn mowers, garden machinery, golf carts, lawn shears), forestry vehicles (harvesters, logging vehicles, forest trailers), lifts and cranes, trucks, lifting machines, vans, motorbikes, cars, boats, and construction machinery (scaffolding, fans, compressors); providing digital workspace solutions that provide unified, reliable and secure access to business resources, simplifying business execution and collaboration across all channels, devices and locations; providing storage, handling, boxing, packing and packaging and mailing services for the customers it serves after the orders are received from the sellers and to operate in the e-commerce logistics market.

[60] TCA's decision, Twitter, numbered 23-12/197-66 and dated 02.03.2023.

[61] TCA's decision, SCOPELY, numbered 23-26/489-167 and dated 7.06.2023.

[62] TCA's decision, DG INVEST B.G., numbered 23-41/800-284 and dated 7.09.2023.

[63] TCA's decision, PHOTOMATH, numbered 23-19/354-121 dated 28.04.2023.

[64] TCA's decision, STABLEX, numbered 23-20/388-134 and dated 05.05.2023.

[65] TCA's decision, LIVEMEDY, numbered 23-41/805-285 and dated 07.09.2023

[66] TCA's decision, BLUTV, numbered 23-58/1138-407 and dated 14.12.2023.

[67] TCA's decision, BAM DIGITAL, numbered 23-47/885-312 and dated 05.10.2023.

[68] TCA's decision, İKAS, numbered 24-11/197-80 and dated 29.02.2024.

[69] TCA's decision, ZİNGAT, numbered 23-56/1121-399 and dated 07.12.2023.

[70] TCA's decision, TURNA.COM, numbered 24-03/55-16 and dated 11.01.2024.

[71] TCA's decision, UDACITY, numbered 24-19/422-172 and dated 18.04.2024.

[72] In 2022, the TCA's decisions for technology undertakings in financial technologies were mainly in the following areas: being a payment and electronic money institution established to mediate all kinds of money transfer and payment transactions; being a payment institution that combines digital wallet, virtual POS, money transfer and other similar transactions under a single structure; developing software to manage the systems of reinsurance companies and selling these products to third parties; operating through a local broker by providing savings and investment products through life insurance packages to individual investors.

[73] TCA's decision, TURAN TEKNOLOJİ, numbered 22-57/900-370 and dated 29.12.2022.

[74] TCA's decision, INVSTR, numbered 23-54/1045-377 and dated 23.11.2023.

[75] TCA's decision, YAZARA, numbered 24-22/516-217 and dated 09.05.2024.

[76] TCA's decision, Apollo Endosurgery, numbered 23-09/138-40 and dated 16.02.2023.

[77] TCA's decision, NUVASIVE, numbered 23-19/362-124 and dated 28.04.2023.

[78] TCA's decision, MedAlliance, numbered 23-24/451-155 and dated 25.05.2023.

[79] TCA's decision, Sartonet, numbered 23-24/452-156 and dated 25.05.2023.

[80] TCA's decision, Syneos, numbered 23-37/707-244 and dated 10.08.2023.

[81] TCA's decision, EVT, numbered 23-47/899-319 and dated 05.10.2023.

[82] TCA's decision, Inofab, numbered 23-50/970-352 and dated 26.10.2023.

[83] TCA's decision, FARMASOL, numbered 24-11/203-83 and dated 29.02.2024.

[84] TCA's decision, BELIMED, numbered 24-12/221-93 and dated 07.03.2024.

[85] TCA's decision, AXONICS, numbered 24-12/234-97 and dated 07.03.2024.

[86] TCA's decision, TecInvest, numbered 24-15/317-129 and dated 28.03.2024.

[87] TCA's decision, URIACH and INELDEA, numbered 24-22/515-216 and dated 09.05.2024.

[88] In 2022, the TCA's decision for technology undertakings in biotechnology sector was mainly in the following area: being a diagnostic imaging company.

[89] TCA's decision, HESKA, numbered 23-23/428-143 and dated 18.05.2023.

[90] TCA's decision, Novamort, numbered 23-32/617-206 and dated 20.07.2023.

[91] TCA's decision, SEAGEN, numbered 23-32/618-207 and dated 20.07.2023.

[92] TCA's decision, SYNLAB, numbered 23-54/1038-373 and dated 23.11.2023.

[93] TCA's decision, Adalvo, numbered 23-12/184-60 and dated 2.03.2023.

[94] TCA's decision, PASCOE, numbered 24-19/427-176 and dated 18.04.2024.

[95] In 2022, the TCA's decisions for technology undertakings in pharmacology sector were mainly in the following areas: outsourcing pharmaceutical consultancy services to manufacturers operating in the field of life sciences; operating in the pharmaceutical and software sector for animals; producing APIs and ready-to-use medicines on behalf of pharmaceutical companies.

[96] TCA's decision, GIMV, numbered 24-09/154-64 and dated 21.02.2024.

[97] TCA's decision, SYNTHESIA, numbered 23-48/924-327 and dated 12.10.2023.

[98] TCA's decision, IMC, numbered 24-20/448-187 and dated 24.04.2024.

[99] TCA's decision, MIRATI, numbered 24-05/67-24 and dated 18.01.2024.

[100] TCA's decision, Croma, numbered 24-30/711-299 and dated 18.07.2024.

[101] TCA's decision, MELTWATER, numbered 23-16/276-95 and dated 30.03.2023.

[102] TCA's decision, CVENT, numbered 23-20/380-131 and dated 5.05.2023.

Crossing the Line: Gun-Jumping Risks in Foreign-to-Foreign Transactions

By Ayberk Kurt and Seda Eliri

Pursuant to Turkish merger control regime, mergers and acquisitions exceeding the applicable thresholds must be notified to the Turkish Competition Board ("Board") before their implementation. According to Article 16 of the Turkish Competition Law, if such concentrations requiring authorization are realized without prior notification and approval of the Board, an administrative fine of 0.1% of the annual gross Turkish revenues of undertakings shall be imposed on natural and legal persons having the nature of an undertaking and on associations of undertakings or members of such associations.

Considering that the Turkish Competition Authority takes an active stance in merger control enforcement, including in global mergers and acquisitions that are completed without authorisation, this article examines the Board's gun-jumping decisions with a particular focus on foreign-to-foreign transactions.

Under Turkish merger control rules, a transaction leading to a permanent change in control must be notified to the TCA if it meets either of two turnover thresholds. First, if the combined Turkish turnover of the parties exceeds TRY 750 million (approx. EUR 21.1 million/USD 22.8 million/GBP 17.9 million) and each of at least two parties has a Turkish turnover above TRY 250 million (approx. EUR 7 million/USD 7.6 million/GBP 5.9 million). Alternatively, in acquisitions, if the acquired assets or operations, and in mergers, at least one party's Turkish turnover exceeds TRY 250 million, while one other party's global turnover surpasses TRY 3 billion (approx. EUR 84.5 million/USD 91.4 million/GBP 71.6 million), notification is required.

In addition to the above, with the "technology undertaking" exception, the TRY 250 million thresholds that are mentioned under the two tests of the 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 Türkiye. 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 particular, given the depreciation of the Turkish lira and the existence of the technology undertaking exception, the likelihood of global transactions being notifiable in Türkiye increases significantly. However, there are cases where the notification to the TCA may be overlooked due to the low nexus of global transactions with Türkiye.

I. Gun-jumping Decisions on Foreign-to-Foreign Transactions

The legal consequences of violation of the suspension requirement are also applicable to foreign-to-foreign transactions. In other words, when it comes to violation of stand-still obligation/ suspension requirement, the Board does not treat the transactions differently in terms of sanctions and imposes administrative fines on foreign-to-foreign/pure offshore transactions as well. In fact, in many cases, the Board imposed a fine due to the breach of the stand-still obligation for foreign-to-foreign transactions:

- Broadcom (USA, semiconductor-based hardware and

infrastructure software solutions) / VMware (USA, computer programming), gun-jumping by way of failure to notify, 2024[103]

■ Elon Musk/Twitter (USA, social networking), gun-jumping by way of failure to notify, 2023[104]

■ Sibur Holding (Russia, petrochemicals) / Taif JSC (Russia Republic of Tatarstan; investment sector, petrol and gas processing, chemicals and petrochemicals and electrical engineering), gun-jumping by not waiting clearance decision, 2021[105]

■ Ionity (Germany, high-power charging infrastructure for electric vehicles), gun-jumping by way of failure to notify, 2020[106]

■ Brookfield Asset Management (Canada, asset management) / Johnson Controls' power solutions business line (Ireland), gun-jumping by way of failure to notify, 2020[107]

■ Labelon (UK; price tag, woven label, barcode and packaging products) / Atex (Denmark; woven labels, care labels, sales labels and packaging products), gun-jumping by way of failure to notify, 2016[108]

■ Longsheng (China; manufacturing, real estate, and financial investment) / Kiri Holding (Singapore, dyes), gun-jumping by way of failure to notify, 2011[109]

■ Simsmetal (USA, scrap metal) / Fairless (USA, scrap metal recycling), gun-jumping by way of failure to notify, 2009[110]

■ CVRD (Brazil, mining) / Inco Limited (Canada, mining), gun-jumping by way of failure to notify, 2007[111]

■ Total (France, energy) / Cepsa (Spain, energy), gun-jumping by way of failure to notify, 2006[112]

Let's look into the details of the most notable ones of the decisions.

a. Ionity Decision

In Ionity Decision, the establishment of Ionity Holding GmbH & Co.KG ("Ionity") by BMW AG, Daimler AG, Ford Motor Company and Dr. Ing. h.c. F. Porsche Aktiengesellschaft and the failure to notify this transaction on time were examined. The parties argued that (i) Ionity (which is a joint venture) will provide services only in the European Economic Area and will not have any operations in Türkiye and (ii) thus the concerned transaction had not been notified to the TCA as per the literal meaning of Article 2 of the Competition Law (i.e., the effects doctrine). However, following the establishment of Ionity in 2017, within the scope of the Notification Form submitted 06.04.2020 regarding the participation of Hyundai Motor Company and Kia Motors Corporation in the joint venture, it was stated that an application was made to the TCA to ensure full transparency in accordance with the case law of the TCA.

However, such arguments were rejected by the TCA because the notification obligation relates to whether the thresholds have been satisfied, irrespective of whether the transaction will give rise to an affected market in Türkiye. Therefore, the undertakings concerned (i.e., BMW AG, Daimler AG, Volkswagen AG and Ford Motor Company) were each sanctioned a monetary fine of 0.1% based on the Turkish turnover generated in the financial year preceding the date of the fining decision.

As it is seen, sometimes transactions that the Parties do not deem necessary to notify are subsequently notified because they become important for other transactions. However, in this case, the notification leads to a fine due to gun-jumping violation.

b. Brookfield Asset Management/Johnson Controls Decision

In Johnson Controls/Brookfield Asset Management Decision, the acquisition of sole control of the power solutions business of Johnson Controls International plc by BCP Acquisitions LLC,

a company controlled by Brookfield Asset Management Inc. ("Brookfield"), was examined.

In the decision, the Board first analysed the turnover of the parties in order to determine whether the transaction is subject to notification. It was stated by the parties that Brookfield had no turnover in Türkiye prior to the transaction. However, during the additional examination process of the TCA, taking into consideration that Brookfield's acquisition of Graftech International Ltd. ("Graftech") was authorised by the Board's decision dated 30.06.2015 and numbered 15-27/296-81, the parties were asked whether Brookfield's control over the said company continued or not, and if not, when it ended.

In the reply letter sent by Brookfield, it was stated that Brookfield is in control of Graftech in terms of competition law and that it was learnt that Graftech had some activities in Türkiye in 2018 and obtained turnover from Türkiye, and this turnover could be attributed to Brookfield. As seen, it is understood that the Board conducted an analysis in the light of its previous decisions and found that the undertaking had a turnover in Türkiye and, in light of this, determined that the transaction was subject to notification. The parties stated that they became aware of the fact that the relevant transaction (which was closed months prior to the notification date) was subject to the TCA's approval while analysing another possible acquisition transaction. The TCA evaluated that the relevant transaction was indeed notified to the European Commission within the statutory periods, but the parties notified the TCA, 5 months after the closing of the transaction. Therefore, Brookfield was sanctioned a monetary fine of 0.1% based on the Turkish turnover generated in the financial year preceding the date of the fining decision.

In addition, the Board determined that both in the transaction subject to this decision and in the transaction of Brookfield's acquisition of the sole control of Jc Autobatterie, which was authorised by the Board's decision dated 22.11.2019 and numbered 19-41/679-293, the turnover of Brookfield was reported by the notifying party without including the 2018 turnover of Graftech under its control. For this reason, Brookfield was imposed another administrative fine for providing false or misleading information.

c. Elon Musk/Twitter Decision

In Elon Musk/Twitter Decision, the acquisition of sole control of Twitter Inc. ("Twitter") by Elon R. MUSK was examined. The TCA followed the unofficial announcements which started to be

made on 14.04.2022 regarding the acquisition of Twitter by Elon R. MUSK, and subsequently learned that, within the scope of the announcements and the news, the transaction was completed on 27.10.2022. In line with the aforementioned announcements, the Board ex-officio decided to take the acquisition of Twitter under examination.

The TCA held that the transaction should have been notified to the TCA, since Twitter is a digital/online platform that qualifies for the technology undertaking exception; thus, there was no need even to check Twitter's (Target) turnover in Türkiye for the thresholds analysis.

Twitter argued that due to following reasons, the acquisition was not notified to the TCA:

- The Agreement regarding the transaction was signed on 25.04.2022, and in this context, the notifiability analysis of the transaction in terms of concentration control was carried out in April-May 2022,
- The thresholds stipulated in Article 7 of Communiqué No. 2010/4 were recently increased and the technology undertaking exception was newly regulated (to enter into force on 04.05.2022); no Guideline was published or Board case law was available on how to apply the technology undertaking exception,
- Twitter's turnover in Türkiye did not exceed the turnover thresholds stipulated in Article 7 of Communiqué No. 2010/4 at the time that the notifiability analysis was conducted,
- At the time of the notifiability analysis regarding the transaction, Twitter was experiencing adverse/negative financial results in terms of its financial position in Türkiye.

The TCA, on the other hand, determined that the relevant communiqué was published on 04.03.2022, the entry into force of the communiqué was 04.05.2022, and the closing of the transaction was carried out on 27.10.2022, in other words, the closing of the transaction took place after both the publication and the entry into force date of the relevant communiqué. Therefore, it has been concluded that the transaction subject to the file has not been notified although it is subject to authorisation, and therefore, the Board imposed an administrative fine on Elon Musk/Acquirer (at the rate of 0,1% of Elon Musk's economic unit's gross income generated in Türkiye).

The TCA's gun-jumping decision against Elon Musk is an important decision showing once more that the TCA keeps a close eye on global transactions especially on digital markets. 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.

In the Broadcom/VMware decision outlined below, the target company operates in the technology sector. However, the Board did not explicitly evaluate the case from this perspective. This suggests that the target's turnover may have exceeded the applicable thresholds without requiring the application of the technology undertaking exception. Therefore, to the best of our knowledge, the Twitter decision remains the only instance where this exception has been considered.

d. Broadcom/VMware Decision

In another ex officio investigation initiated by the TCA, the transaction regarding the acquisition of the sole control of VMware, Inc. ("VMware") operating in the field of computer programming activities by Broadcom Inc. ("Broadcom") and the fact that this transaction was not notified to the TCA were examined. While examining another acquisition transaction, the Board understood that the transaction related to Broadcom's acquisition of VMware was completed without notifying the TCA. This made the TCA's most recent gun-jumping decision.

Regarding the failure to notify the Board of the transaction, Broadcom stated that:

- In the assessments made regarding the notification obligations prior to the signature of the transaction agreement, the connection

of the transaction with Türkiye was considered weak and distant,

■ The Agreement was signed on 26.05.2022, the revisions made in the notification thresholds during the period until the closing on 27.11.2023 did not lead to a reassessment of the notification obligations after the signing of the Agreement.

On the other hand, the Board stated that it is understood from the Party's statements that it is thought that there will be no effect on the Turkish market as a result of the transaction, but the issue of whether there will be any anti-competitive effect in the markets subject to the investigation as a result of the transaction is related to the merits and the Board is authorised to make this assessment within the scope of Law No. 4054. In addition, it is underlined that the notification obligation must be fulfilled independently of the effect of the transaction on the market since it is a procedural obligation. Regarding the revision of the notifiability thresholds, the Board noted that the Agreement was signed after the entry into force of the revised notification thresholds.

In this framework, it was decided that Broadcom should be imposed an administrative fine of one thousandth of its gross revenue from Türkiye for the year 2023 due to the realisation of the acquisition transaction without the authorisation of the Board.

II. Conclusion

With the introduction of the technology undertaking exemption and the absence of an update to turnover thresholds despite the depreciation of the Turkish lira, the number of transactions reviewed by the TCA has surged significantly. According to the TCA's 2024 M&A Outlook Report, the number of examined transactions increased by nearly 50% compared to 2023, reaching 311. Given this sharp rise, ensuring compliance with the TCA's notification requirements—particularly for global transactions—has become increasingly critical. Failure to do so may inevitably result in administrative fines for gun-jumping violations.

As evidenced in the Elon Musk/Twitter decision, the TCA actively monitors global transactions and assesses those it deems notifiable. Furthermore, as seen in the Broadcom/VMware decision, the Board may identify a previously unnotified, notifiable transaction during the review of a subsequent filing. Similarly, parties themselves may become aware of a past transaction that should have been notified when preparing a new notification. The Broadcom/VMware decision underscores the importance of conducting a procedural notifiability analysis based on the TCA's thresholds for all global transactions—regardless of their marginal nexus with Türkiye. The TCA maintains a strict stance on gun-jumping and does not accept any defence for failure to notify a notifiable transaction.

[103] *Decision No. 24-30/707-296 dated 18.07.2024*
[104] *Decision No. 23-12/197-66 dated 02.03.2023*
[105] *Decision No. 21-55/776-383 dated 11.11.2021*
[106] *Decision No. 20-36/483-211 dated 28.07.2020*
[107] *Decision No. 20-21/278-132 dated 30.04.2020*
[108] *Decision No. 16-42/693-311 dated 06.12.2016*
[109] *Decision No. 11-33/723-226 dated 02.06.2011*
[110] *Decision No. 09-42/1057-269 dated 16.09.2009*
[111] *Decision No. 07-11/71-23 dated 01.02.2007*
[112] *Decision No. 06-92/1186-355 dated 20.12.2006*

Cost of Premature Information Sharing in M&A: Lessons from Param-Kartek Gunjumping Case

By Fevzi Toksoy, Bahadır Balkı and Hanna Stakheyeva

Sharing competitively sensitive information during a M&A is often a necessary step to evaluate the financial and operational feasibility of the transaction. Such information enables the acquiring party to conduct thorough due diligence, assess potential synergies, and determine whether the investment aligns with strategic business objectives. At the same time strict compliance with competition law is essential, particularly regarding the exchange of sensitive information between parties to prevent "gun jumping." Companies must remain independent undertakings and competitors until the transaction is fully finalized and merger clearance is obtained from the relevant competition authority. Premature coordination or information sharing can lead to the unauthorized exercise of (de facto) control, risking significant legal and financial consequences. A decision by the Turkish Competition Authority concerning the Param Holding and Kartek Holding transaction highlights the importance of adhering to these obligations and the repercussions of failing to do so.

In this brief article, we highlight the key points of the TCA's decision, emphasizing the main findings and critical aspects of information sharing between the undertakings that resulted in gun-jumping fines. To enhance understanding, we compare these findings with the European Commission's position on the matter. Additionally, we offer guidance and reminders for businesses on compliance principles related to information exchanges during merger processes.

I. Background information

The case involved the acquisition of Kartek Holding A.Ş., a Turkish company, by Param Holding, a Netherlands-based firm. Param operates in the financial technologies and electronic payment services sector, offering solutions for digital payments and financial transactions. Kartek specializes in technology infrastructure and smart card systems, focusing on transportation technologies, payment infrastructure, and system integration services.

The transaction was considered a change in control, qualifying as a concentration under Turkish merger control rules. Following the notification of the transaction in August 2023, and during the subsequent review, the TCA received multiple complaints from third parties alleging that Param had already assumed de facto control over Kartek. In response, the TCA conducted several on-site inspections at the premises of both Kartek and Param. Based on 49 findings from these inspections, the TCA concluded that Param exercised de facto control over Kartek prior to the finalization of the authorization process and obtaining merger clearance.

Article 5 of Merger Communiqué[113] stipulates that control may be acquired through rights, contracts, or other instruments that, individually or collectively, enable the exercise of decisive influence over an undertaking, whether de facto or de jure. These instruments may include ownership or operating rights over all or part of an undertaking's assets, as well as rights or contracts that confer decisive influence over the structure or decision-making processes of an undertaking's governing bodies.

Following its investigation, the TCA imposed an administrative fine on the acquiring party for exchanging information during the pre-merger period, which violated the stand-still obligation by exercising de facto control and, hence, proceeding with the acquisition of sole control without waiting for the necessary clearance.

II. Premature Info Sharing - Key Findings

The inspections revealed that Param had prematurely intervened in Kartek's operations. Evidence showed that Param influenced salary adjustments, promotions, and human resources policies concerning Kartek employees, as reflected in internal communications referring to Param's directives. Joint correspondence with customers indicated Param's involvement in Kartek's customer relations and decision-making processes. Additionally, Param engaged in Kartek's daily business activities, such as managing invoices, overseeing debt payments, and handling social media accounts. Internal documents further confirmed that Param effectively directed Kartek during the interim period, despite the transaction not yet being finalized.

The TCA emphasized that although some level of system integration between merging parties is anticipated for operational alignment, the efforts observed in the Param-Kartek case exceeded reasonable boundaries. The TCA pointed out that the integration activities were not confined to fostering mutual system understanding but extended to significant operational coordination.

Evidence indicated that Param played an active role in Kartek's decision-making processes across multiple areas. In personnel management, Param influenced decisions on promotions, salary adjustments, and performance evaluations, with final approval resting with Param. In customer relationships, Param personnel attended meetings representing Kartek as if it were already integrated into Param's structure, suggesting the acquisition was complete.

Param also directed Kartek's marketing strategies and resource allocation for 2024, overseeing tasks such as bonus planning and operational approvals. Shared sales and marketing efforts further blurred the distinction between the two companies, with employees from both sides collaborating on sales initiatives and customers being informed of transactions as though they were finalized. Additionally, Param took control of Kartek's social media accounts and website, transferring these responsibilities to its internal teams, and treated Kartek as an operational subsidiary for financial matters, including directives on banking relationships and promotional contracts. Finally, Param's strategic decisions, such as withdrawing from certain tenders, directly affected Kartek's ability to participate, undermining its operational independence.

The TCA determined that Param's actions amounted to de facto control over Kartek's operations. These actions compromised Kartek's ability to operate independently before the merger was finalized and exceeded permissible preparatory coordination, posing competitive risks.

Additionally, the findings pointed to behaviors that could trigger horizontal competition concerns under Article 4 (equivalent of Art 101 TFEU) of the Turkish Competition Law. These included joint decision-making in the labor market, collaborative sales and marketing activities, and Param's control over Kartek's procurement

processes. Although the TCA did not address these issues in its final decision, the potential for future scrutiny remains, underscoring the need for merging parties to avoid not only gun-jumping but also conduct that could restrict competition on a horizontal level.

III. The EC's Stance on Premature Information Exchanges

The TCA's approach to premature information exchange is closely aligned with the EU competition law principles and EC's approach toward violations of the stand-still obligation. Under the EU Merger Regulation (EUMR), parties are prohibited from implementing a transaction before receiving clearance from the EC. The EC has consistently emphasized that even partial implementation or premature information exchanges that influence competitive behavior can constitute a breach of these rules.

A landmark case reflecting the EC's position is the Altice/PT Portugal[114] decision, where the EC imposed a EUR 124.5 million fine on Altice for taking control of PT Portugal before obtaining merger clearance. The EC found that Altice had not only gained access to competitively sensitive information but had also exercised decisive influence over PT Portugal's operations, including the approval of marketing campaigns and pricing decisions. This case sets a clear precedent, demonstrating that both the unauthorized exchange of sensitive information and the premature exercise of control would be met with severe penalties.

IV. Compliance Principles on Information Exchanges During Mergers

Under Turkish Competition Law premature information exchanges in the context of merger control are indirectly addressed through several legal frameworks. Guidelines on Horizontal Cooperation Agreements[115] focus on general rules on information exchanges between competitors but do not specifically cover the merger control context. Article 4 of the Turkish Competition Law prohibits agreements and concerted practices that restrict competition, which could cover premature coordination or information exchanges. Article 7 of the Turkish Competition law (together with Article 5 of Merger Communiqué) regulate mergers and acquisitions that may significantly reduce competition in a market. The TCA's decisions provide practical guidance on how premature information exchanges are handled.

Accordingly, we would like to remind here the key compliance principles, which include:

- Maintaining Independence Until Clearance: Parties must operate as separate, independent entities until the merger receives formal approval from the TCA. Any premature coordination or exercise of control may be considered a violation of the stand-still obligation.
- Limiting Information Exchange to What is Necessary: Only information essential for due diligence and transaction-related purposes should be exchanged. This information must be non-strategic, anonymized, and shared within a framework that prevents competitive harm.
- Use of Clean Teams: To mitigate risks, sensitive information should be exchanged through "clean teams" composed of individuals who are not involved in competitive decision-making processes. This ensures that competitively sensitive information does not influence day-to-day operations.
- Prohibition of Joint Commercial Decisions: Until clearance is obtained, merging parties must avoid joint decision-making regarding pricing, customer relations, supply chains, or any other strategic business areas.
- Monitoring and Documentation: All communications and exchanges of information should be documented and monitored to ensure compliance with competition rules. Legal counsel should oversee the process to avoid inadvertent violations.

Failure to adhere to these principles may result in administrative fines, as seen in the Param-Kartek case, and potential reputational damage.

V. Conclusion

The TCA's ruling in the Param-Kartek case offers valuable insight into what constitutes de facto control and when gun-jumping occurs, clarifying the boundaries of acceptable conduct during the pre-merger phase. By highlighting actions such as direct involvement in management decisions, coordinated marketing strategies, and operational integration, the decision emphasizes the necessity of maintaining the independent operations of merging parties until regulatory approval is granted.

This decision serves as a practical guide for balancing due diligence, operational planning, and compliance with competition law during the pre-merger period. Companies should establish clear safeguards to prevent pre-closing activities from resulting in de facto control.

[113] *Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Authorization of the Competition Board // https://www.rekabet.gov.tr/Dosya/2010-4-sayili-teblig-20231107142912073.pdf*

[114] *Altice/PT Portugal (Case COMP/M.7993)*

[115] *https://www.rekabet.gov.tr/Dosya/guidelines/7-pdf*

M&A Overview Report 2024: Record Filings, Foreign Investment, and Sectoral Shifts

By Erdem Aktekin and Ayberk Kurt

In the Mergers and Acquisitions Overview Report ("Report"), the Turkish Competition Authority provides a comprehensive analysis of its merger control activities for 2024. Published on 7 January 2025, the Report presents key statistical data on merger filings, highlights significant trends, and compares developments with previous years. By summarizing M&A activities throughout 2024, the Report serves as a valuable resource for understanding the evolution of merger control in Türkiye. Below is a summary of its key aspects.

In 2024, the TCA reviewed 311 transactions,[116] a significant increase from 207 in 2023 and 227 in 2022. This 43% rise marks the highest number of transactions reviewed in the past 12 years, since the TCA began publishing M&A overview reports. While the Report does not explain the reasons behind this sharp increase, the primary factors are likely the technology undertaking exception and the inflation. The thresholds for notifiable M&As were last updated in early 2022, coinciding with a 100% depreciation of the Turkish Lira. Furthermore, the introduction of the technology undertaking exception at that time removed the turnover thresholds for targets classified as technology undertakings, potentially contributing to the surge in reviewed transactions.[117]

Among the notified transactions in 2024, 8 of them were classified as out-of-scope due to no change in control, with 2 falling under the information note/others category. Besides, there were 6 notifications related to privatizations that have been reviewed by the TCA in 2024.

The Report reveals that the total value of transactions reviewed by the TCA in 2024 amounted to approximately USD 535 billion. Of these, 131 transactions involved a Turkish target, with a total value of around TRY 192 billion (USD 5.8 billion). In comparison, the total value of transactions reviewed in 2023 was significantly higher at approximately USD 2.7 trillion, with 94 transactions involving a Turkish target valued at USD 6.8 billion. As the data indicates, the overall value of transactions in 2024 experienced a notable decline compared to the previous year.

Regarding the TCA's categorization of the transactions based on the origin of the transaction parties, the Report discloses that 75 of 311 transactions in 2024 were solely between the Turkish companies whereas 167 of them were realized solely between foreign companies. In 2023, these numbers were 48 for solely between Turkish companies and 118 for all foreign transactions. This increase in all foreign-to-foreign transactions is striking, probably caused by the two reasons identified above.

In 2024, there were 47 transactions where a foreign company invested in Turkish companies. In these 47 transactions where the target company is of Turkish origin, the amount of investment by foreign investors is approximately USD 3 billion. The ranking of foreign investors in terms of transactions including a Turkish target in 2024 demonstrates that the Netherlands was leading with 7 transactions. France, the UK and Germany which is the leader in 2023 followed the Netherlands. In 2023, there were 35 transactions where a foreign company invested in Turkish companies amounting to value of approximately USD 2.8 billion.

In terms of the distribution of the number of the transactions where a Turkish company is the target in 2024 based on their field of activities, the majority of M&A transactions involving Turkish target companies were in the field of "Computer programming, consultancy, and related activities," with 23 transactions. This was followed by "Production, transmission, and distribution of electricity," which accounted for 13 transactions. Notably, the number of transactions in "Computer programming, consultancy, and related activities" has risen sharply compared to 11 in 2023 and only 3 in 2022. This significant increase since 2022 likely reflects the impact of the technology undertaking exception introduced into the Turkish merger control regime that year.

As in previous years, the TCA has provided statistics on the average number of days required to finalize notified transactions, measured from the date of the final submission, including the parties' responses to any requests for information ("RFIs") necessary to complete the notification form. In 2024, mergers and acquisitions notified to the TCA were finalized, on average, 12 days after the last notification date. This represents a slight improvement compared to 13 days in 2023 and 15 days in 2022.

Finally, in 2024 only two of the transactions were taken into a Phase II review while there was no decision which concluded a Phase II review.

In conclusion, the Report highlights the evolving merger control landscape in Türkiye, marked by a significant rise in reviewed transactions, more notifications for foreign-to-foreign deals, and the continued prominence of deals involving undertakings active in the technology-based areas. These trends underscore the growing influence of the TCA in M&A oversight, suggesting it will continue to expand its role.

[116] This data includes privatizations, out of scope notifications and others.

[117] Technology undertakings are defined as "companies active in digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals, and health technologies"

Navigating Cross-Border Mergers: Some Thoughts on Challenges and Possible Solutions

By Fevzi Toksoy and Hanna Stakheyeva

Cross-border mergers and acquisitions have become increasingly complex, with businesses facing multiple regulatory frameworks, varying timelines, and evolving rules that often create unpredictability. As global economies continue to integrate, regulatory scrutiny has intensified, particularly in digital markets, national security considerations, and foreign investment regimes.

Here we summarize the primary challenges of cross-border mergers and offer some practical recommendations for streamlining the process while ensuring regulatory efficiency. Any measures that enhance consistency, streamline procedures, align review timelines, and improve legal certainty and predictability, would be highly beneficial to businesses irrespective of jurisdiction.

Cross-border mergers and acquisitions involving multiple jurisdictions are becoming increasingly complex and challenging due to the need to navigate parallel regulatory reviews. The expansion of diverse regulatory frameworks exposes businesses to different legal standards, analytical approaches, and procedural timelines, making cross-border transactions unpredictable, time-consuming, costly, and administratively burdensome. These difficulties are further intensified by emerging regulatory mechanisms, such as foreign direct investment screenings and the EU Foreign Subsidies Regulation, as well as sector-specific laws like the Digital Markets Act. These additional layers of oversight create further complications, particularly for transactions in the technology sector and digital markets.

I. Key Challenges in Cross-Border M&A

■ *Regulatory Complexity and Jurisdictional Uncertainty*

Merging parties must navigate overlapping regulatory regimes, often with inconsistent rules on jurisdictional thresholds. Some authorities rely on transaction size or turnover-based criteria, while others use discretionary "call-in" powers, leading to uncertainty. The lack of clear, objective thresholds can result in unnecessary filings and delays, increasing transaction costs and complexity. The reliance on alternative enforcement tools, such as abuse of dominance laws, further complicates the process, particularly in digital markets.

■ *Digital Markets and Data Protection*

The rise of digital markets has led to heightened scrutiny over mergers involving technology firms, data-driven businesses, and platform services. Authorities are increasingly concerned about so-called "killer acquisitions" and market concentration. However, the lack of clear guidelines on assessing competition in digital markets

leaves companies uncertain about whether their transactions will be subject to review. The introduction of additional regulatory layers, such as the Digital Markets Act, further complicates the review process.

■ *Foreign Direct Investment and National Security Reviews*

Many jurisdictions have expanded their foreign investment screening mechanisms, with national security reviews playing an increasing role in M&A decisions. While these reviews traditionally applied to sensitive industries like defense and infrastructure, they are now extending to technology, finance, and healthcare sectors. These regulatory hurdles often operate independently from competition reviews, leading to fragmented and unpredictable timelines.

■ *Diverging Regulatory Outcomes and Increased Deal Uncertainty*

Merger reviews conducted across multiple jurisdictions often lead to conflicting outcomes due to differences in market definition, theories of harm, and remedy requirements. Inconsistent decisions—such as one authority approving a transaction while another blocks it—create significant uncertainty for businesses. Heightened scrutiny has also led to an increase in abandoned transactions, with some companies deciding that regulatory obstacles are too significant to overcome.

II. Türkiye in Cross-Border Merger Control

Türkiye has emerged as a crucial jurisdiction in global merger control, particularly due to its strategic geographic position and its proactive approach to regulating competition. The Turkish Competition Authority plays a key role in assessing mergers that have an impact on the Turkish market, even when transactions primarily involve foreign entities.

One of Türkiye's distinctive merger control mechanisms is the "technology undertaking" exception, which allows the TCA to scrutinize transactions involving digital platforms, software firms, and biotechnology companies, regardless of their local turnover. This provision has positioned Türkiye at the forefront of global efforts to prevent anti-competitive acquisitions in high-tech markets. Additionally, Türkiye's enforcement actions, including fines for gun-jumping violations in foreign-to-foreign transactions, underline the TCA's vigilance in maintaining competitive market conditions.

Given its evolving regulatory landscape, businesses engaging in cross-border M&A must factor in Türkiye's merger control requirements to ensure compliance. As the TCA continues refining its enforcement strategies, Türkiye will remain a critical jurisdiction for companies operating in digital, technology-driven, and high-value industries.

III. Practical Implications for Businesses

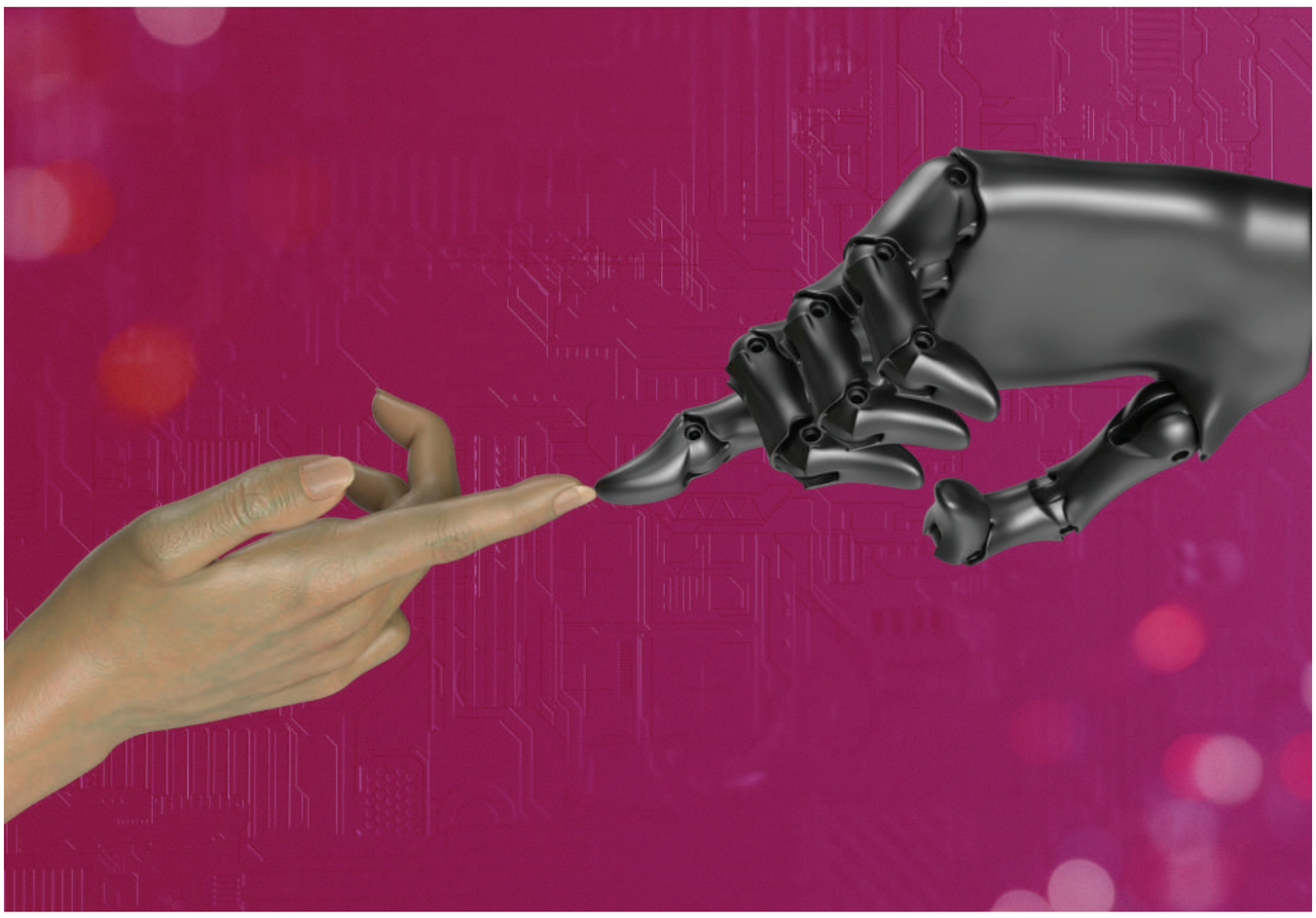
In an environment of heightened regulatory scrutiny, businesses engaging in cross-border M&A must conduct thorough preliminary analyses to assess risks and anticipate regulatory challenges. This includes evaluating foreign direct investment risks, understanding local market conditions, considering political motivations and enforcement priorities, and preparing for competition authorities' potential interventions—including the use of call-in powers even when formal thresholds are not met. Even seemingly straightforward transactions often require multiple filings, leading to delays and increased costs.

Given these complexities, businesses must undertake a comprehensive risk assessment before proceeding with transactions. This involves:

■ Identifying jurisdictions where filings may be required, even if thresholds are not formally triggered. The expansion of jurisdictional reach through call-in powers means merger analysis must now go beyond mandatory filing thresholds to assess potential regulatory scrutiny, with these risks reflected in transaction documents.

■ Evaluating regulatory trends and potential objections in key markets.

■ Incorporating FDI and data protection considerations into deal structuring. Data protection risks require due diligence on compliance, cybersecurity vulnerabilities, and potential liabilities,



as neglecting these aspects could lead to legal penalties and reputational damage.

■ Preparing for extended timelines and potential remedies that may be required to secure approval.

Beyond securing clearance, businesses must also anticipate post-merger challenges, including compliance obligations and ongoing regulatory oversight, particularly in digital and strategic sectors where authorities maintain heightened scrutiny.

IV. Some Thoughts on how Cross-Border Merger Control Could be Improved

Cross-border mergers place a significant strain on both competition authorities and merging parties in terms of costs, time, and resources. Addressing these challenges is essential, but it must be done without undermining the effectiveness of merger control laws. Ensuring consistency and predictability in cross-border merger control requires well-defined jurisdictional rules and clear criteria for regulatory intervention, alongside transparent communication regarding decisions, theories of harm, market definitions, and remedies.

Strengthening international collaboration and aligning regulatory frameworks are key to achieving these objectives. Greater cooperation and coordination among competition authorities reviewing the same transactions can enhance the efficiency and effectiveness of merger assessments, reducing transaction costs and leading to more consistent—or at least non-conflicting—outcomes. This is particularly critical for the exchange of information. The ability of competition authorities to share confidential information with their foreign counterparts can significantly benefit the review process. However, legal constraints often mean that authorities can only do so if the merging parties voluntarily waive confidentiality rights. Authorities should encourage parties to grant such waivers while ensuring that those who choose not to do so are not penalized. At the same time, robust safeguards must be in place to protect confidential information exchanged between authorities. Transaction parties are more likely to waive confidentiality if they trust that regulators will coordinate efficiently—not only on substantive competition issues but also to overcome procedural hurdles, such as aligning remedy requirements.

All in all, the assessment of cross-border mergers may be improved if the competition authorities :

■ Assert jurisdiction only over mergers that have a significant connection to their markets.

■ Apply clear, objective criteria to determine when a merger must be notified or, in jurisdictions without mandatory notification, when it qualifies for review.

■ Establish reasonable information requirements for effective merger assessments.

■ Expedite the review of mergers that pose minimal competition concerns.

■ Conduct merger reviews within a clear and reasonable timeframe.

■ Avoid imposing conflicting remedies on businesses and work towards aligned, coherent solutions.

V. Conclusion

Cross-border mergers play a vital role in fostering economic growth, innovation, and efficiency. However, regulatory fragmentation, jurisdictional ambiguity, and increased scrutiny pose significant hurdles for businesses. By adopting a more harmonized approach to merger control, authorities can ensure that competition policy remains effective without imposing unnecessary burdens on businesses. Clearer jurisdictional rules, greater coordination in review processes, and a focus on legal certainty will contribute to a more predictable and efficient global M&A landscape.

Afterword

As this special issue of The Output® demonstrates Türkiye's dynamic regulatory framework, particularly with the introduction of the technology undertaking exception, has reshaped how transactions in high-tech and digital markets are assessed.

The increased regulatory focus on digital platforms, biotechnology, and financial technologies has made Türkiye a crucial jurisdiction for multinational corporations navigating cross-border M&A. Uncertainties remain—especially regarding the evolving interpretation of the technology undertaking definition, thresholds, and enforcement of merger control in digital ecosystems. Companies must take a proactive approach, ensuring they fully assess the implications of Turkish merger control regulations and their potential exposure to TCA scrutiny.

Looking ahead, Türkiye's competition regime is likely to continue evolving in response to global regulatory trends and economic shifts. Enhanced guidance from the TCA, increased international cooperation, and greater transparency in merger control decisions will be essential in reducing regulatory uncertainty. As businesses adapt to this changing landscape, a well-informed and strategic approach to compliance will be critical in ensuring smooth transaction approvals and mitigating regulatory risks.

This special issue has aimed to provide some degree of clarity on these developments, equipping legal practitioners and businesses with the insights needed to navigate Türkiye's evolving merger control environment effectively.

Disclaimer: This document is for informational purposes only and does not constitute legal advice. For legal guidance on a specific case or issue, please contact the ACTECON team.

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