What have the first two years of “technology undertaking exception” shown us?

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In the Turkish merger control regime, a new concept, namely “*technology undertaking exception*” was introduced in March 2022 and entered into force in May 2022. This exception basically eliminates the turnover thresholds for the Target and requires the undertakings to notify the transaction to the Turkish Competition Authority (“**TCA**”) if they acquire a “technology undertaking”. The aim of the TCA was to catch the “*killer acquisitions*” and took a certain step to regulate the technology M&As as the other competition authorities around the world.

At the end of 2024, it is a good time to see the first impact of this exception in the Turkish merger control regime. In this piece, we will evaluate the first two years of the TCA’s approach to this new concept and certain important decisions that were brought to the TCA’s table through the technology undertaking exception.

***The Rule and Exception***

First, we’d like to remind you the general threshold rule in the Turkish merger control regime. According to the general rule, the turnover thresholds are as follows:

* The aggregated Turkish turnover of the transaction parties exceeds TRY 750,000,000 (approx. USD 31.59 million) and the Turkish turnover of at least two of the transaction parties each exceeds TRY 250,000,000 (approx. USD 10.53 million) or
* The asset or business subject to acquisition in acquisition transactions (i.e. target), and at least one of the parties of the transaction in merger transactions have a turnover in Turkey exceeding TRY 250,000,000 and the other party of the transactions has a global turnover exceeding TRY three billion 3,000,000,000 (approx. USD 126.36 million).

However, as per the “*technology undertaking*” exception, the TRY 250 million (approx. USD 10.53 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 Turkey. Technology undertakings are defined as undertakings active in areas of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals and health technologies. Accordingly, if the Target is active in the above-mentioned areas, the acquirer should notify the transaction to the TCA.

***Statistics for the first two years***

One of the questions on one’s mind was how much extra workload the TCA would face after the introduction of technology undertaking exception. The M&A statistics of the TCA in 2023 definitely gave an idea of this. In 2023, the TCA assessed 214 M&A transactions and 42 of them were notified because of the technology undertaking exception. Considering that it is almost 20% of all the transactions that the TCA evaluated, it could be said that the technology undertaking exception immediately started to play a key concept in terms of the merger control regime in Türkiye.

The number for the first two years is at least 66 for the technology undertaking exception notifications to the TCA[[1]](#footnote-1). Considering the number of technology undertaking exception notifications, we see that undertakings worldwide adopted the new rule as soon as possible and added Türkiye as a new jurisdiction where certain transactions should be notified.

***Important Decisions***

One of the decisions of the TCA that has utmost importance on how the TCA interprets the technology undertaking concept is the *Berkshire Hathaway/Alleghany* Decision[[2]](#footnote-2). In the decision, the TCA has shown that it interprets the technology undertaking exception in a much broader manner. The TCA expressed that since Target is active in the field of financial technologies, which is included under the definition of ‘technology undertaking’ and also generates turnover in Türkiye, the criteria of operating in the geographical market of Türkiye is also fulfilled. Consequently, the TCA concluded that the transaction subject to the notification is notifiable because of the technology undertaking exception.

According to this decision, in an M&A transaction, if the target company operates in digital platforms, software, gaming software, financial technologies, biotechnology, pharmacology, agrochemicals, or health technologies globally, and also operates in Turkey in any capacity (even if its operations in Turkey do not independently qualify as a technology business), it will be classified as a technology undertaking by means of the threshold exception.

Another decision that is differentiated from the other decisions is *Bupa/Compugroup* Decision[[3]](#footnote-3) as the TCA had conducted a broad competitive assessment and cleared the transaction with commitments. This decision shows that the TCA has achieved the result it intended when introducing the technology undertaking exception as the transaction would not be notified without the technology undertaking exception.

The transaction concerned an acquisition of a company that is active in health industry software by Bupa which is mainly active in health insurance and brokerage. In its assessment lasted four months, the TCA focused on potential input foreclosure and access to competitively sensitive information risks and cleared the transaction with behavioral commitments provided by Bupa.

*Microsoft/Blizzard* Decision[[4]](#footnote-4) has also unique characteristics in terms of its global effect and the TCA’s approach to the transaction. In its decision, the TCA before conducting its own analysis, first summarize assessments of the other competition authorities such as the Commission, CMA and CADE. This indicates that the TCA is keen on following global trends while conducting its broad assessment. Another important point here is that without technology undertaking exception, the TCA would not be able to assess the transaction although many competition authorities had conducted its own analysis. In the end, the TCA assessed both the horizontal and vertical overlaps caused by the transaction and unconditionally cleared it within two months.

Another interesting decision that was caught by the technology undertaking exception is related to an acquisition realized by Google. In its *Google/Photomath* Decision[[5]](#footnote-5), the TCA evaluated the acquisition of a “*homework and study help, HSH*” provider by Google. This time, an acquisition of a gatekeeper that is designated by the DMA in the EU could be unnotified without the technology undertaking exception. However, the TCA evaluated the transaction and unconditionally cleared it as the market shares of the parties were not significant.

In the first two years of its application, the TCA imposed only one fine for gun-jumping caused by technology undertaking exception. In its *Twitter* Decision (02.03.2023, 23-12/197-66), Elon Musk was faced with a gun-jumping fine for a failure to notify the Twitter deal. 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 turnover in Türkiye for the threshold analysis. Due to the non-compliance with the merger control formalities in Türkiye, 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.

***What is in the future?***

It is known that the TCA is working on draft amendments to the Competition Law mainly focusing on digital markets which is expected to be published soon.

Another noteworthy point is that the TCA includes law firms and academician opinions saying that the technology undertaking definition could be clearer in its Strategic Plan for 2024-2028. Furthermore, it also explains that it is a correct approach to act protectionist in a field of activity that is still developing for technology companies, and this regulation makes it possible to examine digital service providers that do not generate turnover in merger and acquisition transactions. But also acknowledged that the need for a guideline on the application of the technology undertaking exception has arisen[[6]](#footnote-6). Additionally, in its Strategic Plan, the TCA also exposed its appetite to become a leading competition authority whose activities are carefully monitored at the international level in digital industries[[7]](#footnote-7).

***Conclusion***

Without a doubt, the TCA’s technology undertaking exception is working on catching the transactions in technology sectors. On the other hand, it also raises several questions such as uncertainty on the definition of technology undertaking and increasing number of transactions notified to the TCA.

Considering that the TCA desires to be one of the important competition authorities in the competitive assessment of the technology sector and the development of this two-year process and the feedback received, this exception can be expected to gain some clarity and speed in the near future.

1. The concerned data is in line with the reasoned decisions published on the TCA’s website as of 3 December 2024. The reasoned decisions of the TCA’s decisions taken between March and May were not yet published. [↑](#footnote-ref-1)
2. TCA’s Berkshire Hathaway/Alleghany Decision dated 15.09.2022 and numbered 22-42/625-261. [↑](#footnote-ref-2)
3. TCA’s Bupa/Compugroup Decision dated 29.02.2024 and numbered 24-11/174-69. [↑](#footnote-ref-3)
4. TCA’s Microsoft/Blizzard Decision dated 13.07.2023 and numbered 23-31/592-202. [↑](#footnote-ref-4)
5. TCA’s Google/Photomath Decision dated 28.04.2023 and numbered 23-19/354-121. [↑](#footnote-ref-5)
6. TCA’s Strategic Plan for 2024-2028, page 44. [↑](#footnote-ref-6)
7. TCA’s Strategic Plan for 2024-2028, page 53. [↑](#footnote-ref-7)