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New merger control regime increases turnover thresholds and introduces exemptions

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Introduction

On 4 March 2022, the Turkish Competition Authority (the Authority) published Communiqué No. 2022/2 to amend Communiqué No. 2010/4 on the mergers and acquisitions that are subject to the Competition Board's approval (the Amendment Communiqué). The Amendment Communiqué introduced certain new rules that concern the Turkish merger control regime, which fundamentally affect merger control notifications submitted to the Authority.

According to article 7 of the Amendment Communiqué, the changes introduced by the Amendment Communiqué became effective as of 4 May 2022. The most significant developments that the Amendment Communiqué includes are:

- the increase of the applicable turnover thresholds for concentrations that require mandatory merger control filing with the Authority; and
- the introduction of threshold exemption for undertakings active in certain markets or sectors.

New thresholds

The Amendment Communiqué requires that a transaction be notified to the Authority if one of the following increased turnover thresholds is met:

- the aggregate Turkish turnover of the transaction parties exceeds 750 million Turkish lira (approximately \$84.9 million) and the Turkish turnover of at least two of the transaction parties each exceed 250 million Turkish lira (\$28.3 million); or
- the Turkish turnover of:
 - the transferred assets or businesses in acquisitions exceed 250 million Turkish lira (approximately \$28.3 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion Turkish lira (approximately \$339.7 million); or
 - any of the parties in mergers that exceed 250 million Turkish lira (approximately \$28.3 million) and the worldwide turnover of at least one of the other parties to the transaction that exceeds 3 billion Turkish lira (approximately \$339.7 million).

Accordingly, the Amendment Communiqué increased the previous turnover thresholds of:

- 30 million Turkish lira (approximately \$3.3 million) to 250 million Turkish lira (approximately \$28.3 million);
- 100 million Turkish lira (approximately \$11.3 million) to 750 million Turkish lira (approximately \$84.9 million); and
- 500 million Turkish lira (approximately \$56.6 million) to 3 billion Turkish lira (approximately \$339.7 million).

Further, the Amendment Communiqué introduced a threshold exemption for undertakings that are active in certain markets or sectors. According to the Amendment Communiqué, the 250 million Turkish lira turnover thresholds mentioned above will not be sought for the acquired undertakings (target companies) that are active in, or have assets related to, the following fields:

- digital platforms;
- software or gaming software;
- financial technologies;
- biotechnology;
- pharmacology;
- agricultural chemicals; and
- health technologies.

Such target companies must:

- operate in the Turkish geographical market;
- conduct research and development (R&D) activities in the Turkish geographical market; or
- provide services to users in the Turkish geographical market.

The Amendment Communiqué does not seek a Turkish nexus in terms of the activities which render the threshold exemption. In other words, it would be sufficient for the target company to be active in the above fields anywhere in the world in order for the threshold exemption to apply, provided that the target company:

- generates revenue from customers located in Turkey;
- conducts R&D activities in Turkey; or
- provides services to Turkish users in any fields other than those mentioned above.

Accordingly, the Amendment Communiqué does not require target companies to generate revenue from customers who are located in Turkey, conduct R&D activities in Turkey or provide services to Turkish users in the fields listed above in order for the exemption on the local turnover thresholds to apply.

Sectors exempted from local turnover thresholds

In order to clarify the meaning and the scope of the sectors that are exempted from the use of local turnover thresholds, non-exhaustive lists of the activities that correspond to the sectors referred to in the definition of the Amendment Communiqué are provided below.

Digital platforms

These are systems and interfaces that form a commercial network or market facilitating business-to-business, business-to-customer or even customer-to-customer transactions. Digital platforms include:

- social media platforms;
- knowledge sharing platforms;
- media sharing platforms;
- service-oriented platforms;
- online marketplaces; and
- digital content aggregators.

Software and gaming software

"Software" relates to a set of instructions, data or programs used to operate computers and execute specific tasks, while "gaming software" concerns software customised for gaming. Software and gaming software include:

- writing and publishing of software and gaming software, including the publishing of computer games (*Nomenclature générale des Activités économiques dans les Communautés Européennes Revision* (NACE Rev 2: 58.2);
- wholesale, retail sale, distribution and marketing of software (both customised and non-customised) and gaming software (NACE Rev 2: 46.51 and 47.41);
- reproduction from master copies of software (NACE Rev 2: 18.2);
- manufacture of electronic games with fixed (non-replaceable) software (NACE Rev 2: 32.40);
- translation or adaptation of software and gaming software (NACE Rev 2: 58.29);
- computer programming activities, such as:
 - designing the structure and content of, and/or writing the computer code necessary to create and implement, systems software (including updates and patches);
 - software applications (including updates and patches);
 - databases;
 - web pages; and
 - customising of software (NACE Rev 2: 62.01); and
- software installation services (NACE Rev 2: 62.09).

Financial technologies

These refer to technology-enabled innovations in financial services. Undertakings that encompass both financial services and technology fall into the scope of this definition. In brief, the term "financial technologies" is used to define software and other technology that aims to modify, enhance or automate financial services for businesses or consumers. Financial technologies include technologies and software that has been developed for the following fields:

- financial services activities (monetary intermediation, financial leasing and other credit granting) (NACE Rev 2: 64.1 and 64.9);
- insurance, reinsurance and pension funding (NACE Rev 2: 65);
- under NACE Rev 2: 66:
 - activities auxiliary to financial services;
 - insurance and pension funding;
 - administration of financial markets (futures commodity contracts exchanges, securities exchanges, stock exchanges and stock or commodity options exchanges);
 - security and commodity contracts brokerage (dealing in financial markets on behalf of others (eg, stockbroking) and related activities, securities brokerage, commodity contracts brokerage and bureaux de change);
 - risk and damage evaluation;
 - activities of insurance agents and brokers;
 - fund management activities;
 - financial transaction processing and settlement;
 - investment advisory activities; and
 - activities of mortgage advisers and brokers;

- Under NACE Rev 2: 69.2:
 - accounting, bookkeeping and auditing activities;
 - recording commercial transactions from businesses or others, preparation or auditing of financial accounts;
 - examination of accounts and certification of their accuracy;
 - preparation of personal and business income tax returns; and
 - advisory activities and representation on behalf of clients before tax authorities); and
- digital lending, payments, blockchain and digital wealth management.

Biotechnology

This refers to the technology that utilises biological systems, living organisms or parts thereof to develop or create different products. The sector includes the below activities in the research and experimental development on biotechnology (NACE Rev 2: 72.11):

- deoxyribonucleic acid or ribonucleic acid (DNA/RNA) – namely:
 - genomics;
 - pharmacogenomics;
 - gene probes;
 - genetic engineering;
 - DNA/RNA sequencing, synthesis and amplification;
 - gene expression profiling; and
 - the use of antisense technology;
- proteins and other molecules – namely:
 - sequencing, synthesis and engineering of proteins and peptides (including large molecule hormones);
 - improved delivery methods for large molecule drugs;
 - proteomics;
 - protein isolation and purification; and
 - signalling, identification of cell receptors;
- process biotechnology techniques – namely:
 - fermentation using bioreactors;
 - bioprocessing;
 - bioleaching;
 - biopulping;
 - bioleaching;
 - biodesulphurisation;
 - bioremediation;
 - biofiltration; and
 - phytoremediation; and
- gene and RNA vectors, such as gene therapy and viral vectors;
- bioinformatics – namely:
 - construction of databases on genomes;
 - protein sequences; and
 - modelling complex biological processes, including systems biology; and
- nanobiotechnology, which applies the tools and processes of nanofabrication and microfabrication to build devices for studying biosystems and applications in drug delivery and diagnostics.

Biotechnology also refers to manufacturing biotech pharmaceuticals, such as plasma derivatives (NACE Rev 2: 21.20).

Pharmacology

This is a biomedical science that deals with the research, discovery and characterisation of chemicals that show biological effects and the elucidation of cellular and organismal function in relation to these chemicals. In other words, pharmacology refers to the science of how drugs act on biological systems and how the body responds to the drug. The study of pharmacology encompasses the sources, chemical properties, biological effects and therapeutic uses of drugs. According to NACE Rev 2: 21.1 and 21.2, pharmacology includes biomedical studies and R&D activities conducted in the below areas:

- pharmacodynamics – the relationship of drug concentration and the biologic effect (physiological or biochemical);
- pharmacokinetics – the interrelationship of the absorption, distribution, binding, biotransformation and excretion of a drug and its concentration at its locus of action;
- clinical pharmacology and therapeutics – understanding what a drug is doing to the body, what happens to a drug in the body and how drugs work in terms of treating a particular disease;
- pharmacotherapy – the treatment of a disorder or disease with medication;
- neuropharmacology – the understanding how drugs affect cellular function in the nervous system;

- psychopharmacology – the use of medications in treating mental disorders;
- cardiovascular pharmacology – the understanding how drugs influence the heart and vascular system;
- molecular pharmacology – the investigation of the molecular mode of action of drugs, among other things, using genetic and molecular biology methods;
- radiopharmacology – the study and preparation of radioactive pharmaceuticals;
- the manufacturing and R&D of pharmaceuticals, such as:
 - antisera and other blood fractions;
 - vaccines;
 - various medications, including homeopathic preparations;
- pharmaceutical preparations and medicinal chemicals, such as the manufacture of medicinal active substances to be used for their pharmacological properties in the manufacture of medicaments, including:
 - antibiotics;
 - basic vitamins;
 - salicylic; and
 - O-acetylsalicylic acids;
- the wholesale, retail sale, distribution and marketing of pharmaceuticals, pharmaceutical preparations and medicinal chemicals; and
- the growth of drugs and narcotic crops.

Agricultural chemicals

These refer to chemicals used in agriculture to control pests and disease or control and promote growth, such as:

- pesticides;
- herbicides;
- fungicides;
- insecticides; and
- fertilisers.

The sector includes the below activities:

- mining for chemical and fertiliser minerals (NACE Rev 2: 08.91);
- supporting activities for other mining and quarrying (where it relates to agricultural chemicals and fertilisers) (NACE Rev 2: 09.90);
- manufacturing fertilisers, such as:
 - straight or complex nitrogenous;
 - phosphatic or potassic fertilisers;
 - urea;
 - crude natural phosphates; and
 - crude natural potassium salts;
- manufacturing nitrogen compounds, such as:
 - nitric and sulphonitric acids;
 - ammonia;
 - ammonium chloride;
 - ammonium carbonate;
 - nitrites; and
 - nitrates of potassium (NACE Rev 2: 20.15);
- manufacturing organic and inorganic basic chemicals (where it relates to agricultural chemicals and fertilisers) (NACE Rev 2: 20.13, 20.14);
- manufacturing pesticides and other agrochemical products, such as:
 - insecticides;
 - rodenticides;
 - fungicides;
 - herbicides;
 - acaricides;
 - molluscicides;
 - biocides;
 - anti-sprouting products;
 - plant growth regulators; and
 - disinfectants (for agricultural and other use) (NACE Rev 2: 20.2); and

- wholesale, retail sale, distribution and marketing of fertilisers and agrochemical products (NACE Rev 2: 46.75).

Health technologies

Health technologies are the application of organised knowledge and skills in the form of medicines, medical devices, vaccines, procedures and systems developed to solve a health problem and improve quality of life. They refer to any technology, including medical devices, IT systems, algorithms, artificial intelligence and cloud and blockchain, that is designed to support healthcare organisations and patients. Health technologies include technologies and software developed or being developed for the following fields:

- human health activities (hospital activities, medical (medical consultation and treatment) and dental practice activities, such as:
 - dentistry;
 - endodontic and paediatric dentistry;
 - oral pathology; and
 - orthodontic activities (NACE Rev 2: 86);
- residential healthcare activities, such as:
 - residential nursing care activities;
 - residential care activities for mental retardation;
 - mental health and substance abuse; and
 - residential care activities for the elderly and disabled (NACE Rev 2: 87); and
- manufacture of medical and dental instruments, such as:
 - operating tables;
 - examination tables;
 - hospital beds with mechanical fittings; and
 - dentists' chairs; and surgical appliances (NACE Rev 2: 32.5).

Applicable thresholds

If the target company's activities fall into the above markets or sectors, the applicable thresholds will be:

- the aggregate Turkish turnover of the transaction parties exceeds 750 million Turkish lira (approximately \$84.9 million); or
- the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion Turkish lira (approximately \$339.7 million).

Accordingly, when an undertaking that falls within the above definition and criteria is being acquired, the transaction will be notifiable if the aggregate Turkish turnover of the target company and the acquirer exceeds 750 million Turkish lira or the worldwide turnover of the acquirer exceeds 3 billion Turkish lira.

Comment

The increased turnover thresholds and the exemption on the local turnover threshold mechanism that the Amendment Communiqué has introduced alter the scope of the transactions that are notifiable to the Authority. Therefore, the Authority will scrutinise concentrations in the following fields:

- digital platforms;
- software or gaming software;
- financial technologies;
- biotechnology;
- pharmacology;
- agricultural chemicals; and
- health technologies.

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