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Turkish Competition Board publishes new decision regarding local threshold exception in software sector

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Introduction

On 2 June 2022, the Turkish Competition Board unconditionally approved the indirect acquisition of sole control over Airties Kablosuz İletişim San ve Dış Tic AŞ (Airties) by Providence Managing Member LLC's (Providence's) wholly-owned indirect subsidiary, P8 Holding 2 Sàrl (P8 Holding) (the transaction) as per article 7 of Law No. 4054 on the Protection of Competition and Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorisation of the Competition Board (Communiqué No. 2010/4).(1)

The Board held that the transaction was subject to a merger control filing in Turkey as Airties fell within the scope of the definition of "technology undertaking", for which local thresholds would not be sought as per the newly introduced local threshold exception under article 7(2) of Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 (the Amendment Communiqué). The Amendment Communiqué was published in the *Turkish Official Gazette* on 4 March 2022 and entered into force on 4 May 2022.

The Board's decision serves as further guidance on the local threshold exception and the specific sectors within the scope of the exception.

This article:

- provides a summary of the scope of the transaction;
- explains the Board's assessments and findings;
- outlines the scope of the local threshold exception and the definition of technology undertakings; and
- provides a brief summary of the decision.

Facts

The target, Airties, is a supplier of residential Wi-Fi solutions for broadband operators and offers software services that allow broadband operators to offer and manage Wi-Fi networks for residential customers.

The acquirer, Providence, is a private equity firm that invests in sectors such as media, communication, education, software and information services. Providence is active in the fields of digital advertising technologies, engineering and education in Turkey through its subsidiaries.

P8 Holding, a special purpose company established solely for the purpose of the transaction, is an indirect subsidiary of Providence. As per the share purchase agreement (SPA), P8 would acquire the entirety of Airties's issued shares and Providence would indirectly acquire sole control over Airties, the majority of shares of which is owned by Finvus Invest Sarl,⁽²⁾ which is ultimately controlled by Stichting Administratiekantoor Westend.

The transaction comprises two simultaneous parts, whereby P8 Holding would firstly acquire Airties's indirect subsidiary, Airties Belgium BV. Immediately thereafter, P8 Holding would acquire Airties and its subsidiaries with the exception of Airties Belgium.

Pursuant to the SPA, certain executive owners of Airties would reinvest to indirectly acquire part of Airties's shares. They would also retain the right to request further reinvestment during the period between the signing and completion of the SPA. However, they would not be able to exercise direct or indirect joint control over Airties under any circumstances.

Decision

Potential competition concerns surrounding transaction

In light of the information provided in the merger control filing of the transaction, the Board decided that the transaction would result in a lasting change of control of Airties and that it would not have an appreciable effect on competition or be likely to significantly impede effective competition (SIEC) in any market in Turkey within the meaning of article 7 of Law No. 4054. The Board also concluded that the transaction would not create a dominant position or strengthen an existing one in any market in Turkey. Therefore, the Board found no potential competition concerns and granted clearance to the transaction.

Airties's activities and local threshold exception

With regards to Airties's areas of activity, the Board evaluated that the fact that Airties offers software services which allow broadband operators to offer and manage Wi-Fi networks for residential customers qualified Airties as a "technology undertaking" active in the software sector, and accordingly, Airties's activities fell within the scope of the newly-introduced local threshold exception under article 7(2) of the Amendment Communiqué, which entered into force on 4 May 2022.

The Amendment Communiqué increased the applicable turnover thresholds for the concentrations that require mandatory merger control filing before the Turkish Competition Authority. Moreover, in light of the rapid changes in the technology industry, the Amendment

Communiqué introduced a new merger control regime for undertakings active in certain sectors. Further to the Amendment Communiqué, the 250 million Turkish lira turnover thresholds are no longer sought for acquired undertakings active in:

- digital platforms;
- software or gaming software;
- financial technologies;
- biotechnology;
- pharmacology; and
- agricultural chemicals and health technologies, or assets related to these fields.

The Amendment Communiqué does not seek a Turkish focus in terms of activities that qualify for the threshold exemption. In other words, it would be sufficient for the target company to be active in the fields set out above anywhere in the world for the threshold exemption to become applicable, provided that the target company:

- operates in the Turkish geographical market;
- conducts research and development activities in Turkey; or
- provides services to Turkish users in the fields listed above.

Accordingly, the Amendment Communiqué does not require the generation of revenue from customers located in Turkey.⁽³⁾ As such, in the decision, it was highlighted that in transactions where technology undertakings are being acquired, the target need not meet any turnover threshold. As a result, the Turkish turnover of the target was not taken into account.

Comment

Although the wording of the Amendment Communiqué does not elaborate on the exact scope of the activities in the fields set out above the Board's recent (albeit few) precedents over the past eight months have begun to shape the definition of "technology undertaking".

The Board first applied the local threshold exception in Citrix/TIBCO⁽⁴⁾ which concerned the acquisition of indirect joint control over two target companies active in the software sector. One of the targets, Citrix Systems Inc, is active in the markets for:

- user virtualisation software;
- content sharing and collaboration software; and
- network and information technology software.

TIBCO Software Inc, however, an intelligence software company which sells its software to its Turkish customers, offers infrastructure and analytics software that integrates various systems and data sources and provides analytical insights. Accordingly, the Board held that both targets qualified as technology undertakings due to their software activities and that the transaction was subject to the local threshold exception.

In Cinven/IFGL,⁽⁵⁾ the acquisition of sole control over a target company active in the digital platforms sector was held to fall under the local threshold exception. The Board evaluated that even though a small part⁽⁶⁾ of International Financial Group Limited's (IFGL's) activities in the life insurance sector in Turkey consisted of providing services to its customers through digital platforms, IFGL was still classified as a technology undertaking active in the digital platforms sector.

In Corden/Astorg,⁽⁷⁾ the Board concluded that Corden Pharma Group, which comprises the acquired undertakings for the purpose of the relevant transaction (ie, Corden Pharma Holding SE and Corden Pharma US Holdings Inc), was a technology undertaking active in the pharmacology sector, taking into consideration Corden Pharma Group's production of active pharmaceutical ingredients and ready-to-use medicines for pharmaceutical companies.

In Affidea/GBL⁽⁸⁾ regarding the acquisition of sole control over Affidea Group BV, a diagnostic imaging company that collaborates with a number of hospitals in various parts of Turkey, and its subsidiaries by Groupe Bruxelles Lambert SA, the target company was held to be active in the biotechnology sector due to the services it provides. These services include cancer care, advanced diagnostics, outpatient treatment and laboratory services for cancer patients in Turkey. Therefore, the Board held that the local threshold exception was applicable to the relevant transaction due to the target company being a technology undertaking.

The Board's most recent decision regarding technology undertakings, Covetrus/Clayton-TPG,⁽⁹⁾ provided further insight on the Board's approach towards the exempted sectors under the Amendment Communiqué. The transaction, which concerned the acquisition of joint control over Covetrus Inc by Clayton Dubilier & Rice Fund XI LP, TPG Partners VIII and TPG Healthcare, was held to fall within the scope of the local threshold exception due to the target company's activities in the animal health pharmaceuticals and health technologies sector. Covetrus, a global provider of animal health technology and services primarily to veterinarians and animal health practitioners and those supporting the pet, equine and large animal veterinary fields, as well as a wholesaler of animal health consumables (including its own branded products), has no presence in Turkey and its Turkey-related activities are limited to import sales. Upon evaluating the transaction, the Board held that Covetrus's fields of activities "might be within the scope of health technologies and pharmacology sectors considering the target's activities in animal pharmaceuticals and software sectors". It could be inferred from the wording that the Board may have classified Covetrus's software-related activities within the context of health technologies and pharmacology sectors.

The Board's decision in Airties/Providence provides further guidance on the scope of activities that align with the definition of "technology undertaking" and clarifies, to an extent, the specific nature and scope of the activities of undertakings operating in the software sector. However, in the absence of any guidelines regarding the Amendment Communiqué, it is not yet clear how the Board will evaluate the scope of the software sector and the undertakings engaged in software-related activities within the scope of the local threshold exception. This is especially necessary considering the inevitably widespread use of software products and services by a majority of undertakings in the modern world.

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Endnotes

- (1) The Board's *Airties/Providence* decision, 2 June 2022, No. 22-25/403-167.
- (2) The Board cleared the transaction concerning the acquisition of part of Airties's shares by Finvus SCA through capital increase and share transfer per its decision dated 14 October 2010 and numbered 10-65/1388-514.
- (3) G. Gürkaynak, K. K. Yıldırım, G. Yardım, "[Turkey: merger control in a nutshell](#)", GCR Antitrust Review 2023 (2022)
- (4) Citrix/TIBCO (12.05.2022; 22-21/344-149).
- (5) Cinven/IFGL (18.05.2022; 22-23/372-157).
- (6) The Board evaluated that IFGL's relevant digital platform services are accessed and used by only 230 registered users in Turkey.
- (7) Corden/Astorg (22-25/398-164, 02.06.2022).
- (8) Affidea/GBL (16.06.2022; 22-27/431-176).
- (9) Covetrus/Clayton-TPG (07.07.2022; 22-32/512-209).