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Undertakings Generating Turnover Outside of Turkey In The Sensitive Sectors Defined In The Secondary Legislation Will Fall Into The Lower Jurisdictional Threshold Regime If They Have Any Commercial Activity or Users In Turkey In Any Market

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(1) Introduction

On March 4, 2022, the Turkish Competition Authority (“**Authority**”) published the Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board (“**Amendment Communiqué**”) that became effective as of May 4, 2022 and introduced a sectoral jurisdictional turnover threshold exception for the mandatory merger control filing requirement. In the absence of any precedent of the Turkish Competition Board (“**Board**”), the Amendment Communiqué had initially raised certain questions regarding the application of the sectoral threshold exception. One of the questions was as to whether the exceptional thresholds should apply, if a target company does not operate in the “exempted sectors” in Turkey but it does operate in the “exempted sectors” anywhere in the world. The Board clarified this particular point with its recent *Berkshire/Alleghany*¹ decision, which was published on January 24, 2023, on the Authority’s official website, and confirmed that a target company does not need to operate in the “exempted sectors” in Turkey for the sectoral threshold exception to apply, so long it generated turnover abroad in the “exempted sectors” and has any activity in Turkey.

(2) New Thresholds and Sectoral Threshold Exception

¹ The Board's *Berkshire/Alleghany* decision, dated 15.09.2022 and numbered 22-42/625-261.

The Amendment Communiqué led to significant changes in terms of the notifiability analyses under Turkish merger control regime due the sectoral jurisdictional turnover threshold exception along with the increased jurisdictional turnover thresholds. In this respect, a transaction is subject to a mandatory merger control filing in Turkey, if one of the jurisdictional turnover thresholds set forth below is satisfied²:

- a. The aggregate Turkish turnover of the transaction parties exceeding TL 750 million (approximately EUR 43.2 million and USD 45.3 million) and the Turkish turnover of at least two of the transaction parties each exceeding TL 250 million (approximately EUR 14.4 million and USD 15.1 million), OR
- b. (i) The Turkish turnover of the transferred assets or businesses in acquisitions exceeding TL 250 million (approximately EUR 14.4 million and USD 15.1 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (approximately EUR 172.8 million and USD 181.3 million), or (ii) the Turkish turnover of any of the parties in mergers exceeding TL 250 million (approximately EUR 14.4 million and USD 15.1 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (approximately EUR 172.8 million and USD 181.3 million).

The Amendment Communiqué has also introduced a sectoral jurisdictional turnover threshold exception that “*the TL 250 million Turkish turnover thresholds*” will not be sought for transactions concerning the acquisition of undertakings that are active in “digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemical, and health technologies sectors” (“*Exempted Sectors*”) or their assets related to these sectors, if they (i) operate in the Turkish geographical market or (ii) conduct research and development activities in the Turkish geographical market or (iii) provide services to Turkish users.

Due to the wording of the relevant provision “being active in the Exempted Sectors” should be assessed without any territorial restrictions. The Board confirmed this point in its recent *Berkshire/Alleghany* decision.

² All currency conversions are based on the Turkish Central Bank's applicable average buying exchange rates for the financial year 2022.

(3) The Board’s Precedent Regarding the Exempted Sectors

Taking into account the entry into force of this sector specific exception (i.e. May 4, 2022) and the fact that the Authority publishes the Board’s reasoned decisions regarding the merger control filings in around three-to-six months after its short-form decisions, the Board’s decisions where it discussed the scope of the relevant sectors that are exempted from the use of local turnover thresholds are still limited at this stage. That being said, in the eight-month enforcement period of the Board regarding the Exempted Sectors, the target companies were active in Exempted Sectors in Turkey and generated turnover (even if limited) in Turkey from such activities.³ Furthermore, the Board also confirmed with its decisional practice that the extent of the activities in the Exempted Sectors in Turkey is irrelevant for the application of the sectoral jurisdictional turnover threshold exception. By way of an example, in *Cinven/IFGL*⁴, where the target is active in life-insurance sector and provides the life-insurance services to its customers in Turkey by using digital platforms the Board concluded that the target’s activities fall into the Exempted Sectors even if its “digital platform” activity is only provided to very limited number of customers (approximately 230 registered users in Turkey).

That being said - based on the publicly available reasoned decisions of the Board - until *Berkshire/Alleghany*, the issue as to how the Board would interpret the sectoral exception if the activity in exempted sector is not carried out in Turkey had not come before the Board. Therefore, *Berkshire/Alleghany* is the very first decision of the Board which clarifies this point.

(4) The Board’s Remarks in Berkshire/Alleghany

The transaction concerns the acquisition of sole control over Alleghany Corporation (“*Alleghany*”) by Berkshire Hathaway Inc. (“*Berkshire*”). The Board noted that Alleghany

³ The Board’s *TIBCO-Citrix/Elliot-Vista* decision (12.05.2022, 22-21/344-149), *Airties/Providence* decision (02.06.2022, 22-25/403-167), *Cinven/IFGL* decision (18.05.2022, 22-23/372-157), *Astorg/Corden* decision (02.06.2022, 22-25/398-164), *Affidea/GBL* decision (16.06.2022, 22-27/431-176), *Covetrus/Clayton-TPG* decision (07.07.2022, 22-32/512-209), *Mandiant/Google* decision (09.06.2022, 22-26/425-174), *Klaravik/Castik* decision (08.09.2022, 22-41/582-242), *Oplog/Espro Investment* decision (08.08.2022, 22-35/543-219).

⁴ The Board's *Cinven/IFGL* decision (18.05.2022, 22-23/372-157).

manages investments in property and casualty reinsurance and insurance businesses and supports its subsidiaries active in these fields. Further, it is stated that Alleghany does not have any subsidiaries or affiliated entities in Turkey, however it is active in Turkey through its subsidiaries in non-life reinsurance and manufacturing of trailers.

Although Alleghany is mainly active in the reinsurance sector, similar to its approach in *Cinven/IFGL*, the Board did not consider the fact that the main activity of Alleghany was not in the Exempted Sectors as a relevant parameter for the application of the sectoral jurisdictional turnover threshold exception. The importance of this decision is that the Board confirmed that a target company does not need to operate in the Exempted Sectors in Turkey in order for the sectoral threshold exception to be applied, so long as it generates turnover abroad in the Exempted Sectors and has any activity in Turkey.

The Board decided that Alleghany is active in “financial technologies sector”, since it develops software and sells them to third parties through its operational application established to manage the systems of reinsurance companies and through a business unit namely DragonX operating only in the United States by offering excess casualty coverage customized by class. Additionally, the Board noted that the condition of having activity in Turkish geographic market is also met as Alleghany generates turnover in Turkey, without making any reference to whether this turnover generated in the Exempted Sectors. Thus, the Board concluded that “*the TL 250 million Turkish turnover thresholds*” will not be sought for the transaction.

Based on the reasoned decision, Board did not consider whether or not Alleghany operates in Turkey in the field of "financial technologies" and deemed the fact that any activity of Alleghany in Turkey and operating abroad in the Exempted Sectors are sufficient for the application of the sectoral jurisdictional turnover threshold exception. *Berkshire/Alleghany* clarifies that the sectoral exception would be applicable even in cases where a target does not conduct any Turkey-related activities concerning the relevant sectors that are exempted from the use of local turnover thresholds and only conducts activities in these sectors outside of Turkey.

(5) Conclusion

Berkshire/Alleghany clearly demonstrates that for the acquisitions of undertakings that operate abroad in “digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemical, and health technologies sectors or their assets related to these sectors” and that have any activities in Turkey, “*the TL 250 million Turkish turnover thresholds*” will not be sought even if such acquired undertakings are not active in the aforementioned exempted sectors in Turkey. Accordingly, for the sector-specific jurisdictional turnover threshold exception to be applicable, first of all, a target should have at least global activities in one of the exempted sectors. Furthermore, the target should also (i) be active in the Turkish geographical market (i.e. generate turnover in Turkey), or (ii) conduct research and development activities in Turkey or (iii) provide services to users in Turkey. These three latter conditions are not cumulative, and the activities of the target would be deemed to fall within the scope of the exception even if the target only satisfies one of these three conditions. The mere fact that a target has only de minimis Turkish turnover, or limited number of customers in Turkey, or no assets and/or subsidiaries/affiliated entities incorporated in Turkey is irrelevant on this front.

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