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

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

Introduction

Pursuant to the Turkish merger control regime, mergers and acquisitions that exceed the applicable thresholds must be notified to the Turkish Competition Board ("Board") prior to their implementation. Under Article 16 of the Turkish Competition Law, if such concentrations requiring authorization are completed without the Board's prior notification and approval, an administrative fine amounting to 0.1% of the annual gross Turkish turnover of the undertakings concerned shall be imposed on natural and legal persons that qualify as undertakings, as well as on associations of undertakings or their members. Given that the Turkish Competition Authority ("TCA") adopts a proactive approach in enforcing merger control rules—including in global mergers and acquisitions completed without clearance—this article examines the Board's gun-jumping decisions, with a particular emphasis on foreign-to-foreign transactions.

The Thresholds

Under Turkish merger control regime, the transaction that will result in a permanent change in control, would be notifiable to the TCA in case one of the below turnover thresholds are triggered:

1. 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

2. 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).

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.

The 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 transaction:

- Broadcom (USA, semiconductor-based hardware and infrastructure software solutions) / VMware (USA, computer programming), gun-jumping by way of failure to notify, 2024¹
- Elon Musk/Twitter (USA, social networking), gun-jumping by way of failure to notify, 2023²
- 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, 2021³
- Ionity (Germany, high-power charging infrastructure for electric vehicles), gun-jumping by way of failure to notify, 2020⁴
- Brookfield Asset Management (Canada, asset management) / Johnson Controls' power solutions business line (Ireland), gun-jumping by way of failure to notify, 2020⁵
- 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, 2016⁶
- Longsheng (China; manufacturing, real estate, and financial investment) / Kiri Holding (Singapore, dyes), gun-jumping by way of failure to notify, 2011⁷
- Simsmetal (USA, scrap metal) / Fairless (USA, scrap metal recycling), gun-jumping by way of failure to notify, 2009⁸
- CVRD (Brazil, mining) / Inco Limited (Canada, mining), gun-jumping by way of failure to notify, 2007⁹
- Total (France, energy) / Cepsa (Spain, energy), gun-jumping by way of failure to notify, 2006¹⁰

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

(i) 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 in 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.

(ii) 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.

(iii) 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:

- i. 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,
- ii. 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,
- iii. 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,
- iv. 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.

(iv) 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:

- i. 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,
- ii. 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.

Conclusion

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

The Elon Musk/Twitter decision illustrates the TCA's active monitoring of global transactions and its willingness to assess those deemed notifiable. Similarly, the Broadcom/VMware decision demonstrates that the Board may identify a previously unnotified transaction during the review of a subsequent filing. In some cases, parties themselves may only recognize a past notifiable transaction when preparing a new notification. This precedent underscores the importance of conducting a rigorous notifiability analysis based on the TCA's thresholds for all global transactions—regardless of their limited nexus with Türkiye.

The TCA continues to maintain a strict stance on gun-jumping and does not accept any defense for failure to notify a notifiable transaction.

Footnote(s):

¹ Decision No. 24-30/707-296 dated 18.07.2024

² Decision No. 23-12/197-66 dated 02.03.2023

³ Decision No. 21-55/776-383 dated 11.11.2021

⁴ Decision No. 20-36/483-211 dated 28.07.2020

⁵ Decision No. 20-21/278-132 dated 30.04.2020

⁶ Decision No. 16-42/693-311 dated 06.12.2016

⁷ Decision No. 11-33/723-226 dated 02.06.2011

⁸ Decision No. 09-42/1057-269 dated 16.09.2009

⁹ Decision No. 07-11/71-23 dated 01.02.2007

¹⁰ Decision No. 06-92/1186-355 dated 20.12.2006

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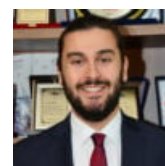
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