From the Presidency of the Competition Authority,

DECISION OF THE COMPETITION BOARD

File number : 2023-1-005 **(Acquisition)**
Decision Number : 23-12/197-66
Decision Date : 02.03.2023

A. MEMBERS IN ATTENDANCE

Chairman : Birol KÜLE
Members : Ahmet ALGAN (Deputy Chairman), Hasan Hüseyin ÜNLÜ, Ayşe ERGEZEN, Cengiz ÇOLAK, Berat UZUN

B. RAPPORTEURS : Selçuk YILMAZ, Murat KARA, Rengin KUŞAR, Hakan ARSLANBENZER, Muhammet DEMİREL

C. NOTIFIED BY : -Ex officio

D. ACQUIRER **: Elon R. MUSK**

E. ACQUIRED : Twitter Inc.
Representatives: Atty. Gönenç GÜRKAYNAK, Atty. Onur ÖZGÜMÜŞ, Atty. S Buğrahan KÖROĞLU, Atty. Efe OKER, Atty. O. Berke OKUR
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(1) **F. SUBJECT OF THE FILE:** The examination of the acquisition of the sole control of Twitter Inc. by Elon R. MUSK pursuant to the Article 11 of the Act no 4054 on the Protection of Competition.

(2) **G. PHASES OF THE FILE**: Unofficial announcements began on 14.04.2022 about Elon R. MUSK's acquisition of Twitter Inc. (TWITTER), which operates as a digital platform in the field of social media services, then, it was understood that the transaction was completed on 27.10.2022 within the scope of announcements and news. In line with the announcements; the Information Note prepared for determining whether the acquisition of TWITTER by Elon R. MUSK is subject to the permission of the Competition Board (Board) within the scope of Article 7 of the Act no 4054 on the Protection of Competition (the Act no 4054) and the Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board was discussed at the Board's meeting dated 26.01.2023 and the decision numbered 23-06/85-M was taken that the transaction shall be examined in accordance with Article 11 of the Act no 4054 and that the powers regulated in Articles 14 and 15 of the Act no 4054 shall be used if deemed necessary within the scope of the examination. In this context, the letter dated 27.01.2023 and no 58033 requested the party to fill in the Notification Form concerning Mergers and Acquisitions and its Annexes as well as to provide information and documents about the party’s explanations for not notifying the transaction to the Board. The response letter on the requested information and documents was submitted to the Competition Authority (Authority) records on 20.02.2023 with the number 35832. The Notification Form concerning Mergers and Acquisitions and its Annexes (the Notification Form) that would enable the assessment of the acquisition of the majority and sole control of TWITTER's shares by Elon R. MUSK within the framework of the Act no 4054 and the

Communiqué no 2010/4 were submitted with the relevant response letter.

(3) The Preliminary Acquisition Examination Report dated 27.02.2023 and no 2023-1-005/Öİ about the subject was discussed and concluded.

(4) **H. RAPPORTEUR OPINION:** It is stated that in the report in question that the acquisition of the sole control of Twitter Inc. by Elon R. MUSK is subject to authorization pursuant to the first and second paragraphs of Article 7 of the Communiqué no 2010/4, in addition, the mentioned transaction will not result in a significant lessening of effective competition, particularly in the form of creating a dominant position or strengthening an existing dominant position, within the framework of Article 7 of the Act no 4054 and for this reason, the transaction can be authorized, but due to the failure to notify an acquisition which is subject to authorization, an administrative fine of one thousandth of the gross income obtained in Türkiye for the year 2022 should be imposed on Elon R. MUSK, the acquiring party of the transaction, pursuant to Article 16(1)(b) of the Act no 4054.

I. EXAMINATION AND ASSESSMENT

(5) It is stated in Article 11 of the Act no 4054 that where a merger and acquisition transaction whose notification to the Board is compulsory is not notified to the Board, the Board shall take the merger or acquisition under examination on its own initiative, when it is made aware of the transaction in any way. According to the said provision, in case the transaction

- is not illegal under the first paragraph of Article 7, the Board allows the transaction but imposes fines on those concerned due to their failure to notify,
- is illegal and prohibited under the first paragraph of Article 7, the Board decides that fines be imposed; in addition, the transaction must be terminated; all de facto situations committed contrary to the law must be eliminated; any shares or assets acquired must be returned, if possible, to their former owners, or if not possible, these must be assigned and transferred to third parties; the acquiring persons may by no means participate in the management of undertakings acquired until these are assigned to their former owners or third parties, and that other measures deemed necessary be taken.

(6) Accordingly, the following issues were evaluated: (i) whether the transaction is subject to authorization under the scope of Article 7(2) of the Act no 4054 and the Communiqué no 2010/4, and whether it would result in significant lessening of effective competition and (ii) whether there will be administrative fine liability according to Article 16(1) of the Act no 4054 because the transaction that subject to the authorization of the Board has been realized without the Board's authorization.

I.1. Assessment within the scope of Article 7 of the Act no 4054

(7) The basis of the transaction that is the subject of the file is the Merger Agreement and Plan (Agreement) executed between the parties on 25.04.2022.[1] In this context, TWITTER merges with X Holdings II, Inc. (X HOLDINGS II), which is a wholly-owned subsidiary of X Holdings I, Inc.in (X HOLDINGS I) controlled finally by Elon R. MUSK. After the merger, TWITTER continues to exist as the surviving company. Although the merger of the target company with a subsidiary of the acquiring company, in a way that the parent company will control the target company, is defined as a merger in the literature, it is accepted that this structure, called the "reverse triple merger", will essentially constitute an acquisition.

(8) The provision in Article 5(1) of the Communiqué no 2010/4 "*the acquisition of direct or indirect control over all or part of one or more undertakings by one or more undertakings or by one or more persons who currently control at least one undertaking, through the purchase of shares or assets, through a contract or through any other means shall be considered a merger or an acquisition within the scope of Article 7 of the Act, provided there is a lasting change in control"*, regulates the types of transactions that will be considered a merger or an acquisition.

(9) Before the transaction, approximately 10.7% of TWITTER shares were owned by The Vanguard Group, 9.5% by Elon R. MUSK, 6.8% by Black Rock, Inc., 8.7% by Morgan Stanley and Morgan Stanley Investment Management Inc, and 64.3% by other shareholders, after the transaction, X HOLDINGS I became the owner of all TWITTER shares. X HOLDINGS II is a wholly owned subsidiary of X HOLDINGS I. The majority shares and control of X HOLDINGS I belong to Elon R. MUSK. X HOLDINGS II merged with TWITTER on 27.10.2022 pursuant to the contract signed between the parties and TWITTER became an undertaking in which X HOLDINGS I and therefore Elon R. MUSK have all the shares and sole control after the merger. Thus, the transaction that is the subject of the file is an acquisition within the scope of Article 7 of the Act no 4054 and Article 5 of Communiqué no 2010/4, as it causes a permanent change in control.

(10) The amendments made to the Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board (the Communique no 2010/4) with the Communiqué no 2022/2 on the Amendments to the he Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board (the Communiqué No 2022/2), which was

[1] In order to obtain the necessary permissions from the competition authorities within the scope of the closing procedures of the transaction, the parties a notification to the Federal Trade Commission and the Antitrust Division of the Department of Justice in the US on 03.05.2022, pursuant to the Hart-Scott-Radino Antitrust Improvements Act of 1976 (HSR Act). It was stated that the waiting period regulated in the HSR Act expired on 02.06.2022. In addition, the parties stated that they submitted an unofficial information letter on 16.05.2022 indicating that since the thresholds stipulated for a possible investigation by the UK Competition and Markets Authority (CMA) were exceeded, they did not intend to report the transaction to the CMA as no competitive concerns arouse. In response to this unofficial information letter, on 24.05.2022, CMA notified that no further information was required for the transaction. Lastly, the parties submitted a letter to the European Commission on 18.05.2022, explaining that the transaction did not exceed the notification thresholds under the European Union Concentration Regulation or the concentration control laws of the EU Member States. Additionally, it was stated that since there was no overlap between TWITTER's and Elon R. MUSK's fields of activity globally, the transaction was not reported to competition authorities in jurisdictions other than the US. Finally, the transaction was completed and closed pursuant to the provisions of the agreement concluded on 27.10.2022.

published in the Official Gazette dated 04.03.2022, entered into force on 04.03.2022. Since the closing procedures of the transaction were carried out on 27.10.2022, the changes made with the Communiqué No 2022/2 should be implemented.

(11) Article 7, paragraph one of the Communique no 2010/4, which is amended by Article 2 of the Communiqué no 2022/2 includes the following regulation: *"In a merger or acquisition transaction as specified under Article 5 of this Communiqué, authorization of the Board shall be required for the relevant transaction to carry legal validity in case, (a) Total turnovers of the transaction parties in Türkiye exceed seven hundred and fifty million TL, and turnovers of at least two of the transaction parties in Türkiye each exceed two hundred and fifty million TL, or (b) The asset or activity subject to acquisition in acquisition transactions, and at least one of the parties of the transaction in merger transactions have a turnover in Türkiye exceeding two hundred and fifty million TL and at least one of the other parties of the transaction has a global turnover exceeding three billion TL."* The paragraph specifies which types of mergers and acquisitions are subject to Board's authorization.

(12) On the other hand, paragraph two of the Communique no 2010/4, which is amended by Article 2 of the Communiqué no 2022/2 includes the following regulation: *"In transactions involving the acquisition of technology companies which operate in the Turkish geographical market or have R&D activities in Türkiye or which provide services to users in Türkiye, the two hundred and fifty million TL thresholds in sub-paragraphs (a) and (b) of the first paragraph shall not apply."*

(13) Article 4(1)(e) of the Communiqué no 2010/4 defines technology undertakings as *"undertakings operating in the field of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or healthcare technologies, or assets thereof."* In this context, it is understood that TWITTER, which is the acquired party in the transaction that is the subject of the file, is a digital platform within the scope of its activities in the fields of social networking, online advertising and the provision of data licensing services, and therefore, it is an undertaking covered by the relevant definition of "technology undertaking". When the turnover information is considered, it is found that that Elon R. MUSK's global turnover in the fiscal year 2021 exceeded three billion TL. Therefore, pursuant to Article 7(2) of the Communiqué no 2010/4, the two hundred and fifty million TL thresholds shall not apply in terms of the acquired undertaking in acquisitions of technology undertakings, and global turnover of at least one of the transaction parties exceeds the threshold stated in the relevant Article, thus, it is concluded that the notified transaction is subject to the Board's authorization.

(14) Following the finding that the transaction in question is subject to the Board's authorization, whether the transaction would result in a significant restriction of effective competition, particularly by creating a dominant position or strengthening an existing dominant position within the meaning of Article 7 of the Act no 4054 was examined. The Communiqué no 2010/4, defines the affected markets as "*relevant product markets which are likely to be affected by the transactions and where at least two of the parties are active in the same product market or where at least one of the parties operates in the downstream or upstream of any product market in which the other party is active".* In this context, whether there is a horizontal or non-horizontal overlap between the activities of the parties is

evaluated.

(15) As stated in the Notification Form, the acquired party TWITTER, which is a social media platform provider, in general, operates in the markets of "social networking services", "online advertising services" and "data licensing services" concerning social media services. TWITTER provides its activities in the market for social networking services, which are defined as multi-sided platforms that allow users to communicate, connect and share with each other across multiple devices and tools, generally free of charge. TWITTER only earns “premium subscription revenues” from this activity. Another service that is within the scope of TWITTER's social media services is online advertising service. TWITTER enables advertisers to bring their advertising content to end users in its platform through its online display advertising service. Advertisers pay TWITTER in return for the advertising service. Another service offered by TWITTER is data licensing services. As a part of its data licensing service, TWITTER offers licenses that allow third parties to access and analyze historical and real-time data consisting of publicly available content on its platform. TWITTER TÜRKİYE, which is the subsidiary of TWITTER established in Türkiye, and which operates in the fields of social networking, online advertising and data licensing services in Türkiye, operates for having (…..).

(16) Elon R. MUSK, who is in the position of acquirer, has minority shares that do not grant him the control right and/or any control rights in many undertakings of which he is a founder and/or investor. The undertakings, which Elon R. MUSK has right to control, are THE BORING COMPANY, NEURALINK and SPACEX/STARLINK. THE BORING COMPANY’s activities are related to services for infrastructure and tunnel construction whereas NEURALINK conducts research and development activities for implantable brain-machine interfaces. SPACEX/STARLINK carries out the production of Starlink, a satellite communication service in the field of aviation production, space transportation services and satellite communications. On the other hand, when the fields of activity of the undertakings in which Elon R. MUSK has minority rights are examined, it is understood that there are activities related to the production of electric vehicles, brain monitors and machine learning algorithms for medical applications, artificial intelligence research and payment transaction software and application programming interface services for e-commerce websites and mobile applications.

(17) As a result of the examination of the fields of activity of the parties to the transaction, it is concluded that there is no horizontal overlap between the activities of the parties on a global scale and in terms of Türkiye, when the facts that none of the undertakings in which Elon R. MUSK had shares prior to the transaction provides social media services, social media-related data licensing services or online advertising services are considered.

(18) It is also concluded that there is no vertical overlap between the parties on a global scale and in terms of Türkiye when the facts that that none of the companies in which Elon R. MUSK owns shares are customers or suppliers of TWITTER, that they do not purchase online advertising or data licensing services related to social networks, and that they do not offer any products and/or services that can be purchased by TWITTER are considered.

(19) Within the framework of the assessments made above, the notified transaction is subject to authorization pursuant to the first and second paragraphs of Article 7 of the Communiqué no 2010/4, in addition, the mentioned transaction will not result in

a significant lessening of effective competition, particularly in the form of creating a dominant position or strengthening an existing dominant position, within the framework of Article 7 of the Act no 4054

I.2. Assessment within the scope of Article 16 of the Act no 4054

(20) It is understood that the examined transaction is a transaction which is subject to authorization pursuant to the first and second paragraphs of Article 7 of the Communiqué no 2010/4, but the parties did not notify the transaction to the Board.

(21) According to the first paragraph of Article 16

> *"in those cases where*
> *…*
> *Mergers and acquisitions that are subject to authorization are realized without the authorization of the Board,*
> *the Board shall impose on natural and legal persons having the nature of an undertaking and on associations of undertakings or members of such associations, an administrative fine by one in thousand of annual gross revenues of undertakings and associations of undertakings or members of such associations which generate by the end of the financial year preceding the decision, or which generate by the end of the financial year closest to the date of the decision if it would not be possible to calculate it and which would be determined by the Board for those mentioned in sub-paragraphs (a), (b) and (c), ...". However, the penalty to be determined pursuant to this principle cannot be less than ten thousand Turkish Liras. Pursuant to sub-paragraph (b) of this paragraph, administrative fine is imposed to each of the parties in merger transactions and only to the acquirer in acquisition transactions".*

(22) Article 10(8) of the Communiqué no 2010/4 includes the regulation *"In merger or acquisition transactions, date of implementation is the date when the control is changed."* In this context, the parties must notify the transaction which is subject to the notification to the Board before realizing it. It is stated that the closing date of the transaction is 27.10.2022 in the response letter submitted within the scope of the examination.

(23) During the examination process, TWITTER was requested to provide a justification and explanation for not notifying the transaction to the Board together with the Notification Form. It is stated in the letter dated 20.02.2023 and numbered 35832 submitted by TWITTER that

- The Agreement related to the transaction was signed on 25.04.2022, in this context, analysis of whether the transaction was notifiable in terms of concentration control was carried out in April-May 2022,
- The thresholds stipulated in Article 7 of Communiqué no 2010/4 have recently been increased and the exception for the sectors has been just regulated (to enter into force on 04.05.2022), no guidelines have been published by the Authority on how to implement the introduced sector-specific exception, there is no jurisprudence of the Board either,
- TWITTER's relevant turnover in Türkiye did not exceed the turnover thresholds stipulated in Article 7 of the Communiqué no 2010/4 during the period in which the analysis of whether the transaction was notifiable was made,
- The transaction will be subject to notification if it is determined that the sector-specific exception may (potentially) be applied to the transaction since

TWITTER's activities are related to Türkiye,
- The parties to the transaction find/assess that the transaction does not have any potential significant impact on competition in Türkiye at that stage and this can also be understood from the Notification Form filled in for the transaction,
- During the analysis of whether the transaction was notifiable, TWITTER experienced negative financial consequences in terms of its financial situation in Türkiye,
- For these reasons, the acquirer did not notify the transaction to the Authority.

(24) It is seen that the parties generally made statements on the enforcement date of the Communiqué no 2022/2. Article 7 of the Communiqué no 2022/2, which was published in the Official Gazette dated 04.03.2022 and no 31768, states *"This Communiqué shall enter into force two months after its publication".* Therefore, the relevant Communiqué entered into force on 04.05.2023. The Agreement for the realization of the transaction was concluded on 25.04.2022, and the transaction was closed on 27.10.2022. As it is seen, the closing of the transaction was carried out after both the publication and enforcement dates of the relevant Communiqué. Thus, it was concluded that the transaction was not notified despite being subject to authorization, and therefore an administrative fine should be imposed pursuant to the Article 16(1)(b) of the Act no 4054.

(25) It is understood that the closing date is considered as the date on which the control changes in a legal sense in previous Board decisions[2]. In addition, the issue that the closing date will be taken as a basis is also included in the Council of State jurisprudence. Accordingly, decision of the 13th Chamber of the Council of State dated 05.01.2010, no E. 2007/4872 and K. 2010/9; concerning the necessity of taking the closing date as a basis in mergers and acquisitions that must be notified to the Board rules that

> *"The realization of acquisitions and mergers which are subject to the authorization without the authorization of the Competition Board are depended on sanction of a fine because the legal acquisition is usually realized on the closing date specified in the agreement signed between the parties in transfer transactions, it is usually stated in contracts where a closing date is not determined that the closing will be made after certain permissions are obtained, in other words, closing is the most important element that indicates the transfer has been legally completed and it is deemed necessary for companies to complete the required permissions before closing in order not to encounter any problems later and to ensure that the transfer transaction gains legal validity."*

In this context, the court decision found that there is no unlawfulness in imposing an administrative fine pursuant to Article 16 of the Act no 4054, on the grounds that the transfer transaction which is subject to authorization was carried out without the Board's permission before the closing date.

(26) Based on the regulation in the last sentence of the first paragraph of Article 16 of the Act no 4054, it was concluded that the party to the transaction to be imposed administrative fines due to non-notification of the transaction should be Elon R. MUSK, who is in the position of the acquirer.

[2] Board decisions dated20.12.2006 and no 06-92/1186-355, dated 01.02.2007 and no 07-11/71-23.

(27) It is stated that in the first paragraph of Article 16 of the Act that an administrative fine by one in thousand of annual gross revenues which generate by the end of the financial year preceding the decision, or which generate by the end of the financial year closest to the date of the decision if it would not be possible to calculate it and which would be determined by the Board of undertakings and associations of undertakings or members of such associations shall be imposed due to the failure to notify mergers and acquisitions that are subject to authorization. Therefore, it is necessary to take into account the turnover from Türkiye in the 2022 fiscal year, which is the fiscal year preceding the decision in the administrative fine to be imposed on Elon R. MUSK for not notifying the transaction to the Board. In this context, the administrative fine is calculated on the basis of the turnover Elon R. MUSK obtained through the companies whose shareholdings grant him the right of control as of the 2022 fiscal year.

(28) As a result of the examination carried out within the framework of Article 11 of the Act no 4054, it was concluded that the transaction that is the subject of the file is subject to authorization pursuant to the first and second paragraphs of Article 7 of the Communiqué no 2010/4, in addition, the mentioned transaction will not result in a significant lessening of effective competition, particularly in the form of creating a dominant position or strengthening an existing dominant position within the framework of Article 7 of the Act no 4054 and for this reason, the transaction can be authorized, however, due to the failure to notify an acquisition which is subject to authorization, an administrative fine of one thousandth of the gross income obtained in Türkiye for the year 2022 should be imposed on Elon R. MUSK, the acquiring party of the transaction, pursuant to Article 16(1)(b) of the Act no 4054.

J. CONCLUSION

(29) Depending on the report prepared and the scope of the file examined, it was decided UNANIMOUSLY that

1. The notified transaction is subject to authorization under the scope of Article 7 of the Act no 4054 and the Communiqué no 2010/4 on Mergers and Acquisitions Calling for the Authorization of the Competition Board, which was issued based on that article,
2. The transaction shall be authorized, as it would not result in significant lessening of competition,
3. However, (.....) administrative fines by one in thousand of the gross revenues generated in Türkiye in 2022 of Elon R. MUSK, who is the acquiring party, according to article 16(1)(b) of the Act no 4054 on the Protection of Competition because the transaction in question has been realized without the authorization of the Competition Board,

with the decision subject to appeal before Ankara Administrative Courts within 60 days as of the notification of the reasoned decision.