

Recent Developments under Turkish Competition Law

2023 Summer Issue

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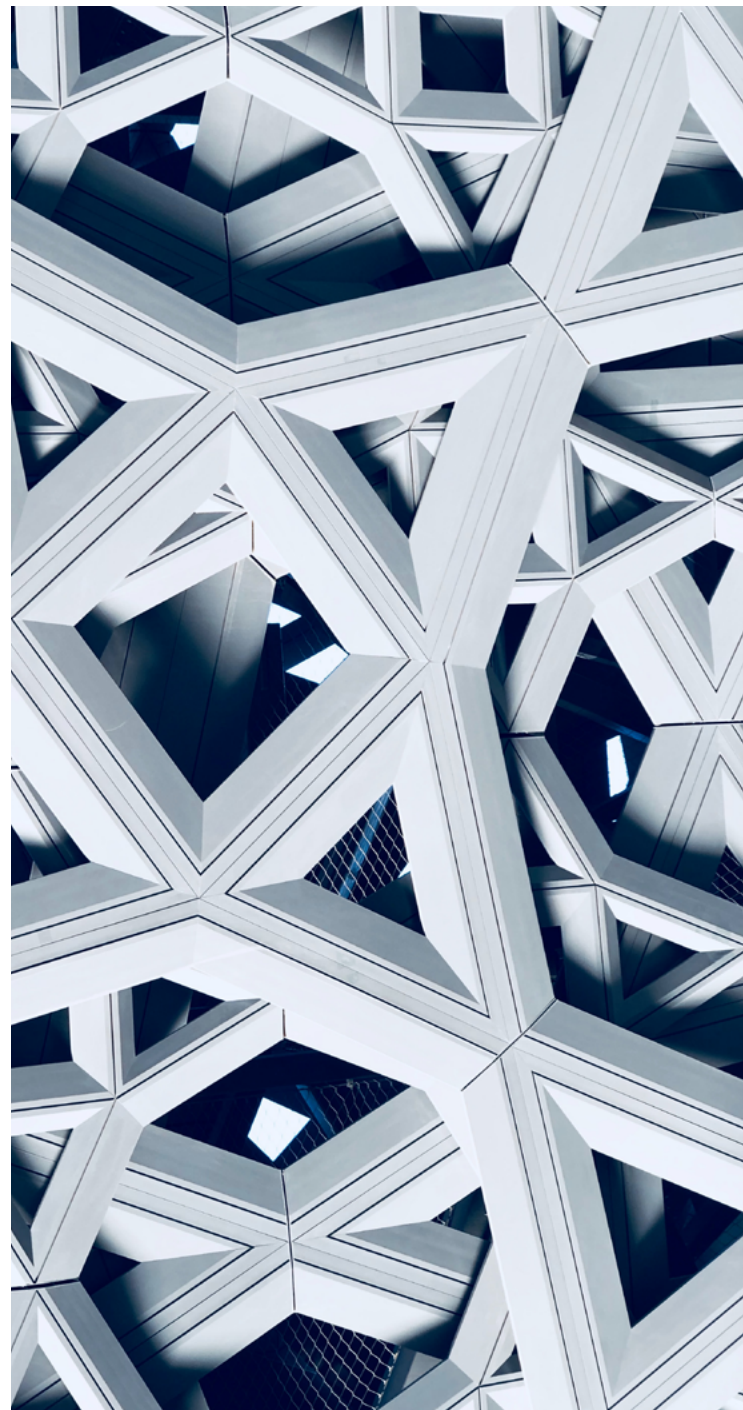
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Introduction

The Turkish Competition Authority (**Authority**) embarks on a busy summer season. Before starting our remarks on the Authority's hectic agenda, it is to be noted that the Authority got on with its regular workload after the earthquake that hit Türkiye in February and finally rescheduled oral hearings for nearly 10 ongoing investigations that were postponed due to the natural disaster. That delay had left numerous well-operating companies (such as Trendyol, Sahibinden, EssilorLuxottica, Samsung and LG Electronics) preoccupied with uncertainty as to potential sanctions.

It appears from the oral hearings held by the Authority up to mid-August 2023, that the Authority has been unhesitant to impose monetary fines on many prominent companies. Indeed, on 9 August 2023, the Authority imposed a total of EUR 21 million on well-known homeware appliances companies, including Arçelik, Samsung, LG and SVS, which it determined that these companies engaged in resale price maintenance practices.

Another recent decision rendered on 26 July 2023 involved nearly 40 companies from multiple industries, making it the most extensive investigation into no-poach agreements to date. In total, 16 well-established companies were fined for agreeing not to hire each other's employees, 21 companies were not found in violation of Article 4 of Law No. 4054 on the Protection of Competition and the cases against 11 companies were settled during the investigation process. The fined undertakings include one of Türkiye's largest ready-to-wear fashion retailers, LC Waikiki (fined approximately EUR 2 million), which is followed by Türkiye's prominent telecommunication operator, Turk Telekom (fined approximately EUR 1.4 million).

Another highlight of this summer was the Turkish Constitutional Court's limitation of the Authority's on-site inspection powers, which ruled that the Authority cannot carry out on-site inspections without a judicial decision. The decision surprised many academicians and practitioners as the Law No. 4054 on Competition Law explicitly provides such powers to the Authority. The decision is expected to have a serious impact on the practice of competition law and the legislation in the long term.

It is also noteworthy that the Authority was fairly busy evaluating and clearing mergers. In June and July 2023, the Turkish Competition Board approved approximately 30 transactions, including the Microsoft acquisition of Activision Blizzard, which caused significant uproar and serious resistance worldwide.

This Summer Edition aims first to focus on the important events in the Turkish competition law sphere and mainly discuss the latest non-poaching decision, the Constitutional Court's unforeseen ruling, the Microsoft/Activision Blizzard mega-merger and the global concerns in the gaming industry as well as the Authority's recent RPM case against prominent homeware appliance companies. In this Edition, we also address global developments - while forecasting their potential impact in Türkiye - and refer to the European Court of Justice's approach to RPM with the recent Super Bock decision, the Commission's latest gun-jumping case - Illumina / GRAIL and finally the intersection between competition and data protection law in light of the European Court of Justice's ruling on Meta.

We hope you find this Summer Edition helpful.

Togan Turan



• DAWN RAID

No dawn raid without a Judicial Decision?

by Gülçin Dere, İrem Uysal

The Turkish Constitutional Court (**Constitutional Court**) has recently issued a landmark decision that is expected to have a serious impact on Turkish competition law practice. The decision, which was published in the Turkish Official Gazette dated 20 June 2023 and numbered 32227 (**Decision**), held that the right to immunity of domicile guaranteed by Article 21 of the Turkish Constitution (**Constitution**) was violated by the dawn raids carried out by the Turkish Competition Authority (**Authority**) at the workplaces of the undertakings involved without a judicial decision. Accordingly, the failure of the Authority to obtain judicial authority to carry out the dawn raid under the Law No. 4054 on the Protection of Competition (**Law No. 4054**) and to comply with the guarantees provided under Article 21 of the Constitution caused the violation.

On-site inspection was conducted by the Authority's officials at the workplace of the relevant undertaking pursuant to Article 15 of Law No. 4054. The Constitutional Court ruled that where the management activities of undertakings are carried out and areas such as workrooms, which are not freely accessible to everyone, are included in the scope of the term 'residence', along with the workplaces, including offices where people carry out their professions, and offices, headquarters and branches generally fall within the terms of the authorisations listed under Article 15 of the Law No. 4054.

Indeed, the on-site inspection process regulated under Article 15 of the Law No. 4054 is the on-site inspection conducted by the Authority officials at the workplaces

of undertakings or associations of undertakings. Within this process, Authority officials may examine the books, data and documents kept as physical and electronic media and information systems of the relevant undertaking, take copies and physical samples thereof, request written or oral explanations from the undertaking regarding certain issues and, finally, conduct on-site inspections regarding all assets of the relevant undertaking.

Accordingly, the Constitutional Court concluded that the inspection carried out at the applicant's workplace 'constituted an interference with the right to immunity of domicile', taking into account the fact that documents were obtained from the undertaking's officials' computers during the inspection subject to the application.

The Constitutional Court also concluded that the current regulation, which does not limit the possibility of conducting on-site inspections upon the order of the Turkish Competition Board (**Board**) to cases where there is an inconvenience in delay, is contrary to Article 21 of the Constitution. In addition, the Constitutional Court found Article 15 of Law No. 4054 unconstitutional in that it does not carry the obligation to submit the Board's decision for the approval of the judge in charge within 24 hours.

In the light of the Decision, it can be concluded that although the dawn raid was carried out in accordance with competition law legislation, the relevant provisions of the Law No. 4054 were found to be inconsistent with the Constitution. In this context, as the Constitutional Court ruled that the Turkish Grand National Assembly should be notified of the Decision so that it could review the relevant provisions of the Law No. 4054 and solve this structural problem, it is understood that the issue will be of greater importance in the future.

Turkish watchdog gives clearance to the mega-merger: Microsoft/Activision Blizzard deal

by Büşra Aktüre, Lara Akça

In January 2022, Microsoft announced its plans to acquire Activision Blizzard, a leader in the fast-moving gaming industry, and which had developed extremely notable games such as Call of Duty, Candy Crush and World of Warcraft. The \$68.7 billion value transaction led to reaction worldwide, as Microsoft would become the world's third-largest gaming company post-transaction, based on revenue, behind its biggest competitor, Tencent and Sony. With this transaction, Microsoft envisages promoting competition across the highly dynamic and evolving gaming industry and bringing gaming to everyone across every device.

The Turkish Competition Board unconditionally approved the merger on 13 July 2023. While the reasoned decision will shed light on the Authority's assessment and competition concerns, as well as the main competition concerns made public by multiple leading competition agencies worldwide, such as the European Commission (**Commission**), the Competition and Markets Authority (**CMA**) and the Federal Trade Commission (**FTC**)

Focusing on the process in the European Union (**EU**), the Commission has conducted an in-depth market investigation, which confirmed that Microsoft could harm competition in the distribution of games via cloud game-streaming services and that its position in the market for PC-operating systems would be strengthened. In response to the Commission's competition concerns regarding the distribution of PC and console games through cloud game-streaming services, Microsoft has proposed a set of extensive licensing commitments (**Commitments**) lasting for 10 years. These Commitments include: (i) granting consumers in the European Economic Area (**EEA**) a free licence, enabling them to stream all existing and upcoming Activision Blizzard PC and console games through any cloud game-streaming service they wish, provided they possess a valid licence for those games; and (ii) providing cloud game-streaming service providers in the EEA with a corresponding free licence, allowing them to offer streaming access to



Activision Blizzard's PC and console games to gamers based in the region. The proposed Commitments will make existing and future Activision Blizzard PC titles (**Eligible Games**), including Call of Duty, available to cloud gaming services worldwide. The licences will be granted for a period of 10 years regardless of whether Microsoft currently streams or will in the future stream Eligible Games on Xbox Cloud Gaming. For new releases, Microsoft proposes to make Eligible Games (including publicly available beta versions and early access versions) available for streaming from the release of the game on the Microsoft Game Store.

In the United Kingdom, the CMA concluded in its Provisional Findings Addendum in March 2023 that Microsoft would not have the ability to foreclose PlayStation based on partial or total foreclosure strategies. In light of this, the CMA's only remaining concerns were in relation to cloud gaming. To address the CMA's concerns in relation to cloud gaming, the Parties put forward a proposed remedy in response to the CMA's Remedies Working Paper on 31 March 2023. The Parties also kept the CMA apprised of the positive discussions with the Commission on the proposed remedies, which substantially also addressed the concerns the CMA has identified. However, on

26 April 2023, the CMA's final report found that the merger may be expected to result in a substantial lessening of competition in cloud gaming services in the UK, and it rejected the behavioural remedy that Microsoft offered to address these concerns. Microsoft appealed the CMA's decision. The appeal delayed the company's plans to attempt to close the deal by 18 July 18, the planned closing date. Therefore, Microsoft was forced to negotiate an extension to the merger agreement, which led to a new planned closing date of 18 October 2023 and a three-month extension of the merger agreement. Significantly, if Microsoft's CMA appeal fails or it fails to get approval from other regulators it will owe Activision \$3 billion in break-up fees.

In United States, the FTC filed a motion for a temporary restraining order (TRO) and a preliminary injunction (PI) in federal court on 12 June 2023. On 13 June 2023, the court granted the motion for a TRO to prevent the Parties from closing the transaction prior to the court hearing on the preliminary injunction motion. The hearing was held on 10 July and the judge ruled in favour of the Parties, rejecting the FTC's request for a PI.

Overall, with the latest developments both in the US and the UK, it seems that the parties still keep their focus on closing the deal by the extended closing date. Unlike in those jurisdictions, the Authority did not make its concerns public regarding the transaction and only announced an unconditional clearance decision. Therefore the reasoned decision is highly anticipated, as it will provide guidance on the Authority's analysis vis-à-vis this year's biggest merger in the gaming industry and whether it shares any common concerns with the aforementioned antitrust agencies.

• SUPPLY CHAIN / DISTRIBUTION

The European Court of Justice made it clear: A shift toward a less formalistic approach to RPM

by Kansu Aydoğan Yeşilaltay, Oğulcan Halebak

Background

A Portuguese beverage manufacturer, Super Bock, was fined EUR 24 million by the Portuguese competition authority. The Portuguese authority considered that Super Bock (i) implemented a rather tight control over



its distributors in the on-trade sector, that is hotels, restaurants, bars and cafes, by way of imposing minimum prices to be charged to their customers, (ii) monitored whether distributors comply with said prices, and (iii) in cases of non-compliance retaliated by removing financial incentives and/or refused to supply products, and that such conduct could amount to resale price maintenance (RPM) and accordingly imposed the fine.

Super Bock appealed the decision, arguing that the Portuguese authority failed to demonstrate (i) the existence of an agreement and (ii) that the conduct in question was sufficiently harmful. The Lisbon Court of Appeal referred the case to the European Court of Justice (ECJ), seeking guidance on, among other things, (i) whether the concept of 'restriction of competition by object' is capable of covering – and, if so, under what conditions – a vertical agreement fixing minimum resale prices, and (ii) the concept of 'agreement' where minimum resale prices are imposed by the supplier on its distributors.

Judgement of the ECJ

(i) The concept of 'a restriction of competition by object'

The referring court asked whether RPM constitutes a restriction 'by object' in itself such that the authority need not examine the alleged conduct's effects. The ECJ held that *'the concepts of "hardcore restrictions" and "restriction by object" are not conceptually interchangeable and do not necessarily overlap'* and that *'it is necessary to examine restrictions falling outside that exemption, on a case-by-case basis, with regard to Article 101(1) TFEU'*.¹

On this point, the ECJ decided that a vertical agreement fixing minimum resale prices may only constitute a by object restriction if such agreement reveals a sufficient

1 Super Bock decision of the ECJ dated 29 June 2023 (C-221/22) para. 41.

degree of harm to competition (*that it may be found that there is no need to examine their effects*²), taking into account the nature of its terms, the objectives that it seeks to attain and all of the factors that characterise the economic and legal context of which it forms part.

(ii) The 'agreement' criteria

The referring court sought clarification of the concept of 'agreement' (whether Article 101(1) Treaty on the Functioning of the European Union (TFEU) must be interpreted as meaning that there is an 'agreement' within the meaning of that Article where a supplier imposes on its distributors minimum resale prices of the products that it markets). The ECJ referred to the *Visma* decision and provided that it suffices for undertakings to have expressed their joint intention to conduct themselves on the market in a specific way.³ Accordingly, the ECJ pointed that an agreement cannot be based *'on a statement of a purely unilateral policy of one party to a contract for distribution'*.⁴ On this point, the ECJ stated that a 'concurrence of wills' must be established regardless of the form in which that concurrence is expressed. The ECJ stated *'[t]hat concurrence of the parties' wills may be shown from the terms of the distribution contract at issue, ... as well as from the conduct of the parties and, in particular, from any explicit or tacit acquiescence on the part of the distributors to an invitation to comply with minimum resale prices'*.⁵

In relation to the case at hand, the ECJ pointed out (on the reading of the findings of fact made by the referring court) that the fact that a supplier regularly transmits to distributors lists indicating the minimum prices that it has determined and the distribution margins, as well as the fact that it asks them to comply with those prices, which it monitors, on pain of retaliatory measures and at the risk, in the event of non-compliance with those measures, of the application of negative distribution margins, are elements from

which it maybe concluded that that supplier seeks to impose minimum resale prices on its distributors.⁶

When asked about the proof of the existence of an 'agreement', the ECJ clarified that an agreement may be established in the absence of direct evidence and on the basis of *'objective and consistent indicia from which the existence of such an agreement may be inferred'*⁷



The Turkish Competition Board's Practice on RPM

The Board has a somewhat inconsistent approach when it comes to RPM in the sense that in its precedents, the Board (i) adopts a by object approach and there is considerable level of economic and context analysis including price analyses,⁸ or that (ii) it adopts a formalistic by object approach and there is little to no context analysis.⁹ On this note, recent approach of the administrative courts should also be taken into consideration since courts have annulled decisions on the grounds that the Board did not conduct a substantially adequate analysis and was content with the "restriction by object" tag while the Board was expected to conduct a thorough analysis (especially by way of considering market outcomes) demonstrating that the conduct in question is sufficiently harmful.¹⁰

As for the 'agreement' criteria, the Board has laid out in its Poultry decision that concurrence of wills between parties must be established to speak of an agreement.¹¹

2 Super Bock decision of the ECJ dated 29 June 2023 (C-221/22) paras 31–34.

3 *Visma Enterprise* decision of the ECJ dated 18 November 2021 (C 306/20) para. 94.

4 Super Bock decision of the ECJ dated 29 June 2023 (C-221/22) para. 48.

5 Super Bock decision of the ECJ dated 29 June 2023 (C-221/22) para. 50.

6 Super Bock decision of the ECJ dated 29 June 2023 (C-221/22) para. 52.

7 Super Bock decision of the ECJ dated 29 June 2023 (C-221/22) paras 57–58.

8 See for example, the Board's *Adidas* decision (22-18/300-133, 21.04.2022), *Groupe SEB* decision (21-11/154-63, 04.03.2021); *Fuel Oil* decision (20-14/192-98, 12.03.2020); *Baymak* decision (20-16/232-113, 26.3.2020); *Sony* decision (18-44/703-345, 22.11.2018); *Aygaz* decision (16-39/659-294, 16.11.2016); *Toros Gübre* decision (11-04/64-26, 19.01.2011); *Kütaş Teekanne* decision (06-59/773-226, 24.08.2006).

9 See for example, the Board's *Reckitt Benckiser* decision (13-36/468-204, 13.06.2013).

10 Ankara Regional Administrative Court 8th Administrative Chamber's *Henkel* decision E. 2021/1300, K. 2021/1241 T. 09.09.2021. The Council of State's *Henkel* decision E. 2021/969 K. 2021/2654 T. 06.07.2021; the 13th Administrative Chamber of the Council of State's decision E.2021/4683, K.2022/1815 T. 21.04.2022.

11 The Board's *Poultry* decision (25.11.2009, 09-57/1393-362), para. 2460.

Conclusion

The ECJ's Super Bock decision is of great importance in the sense that it clearly lays out and confirms the approach of ECJ that EU competition authorities are obliged to demonstrate sufficient harm to competition, taking into account the economic and legal context, of certain conduct for that conduct to be categorised as a violation. This shows the ECJ moving away from a rather stricter framework of object and laying rigid formalism in RPM practices to rest.

Because Türkiye's legal framework on RPM is akin to and closely modelled on Article 101 of the TFEU, and considering that the Authority closely follows developments in EU, the ECJ's Super Bock decision is sure to influence future Turkish Competition Board's decisions, possibly in the form of increasing economic and legal context analyses in RPM cases, and hopefully, the concept of an agreement will not be disregarded by treating certain behaviours as presumption indicators of a violation.



• SUPPLY CHAIN / DISTRIBUTION

The Turkish Competition Authority does not tolerate RPM practices – Recent Decisions

by Gülçin Dere, Sabiha Ulusoy

The Board's decision dated 9 September 2021 and numbered 21-42/617-M initiated a full-fledged investigation against (i) Arçelik Pazarlama AŞ (**Arçelik**), (ii) BSH Ev Aletleri San. ve Tic. AŞ (**BSH**), (iii) Samsung Electronics İstanbul Paz. ve Tic. Ltd. Şti. (**Samsung Türkiye**), (iv) LG Electronics Tic. AŞ (**LG**), (v) SVS Dayanıklı Tük. Mall. Tic. AŞ (**SVS**), and (vi) Gürses Kurumsal Tedarik ve Elektronik Tic. Paz. AŞ, (**Gürses Kurumsal**).

The main allegations behind the full-fledged investigation were resale price maintenance and prohibition of online sales. The Board considers RPM practices as hardcore violations and undertakes an in-depth analysis of such behaviours within the scope of by object restriction. In recent years, the Board has pursued strong enforcement in such cases. As such, when monitoring the Board's approach to RPM practices, the recent investigations against these six entities were quite remarkable.

The first oral hearing was held for LG and SVS on 26 July 2023. The second and third oral hearings were held for Arçelik and Samsung Türkiye on 1 and 2 August 2023. All the oral defence hearings were public with online access. The defence arguments were highly informative and included comprehensive discussions on the ECJ *Super Bock Bebidas*, *Visma Enterprise* and *Groupement des Cartes Bancaires* cases as well as the Paris Court of Appeal's *Apple* decision.

The Board publicly announced its decisions on 9 August 2023. The Board decided that LG, SVS, Samsung Türkiye and Arçelik violated Article 4 of Law No. 4054, and imposed monetary fines on each entity.

As for LG, a monetary fine of TRY 33,870,305.21 was imposed based on its 2021 annual gross revenue. The base fine is determined on the basis of 'other violations' (a range between 0.5% and 3%). As for Arçelik, a monetary fine of TRY 365,379,161.06 was imposed based on its 2021 annual gross revenue, with a base fine

determined on the basis of 'other violations' (a range between 0.5% and 3%). During the investigation phase, the part of the investigation carried out against Arçelik concerning the prohibition of online sales was closed since Arçelik submitted certain commitments to the Board regarding such practices.¹² However, the Board continued its review of RPM practices and imposed monetary fine due to this violation.

BSH also submitted certain commitments to the Board concerning the prohibition of online sales. The Board closed the investigation against BSH in terms of the part of the investigation concerning the prohibition of online sales following BSH's commitments.¹³ The Board later decided to close the other part of the investigation concerning the remaining allegations, concluding that (i) there was not any information and documents proving RPM violation at BSH's end, and (ii) BSH did not violate Article 4 of Law No. 4054 by way of engaging in customer and region allocation.¹⁴

As for SVS and Samsung Türkiye, respective monetary fines were TRY 1,984,907.00 and TRY 227,161,142.04 respectively and were imposed based on their 2021 annual gross revenues. The base fines are determined on the basis of 'other violations' (a range between 0.5% and 3%).

One of the most important remarks regarding the determination of the monetary fine is that the Board took the entities' 2021 annual gross revenues rather than 2022 revenues since the oral hearing meetings were postponed due to the earthquake disaster in Türkiye. It also to be noted that the Board does not show tolerance toward RPM practices and seems to continue with close scrutiny leading to enforcement. The details of the Board's assessment on this RPM case will be available once the reasoned decisions are published. However, it became a common consideration that the entities must make their best efforts to avoid any anti-competitive behaviours which might result in maintenance of the resale prices.



• LABOUR MARKET

Turkish Watchdog sheds further light on no-poaching agreements

by Büşra Aktüre, Lara Akça

On 2 August 2023, the Authority has announced a milestone decision (**Decision**),¹⁵ where it imposed a total of TRY 151 million on 16 undertakings active in labour market due to their involvement in gentleman's agreements.¹⁶

The labour market is only very recently considered to be one of the growing areas of interest in Turkish competition law and has also been under close scrutiny of the Board. Accordingly, in 2022, the Board's first ever decision¹⁷ where no-poaching agreements were considered to contradict with Turkish competition law in the same way as other agreements that may be found to restrict competition was published. Almost a year later, the Authority announced this Decision that is its second decision concerning the labour market in order to provide further clearance about its stance regarding no-poaching agreements.

The investigation subject to this decision was firstly initiated by the Authority in April 2021, involving a total of 48 undertakings working in various sectors, such as Google, Vodafone, Migros, Çiçeksepeti, NTV and Vivense. However, 11 out of these 48 undertakings have decided to pursue the settlement process with the TCA resulting the investigation to be closed for

¹² See the Board's decision dated 8 September 2022 and numbered 22-41/580-240.

¹³ See the Board's decision dated 8 September 2022 and numbered 22-41/579-239.

¹⁴ See the Board's decision dated 15 December 2022 and numbered 22-55/864-358.

¹⁵ For the Board's announcement please see <https://www.rekabet.gov.tr/en/Guncel/investigation-conducted-about-certain-un-32962c9bfb31ee118ec500505685da39>

¹⁶ The Board's No-Poaching Decision (23-34/649-218, 26.07.2023)

¹⁷ The Board's Private Health Institutions decision (22-10/152-62, 24.02.2022).

them. Furthermore, another 21 undertakings were not imposed an administrative monetary fine because no violation was found regarding the allegations of no-poaching agreements involving these 21 undertakings. Thus, 11 undertakings ended up being fined for a total of 5 million euros for making no poaching agreements to prevent hiring each other's employees or limit the mobility of employees. The fined undertakings include Türkiye's one of the largest clothing retailer LC Waikiki, which faced the highest fine of TRY 60 million (approx. EUR 2 million), followed by one of the leading telecommunications company Turk Telekom's TRY 41 million (approx. EUR 1.4 million) and the Turkish footwear manufacturer and retailer Flo's TRY 18 million (approx. EUR 600,000).

It is important to underline the fact that this amount of EUR 5 million total fine is surprisingly low, considering the significant number of undertakings involved in the investigation and given the magnitude of their total turnover. There is no doubt that the reasoned decision will shed light on the Authority's method of turnover calculation as well as the approach vis-à-vis no-poaching agreements.

All in all, it is evident that the Authority puts increasing emphasis on the labour markets, as it issued its first no sanctions on this matter in 2022, when it found several private hospitals agreed not to poach each other's doctors. The latest no poaching Decision further confirms this understanding, as the scope of the investigation was very extensive, covering many companies that are not even considered as competitors in the output market.

The decision appears to remain as a hot topic of debate for a while. It is fair to reiterate that the Authority has indeed put the labour market into close scrutiny in the last years as its announcement itself states that the competitive structure of labour markets may be distorted by no-poaching agreements.



• ENFORCEMENT

Companies fined due to their behaviour during on-site inspections

by Büşra Aktüre, İrem Deyneli

The Authority has recently announced two important decisions in relation to the hindering of on-site inspections, in both of which it continued its strict approach regarding the undertaking officials' behaviour during dawn raids.

The *Union of Turkish Engineers and Architects Chambers (TEAA)* decision numbered 22-48/698-296 and dated 20 October 2022 (**TEAA Decision**) concerns the on-site inspection carried out in the Alanya Branch of the TEAA (**TEEA Alanya**) within the scope of the preliminary investigation against it. The Authority officials focused on the personal mobile devices and email accounts of TEEA Alanya officials within the scope of the preliminary investigation carried out against TEEA Alanya, and one of the undertaking officials refused to comply with the Authority officials' request.

Under the authority granted by Article 16 of the Law No. 4054, Authority officials are entitled to conduct such examinations at an undertaking's premises and are authorised to inspect all kinds of data and documents belonging to the undertaking. In the event that the undertaking's officials do not comply with such request, the Law No. 4054 stipulates that a fine of 0.005% of the annual gross revenue of the undertaking may be imposed.

As the TEEA Alanya officials refused to provide the requested access and assistance to the officials, the Board decided that the on-site inspection carried

out at TEEA Alanya was prevented or made difficult. More specifically, the TEEA Decision is also of great importance as it analyses the concept of 'association of undertakings' and whether TEEA Alanya constitutes an undertaking. The Turkish Competition Board (**Board**) concluded that TEEA Alanya is a member of the TEEA, and according to the TEEA Regulation it does not qualify as an independent legal entity. Thus, the Board noted that the TEEA should be imposed an administrative fine as TEEA Alanya branch does not qualify as a separate legal entity.

While the majority of the Board members decided to hold TEEA liable for the TEEA Alanya branch officials' refusal, there was a dissenting opinion emphasising that the act of hindering an on-site inspection should be attributed to the individual who committed the violation rather than attributing the violation to the entire TEEA. Additionally, the dissenting opinion raises concerns about the potential implications of attributing such violations to the entire undertaking as, holding the entire undertaking liable would create uncertainty and unpredictability for undertakings and would disrupt the fundamental principles of legal certainty.

On a separate note, the Board also published the *Horizon/Pacific Decision*, numbered 22-53/797-327 and dated 1 December 2022 (**Horizon/Pasifik Decision**), in which it did not tolerate the deletion of WhatsApp correspondence during an on-site inspection. The *Horizon/Pasifik Decision* concerns the on-site inspection conducted on Hızlı Tüketim AŞ. (**Horizon**) and Pasifik Tüketim Ürünleri Satış ve Ticaret A.Ş. (**Pasifik**) to investigate potential violations of the Law No. 4054. The on-site inspection began at 9.20 am and the legal department of the undertaking sent an email to personnel, saying that they should not delete any correspondence and/or documents as the Authority officials were conducting an inspection. However, the intelligence programme of the Authority later discovered that certain WhatsApp correspondence and groups were deleted after the on-site inspection began.

The Board emphasised the sudden and unannounced nature of inspections and also made references to the previous case law in this regard. Accordingly, in the Council of State 13th Chamber's E. 2008/5890 K. 2013/847 decision, it was found that the undertaking had hindered the on-site inspection as it caused delays and deleted a folder. Similarly, in the Ankara 13th Administrative Court decision numbered E. 2013/1598

K. 2014/1495, the court upheld the Board decision where it was decided that the on-site inspection was hindered by the deletion of certain computer documents during the inspection. Upon assessing the evidence and the mentioned case law of the local courts, the Board concluded that both Horizon and Pasifik should be penalised separately, with a fine of 0.005% of each company's annual gross revenue.

In conclusion, the Board seems to continue its no-tolerance policy when it comes to hindrances to on-site inspections. These recent decisions demonstrate the Board's strict approach toward obstructing inspections and its commitment to ensuring fair competition practices.



• MERGERS & ACQUISITIONS

To jump the gun or not the jump the gun?

European Commission's Illumina / GRAIL case

by Gamze Boran, Sabiha Ulusoy, Sena Sasani

The Commission has recently issued an important decision on violation of the standstill obligation (so called gun-jumping) under its merger control rules, imposing monetary fines on a genetic testing company, Illumina, and a cancer test-maker, GRAIL, with record fines of EUR 432 million and EUR 1,000, respectively, for closing their transaction before waiting for the Commission's clearance decision on the deal.



Background to the Illumina / GRAIL case

Similar to the rules under the Turkish merger control regime, there is a standstill obligation for parties to a transaction that is subject to competition clearance from the Commission, which means that the parties are under the obligation not to close or implement the relevant transaction in any way before the clearance is granted.

In the Illumina / GRAIL case, the Commission launched an in-depth investigation into the transaction for the acquisition of GRAIL by Illumina in July 2021, during which the parties were under the standstill obligation until clearance. However, in August 2021 while the Commission's investigation was still ongoing, Illumina made a public announcement confirming that the acquisition of GRAIL had been completed. In other words, the parties had already signed all the documents required to close the transaction, and GRAIL had also merged with two subsidiaries of Illumina before the Commission completed its review.

The Commission ultimately prohibited the transaction in September 2022 as it would result in certain significant anti-competitive effects such as impediment of the innovation and reduction of choice in the relevant emerging market. The Commission later found that both Illumina and GRAIL deliberately violated the standstill obligation in the EU Merger Regulation (**EUMR**) and it issued a record fine to Illumina for closing the transaction before clearance. Notably, the Commission considered that Illumina intentionally jumped the gun in that it considered the potential outcomes of closing the transaction and which would result in a gun-jumping fine, against the risk of having to pay a significant break-up fee in case it failed to acquire GRAIL, and the gains to be received from the GRAIL in early implementation of the deal; and as a result, the Commission imposed

the highest fine possible under the EUMR. Illumina had decided to proceed with the implementation of the transaction and completed the acquisition before the Commission's final decision. The Commission therefore imposed a ground-breaking fine of EUR 432 million on Illumina which took into account the severity of the violation and Illumina's intentional engagement in the violation.

Moreover, the Commission found that the target, GRAIL was also aware of the possible consequences of breaching the standstill obligation, yet actively participated in the violation despite being aware of the Commission's ongoing investigation. Accordingly, the Commission also imposed a monetary fine on GRAIL – a symbolic EUR 1,000. This decision was the first time the Commission imposed a monetary fine on the target company for gun-jumping.

The Turkish Competition Board's stance on gun-jumping violations

It is worth noting that the Board attaches great importance to gun-jumping violations and handles each case with a meticulous approach.¹⁸

The Turkish merger rules are generally parallel with the EU merger rules, and similar to the EU rules, parties are under a standstill obligation in case there is a notifiable transaction, and if such transaction is implemented without prior approval of the Board, by either closing the transaction before obtaining the Board's approval or not notifying at all, the parties would be deemed to have violated the standstill obligation. An unapproved notifiable transaction is invalid unless and until it is cleared by the Board. Moreover, pursuant to Articles 11 and 16 of Law No. 4054, the Board will impose a fixed administrative monetary fine for any violation of the suspension requirement (i.e. closing a notifiable transaction without clearance or not notifying a notifiable transaction at all).

The amount of the administrative fine for violation of the suspension requirement is calculated based on a fixed rate of 0.1% of the relevant party's turnover in Türkiye in the fiscal year preceding the decision to fine. Law No. 4054 requires that administrative monetary fines for gun-jumping are imposed on (i) each of the parties in merger

¹⁸ Recent examples of gun-jumping cases where the Board issued fines are: IONITY decision (28.07.2020; 20-36/483-211); DSG/Electro World (05.09.2013; 13-50/717-304); Zhejiang Longsheng/ Dystar Colours (02.06.2011; 11-33/723-226)

transactions and (ii) the acquiring party in acquisition transactions. It is important to note that the Turkish legislation does not include any provision envisaging a monetary fine to be imposed on the target entities (although in the past the Board made a few decisions where it ruled to the contrary, before amendments were made to Law No. 4054 Law in 2008).

In addition, if the transaction in question results in any anti-competitive effects in Türkiye, the Board is also entitled to impose a monetary fine on the parties of up to 10% of the parties' annual Turkish turnover. In such a case, the transaction's target entity can also be subject to a monetary fine as in the Illumina / GRAIL case. The Board can also take interim measures and/or, among other measures, order the parties to unwind the transaction. However, there is no Board case law transactions that were closed without the Board's approval and were also deemed anti-competitive. Accordingly, it would be safe to assume that the Commission's approach in unwinding the Illumina / GRAIL transaction will also be a precedent for the Board in its approach in future cases.



• DATA PROTECTION

The European Court of Justice's Meta ruling clarifies the intersection between competition and data protection law

by Deniz Benli

On 4 July 2023, the ECJ ruled that the competition authorities in the European Union can identify a violation of the data protection rules in the context of the examination of an undertaking's abuse of a dominant position. The decision clarifies the ECJ's position regarding the debate on the integration of competition law and data protection and reaffirms the competences of competition and data protection authorities.

Background to the decision

In a much-debated decision in 2019, the German Federal Cartel Office (FCO) ruled that Meta (formerly



Facebook) abused its dominant position in the German market for online social networks by processing and combining user data across Facebook and other online services belonging to Facebook (including Instagram and WhatsApp) without the users' consent. The FCO based its decision on the contention that Meta's terms and conditions were not consistent with the General Data Protection Regulation (GDPR) as the processing of data across multiple mediums was done with no effective consent from users. Meta sought to block the order by appealing to German courts, leading to the Higher Regional Court of Düsseldorf to refer to the ECJ, inter alia, the question of whether national competition authorities can assess compliance with the GDPR in the context of a competition law investigation.

The FCO's Meta decision was a leading example of a more integrationist approach to competition and privacy concerns. This approach adopts a more novel definition of consumer harm, where both price and non-price factors (such as control over one's personal information) contribute to consumer welfare. The FCO's Meta decision was criticised by some commentators who argued that competition law was not a general tool for solving problems that relate to other areas of law.

The ECJ's verdict

The ECJ has upheld the FCO's position by clearly stating that in the context of the examination of an abuse of a dominant position by an undertaking, it may be necessary for national competition authorities to examine whether the conduct in question complies with rules other than those relating to competition law, such as data protection rules. The ECJ further emphasises the role of personal data as an important parameter of competition in the digital economy. According to the decision, this alone is enough reason not to exclude the rules of personal data

19 The Board's Mauna/A&E Group decision dated 29.06.2006 and numbered 06-46/586-159, and Swedish Match decision dated 03.08.2000 and numbered 00-29/309-176, Kiler/Canerler decision dated 04.05.2006 and numbered 06-32/392-102

protection from the legal framework to be taken into consideration by competition authorities.

The decision is also valuable as it clarifies the relationship between competition law and data protection law and reaffirms the sphere of competence of the respective regulatory authorities. The ECJ states that by merely noting the non-compliance of a data-processing operation with the GDPR in establishing an abuse of a dominant position and by imposing measures derived from competition law to put an end to that abuse, competition authorities are not to monitor or enforce the application of the GDPR. Moreover, competition authorities must consult and cooperate sincerely with data protection authorities when assessing and applying the GDPR in order to ensure consistent application of its rules

What's next?

The ECJ's Meta decision opens the door for competition authorities to take data protection rules into consideration when assessing whether competition law is breached. The decision opens the way for an extensive interpretation where similar considerations can apply to other areas of law, such as consumer protection. Therefore, there will likely be other cases at the intersection of data protection and competition law

in the future requiring greater coordination between the respective regulatory authorities.

As to the situation in Türkiye, the Authority will no doubt be at the forefront of this relatively novel enforcement angle. In fact, the Authority is no stranger to operating at the intersection of competition law and data protection. Following an investigation launched on 11 January 2021, the Authority ruled that Meta's practice of combining user data collected from Facebook, Instagram and WhatsApp would be an abuse of Meta's dominant position in the markets for social network services for personal purposes, consumer communication services and online display advertising, leading to the exclusion of its competitors from the market. As a result, the Authority imposed an administrative fine on Meta and ordered it to end its exclusionary data-processing practices. Previously, in its 2021 decision against DSM Grup Danışmanlık İletişim ve Satış Ticaret A.Ş. (owner of Trendyol, a leading B2C online marketplace), the Authority held that Trendyol abused its dominant position by using data gathered from third-party sellers to self-preference its own retail offering. The Authority has also proposed new amendments to the Turkish competition law, which include new rules on how data will be collected and used transparently in digital markets. Therefore, the ECJ's Meta ruling will no doubt provide valuable guidance and encouragement to the Authority's existing efforts in this sphere.

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