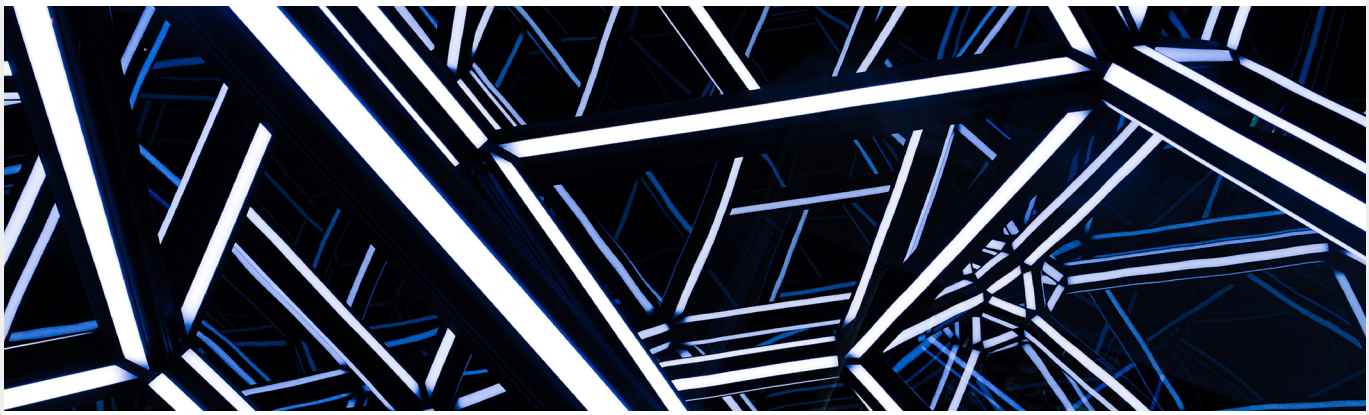
Turkish Competition Law Newsletter

2022 Fall Issue



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Introduction

Since its first establishment back in 1994, the Turkish Competition Authority ("**TCA**") has been very active both on the enforcement and legislation side. It initiates multiple preliminary and full-fledged investigations covering various allegations every year, examines a significant number of mergers and acquisitions (approx. 300 cases in 2021), regularly conducts sector reports and closely follows global trends to keep its legislation and practice up-to-date. Indeed, Turkey's competition laws are frequently being updated to address the needs of a changing economic environment and to harmonise Turkey's competition legislation with that of the EU. Recently, inspired by the leading competition agencies in the world, the TCA has been increasingly focusing on digital markets and tech companies, which results with reformative, novel and somewhat disputable steps taken by the TCA.

In this regard, this Issue is intended to provide brief summaries to its recipients on recent developments, particularly on digitalization and other hot topics under Turkish competition law that we think could easily concern global and national companies operating in Turkish geographic markets.

Our competition and antitrust department regularly reports on competition law developments in our quarterly published Turkish Competition Law Newsletter. In this Issue, you will find information on (i) the recently introduced technology undertaking concept and the relevant case law, (ii) reformative steps amending the main competition legislation in line with the Digital Markets Act, (iii) a more rigid approach on the ancillary restraints in M&A cases, (iv) the potential impact of the new VBER in Turkey and diverging vertical matters between the EU and Turkey, (v) increasing scrutiny in labour markets, (vi) commitment procedure as a useful tool and the recent case law, and (vii) the settlement mechanism as an incentive for companies to come clean for efficiency purposes.

We hope you will find our newsletter useful. Please feel free to contact us at tturan@paksoy.av.tr if you need further information on Turkish competition law developments.

Togan Turan

A novel concept under the Turkish merger control regime: the Technology Undertaking Exception

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***") entered into force on 4 May, 2022 and introduced a new merger control regime for "technology undertakings". The Turkish Competition Authority ("**TCA**") publicly confirmed that the objective of the technology undertaking exception was to catch killer acquisitions.

In this regard, Pursuant to this Amendment Communiqué, "the threshold that requires a turnover more than TL 250 million generated in Turkey" will not be sought for *target companies* (i) if they qualify as "technology undertakings" (ii) that are active in the Turkish geographical market or have R&D activities in Turkey or provide services to users in Turkey. In other words, if the target company in a given transaction falls within the scope of the aforementioned legislation, the transaction may be notifiable in Turkey, regardless of the target's turnover figure.

Too broad a definition: does the legislation efficiently catch killer acquisitions?

A technology undertaking is defined quite broadly in the relevant legislation as "*undertakings or related assets operating in the fields of:*

- *digital platforms*
- *software and game software*
- *financial technologies*
- *biotechnology*
- *pharmacology*
- *agrochemicals*
- *health technologies"*

The TCA has not yet published guidelines on how to interpret this definition. Therefore, the technology undertaking concept contains a lot of ambiguity at the moment. This ambiguity is also because the above definition literally covers *all* undertakings or related assets operating in the aforementioned fields. As the digital age evolves, companies in almost all sectors develop and utilise certain technology during the course of their business (using their own software, etc.). Therefore, any company active in financial technologies, biotechnology, pharmacology, agrochemicals and health technologies could simply fall within the scope of this technology even if such a company were not a start-up and the transaction could not -in any way- be considered as a killer acquisition.

In this regard, considering the increasing use of technology in almost all aspects of modern business, such a definition is disputable in terms of efficiently serving the objective of the amendment legislation that was to detect killer acquisitions.

Limited Case Law: does recent case law shed light on the matter?

Currently, very few precedents signal the Turkish Competition Board's ("**TCB**") interpretation of the technology undertaking definition: more specifically, only four (4) decisions are available through publicly available sources. Below is a brief summary of the target companies' activities in all four precedents:

- In *Cinven/IFGL*[1], the TCB noted, in the reasoned decision, that the target – IFGL- generated its turnover in Turkey basically from a third party distributor, which sells single premium investment products. A small part of its activities in the life insurance sector in Turkey involved services to its customers through digital platforms. The TCB accordingly concluded that the IFGL was a technology undertaking, based on its limited activities on digital platforms.
- In *CD&R/Covetrus*[2], the TCB explicitly evaluated that the target company – Covetrus- was active in "health technologies" and "pharmacology" through its pharmacology and software-related activities for animal medication. Accordingly, the TCB concluded that Covetrus was a technology

1 The TCB's *Cinven* decision dated 18.05.2022 and numbered 22-23/372-1547.

2 The TCB's *Covetrus decision dated 07.07.2022 and numbered 22-32/512-209.*

undertaking and that the transaction was subject to clearance in Turkey.

- In *Providence/Airties*[3], the TCB considered Airties to be a technology undertaking, as it was a provider of residential WiFi solutions for broadband operators and related software services.
- In *Astorg/Cardon Pharma*[4], the TCB found that the target was active in -pharmacology through its manufacturing activities concerning Active Pharmaceutical Ingredients (APIs) and ready-to-use drugs and therefore the target was a technology undertaking.

Against the foregoing, the TCB does not prepare and publish the reasoned version of "out-of-scope decisions", in which the TCB did not find the target companies as a "technology undertaking" and, rather, concluded that the transaction had not triggered the relevant thresholds. Only a one-line summary of those decisions are made available for online review. This practice further contributes to the existing ambiguity, as it becomes fairly difficult to predict the TCB's reasoning as well as the interpretation of the definition in terms of the relevant target companies' activities that do not fall within the scope of the definition.

All in all, as the digital age evolves, companies in almost all sectors develop and utilise certain technology during the course of their business (using their own software etc.). In this regard, the amended legislation creates uncertainty for companies under these circumstances and evidently requires an in-depth, case-by-case analysis.

Büşra Aktüre
Lara Akça

3 The TCB's *Airties decision dated 02.06.2022 and numbered 22-25/403-167.*

4 The TCB's *Astorg dated 02.06.2022 and numbered 22-25/*398-164.

Is winter coming for big techs in Turkish digital markets? Ex-ante market rules for fair and contestable digital markets in Turkey are on the way

Turkish digital markets have been experiencing hot days for a while, as a result of the recent amendments on Law No. 6563 on the Regulation of Electronic Commerce and the Distance Contracts Regulation, which are more sector specific, i.e. amending the obligations of electronic intermediary service providers.

However, it seems that certain big techs would not enjoy the hot summer days, as the recent amendment bill (the "**Draft Bill**") on Law No. 4054 on the Protection of Competition ("***Law No. 4054***") presented by the TCA to the public, is chasing other big techs, defined as the "*undertaking with significant market power*" (the "**Gatekeepers**") in the Draft Bill, providing core platform services.

The Draft Bill would be the most comprehensive amendment to Law No. 4054 since its entry into force, aiming to capture the latest developments with respect to competition in digital markets, in line with the recent amendments to competition laws in different jurisdictions, such as the Digital Markets Act by the European Union (the "**DMA**") and German anti-trust law amendment ("**GWB-Digitalisierungsgesetz**" – "**GWB Digitalisation Act**").

The Draft Bill is *hybrid* in nature, as it adopts the ex-ante approach brought by the DMA, as well as recognizing the discretionary powers of the TCA to designate Gatekeepers through secondary legislation, such as the communiqué, and their respective obligations with the TCB's decisions.

There are also controversial issues, as the Draft Bill prefers the concept of "*fair"* markets in certain amended parts, which is not embraced by the current approach in Law No. 4054, and would trigger fundamental discussions with respect to the purpose of Law No. 4054.

The Draft Bill provides new definitions for Turkish digital markets and significant obligations on the Gatekeepers, as well as new sanctions, as explained below:

Designation as a Gatekeeper as per the Draft Bill

The Draft Bill's scope of application is limited to a number of core platform services provided by Gatekeepers to end users and/or business users resident in Turkey, regardless of whether these Gatekeepers are resident in Turkey, where the TCA deems that the competition restrictions are the most evident. Accordingly, the Draft Bill defines core platform services, in parallel with the DMA, as online intermediation services, online search engines, online social networking services, etc.

A Gatekeeper is defined in the Draft Bill as an undertaking (*i) that provides one or more core platform services by having a certain scale, (ii) that has a significant impact on access to end users or on the activities of business users and (iii) is capable of enjoying an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position.*

An undertaking may be designated on the basis of certain quantitative and qualitative thresholds, which will be determined by secondary legislation. The quantitative thresholds include various criteria, such as the annual gross income of the undertaking and the number of end users or the number of business users, whereas the qualitative thresholds are based on network effects, data ownership, economies of scale and scope, switching costs, vertically integrated and conglomerate structure, etc. The criteria and methodology for designation as a Gatekeeper is a mixture of the DMA and GWB Digitalisation Act, as the quantitative thresholds will be determined through secondary legislation by the TCA.

Significant Obligations for Gatekeepers

Article 6 A of the Draft Bill stipulates a clear list of "*Do's and Don'ts*" for Gatekeepers. The Draft Bill prohibits certain practices such as (i) self-preferencing, (ii) using non-public data for competing with business users, (iii) tying the goods and services with any other goods or services, (iv) making users log in or register with another core platform service provided by the Gatekeeper, (v) restricting the business users from working with the Gatekeeper's rivals and (vi) discriminating business users by presenting unfair and unreasonable conditions. On the other hand, it brings new obligations for Gatekeepers, such as (i) enabling the business users to have access the data shared by business users themselves or by end users, or generated within the scope of their activities on the relevant platform, or (ii) procuring the interoperability of core platform services or ancillary services, effectively and free of charge.

In addition to the above, the undertakings that provide at least one core platform service, regardless of whether resident in Turkey, should fulfil the technical and administrative requirements to enable the TCA to conduct efficient dawn raids. These ex-ante obligations are posing the DMA effect in Turkish digital markets as well.

Sanctions

The Draft Bill increases the threshold for administrative fines in line with the DMA - up to 20% of the gross annual income of the concerned undertaking, which for competition infringements is currently 10% in Law No. 4054.

The Draft Bill also provides administrative fines for non-compliance with formalities during the procedure for designation as a Gatekeeper, such as providing incomplete, incorrect or misleading information/ document in the applications, or not notifying that the qualitative thresholds are exceeded.

If the TCB detects that the Gatekeeper has infringed the obligations listed under article 6 A of the Draft Bill for at least two times within the last five years, it may prohibit mergers and acquisitions by the Gatekeeper up to five years, once the Draft Bill is adopted.

Finally, the Draft Bill brings significant change for the procedure, imposing structural remedies, as the TCA may impose a structural remedy on the Gatekeeper without rendering a final decision on imposing a behavioural remedy.

Conclusion

The TCA follows the global trend by emphasizing that digital markets experience competition problems arising from the allegedly anticompetitive conduct of Gatekeepers and from structural issues in the digital markets, and ex-post intervention tools are insufficient to catch all the competition problems in digital markets in a timely manner. Therefore, the Draft Bill mostly adopts the DMA approach for the definitions and obligations, but also prefers a *hybrid* model by embracing the TCA's discretionary powers. Time will tell whether the Gatekeepers will continue to hold the doors, as digital Hodors.

Gülçin Dere
Beritan Arık

Ancillary restraints in the spotlight again?

The TCB's recent focus within the scope of evaluation of merger control filings draws attention on assessing of ancillary restraints, a matter that has remained "out of sight" for over ten years.

Ancillary restraints – in short

Ancillary restraints are restrictions such as non-compete, non-solicit and/or confidentiality obligations imposed on the seller by the buyer (and in some cases, *vice versa*) for the purposes of a merger or acquisition transaction, aiming to ensure that the relevant party benefits economically from the transaction (such as a buyer. as a new entrant in the relevant markets. against a seller's established customer loyalty and know-how).

These obligations need to be directly related to and necessary for the implementation of the transaction and to fully achieving the efficiency expected from the concentration in order for them to be deemed "ancillary restraints" of the transaction and be permissible within the scope of Turkish competition law. Otherwise, such restrictions could be within the scope of Article 4 of Law No. 4054, which prohibits all types of anticompetitive agreements, or Article 6, which prohibits abuse of dominant position. In other words, non-compete (and similar obligations) to be imposed on the parties for the purposes of an M&A transaction may constitute a breach of competition law if such obligations cannot be considered as ancillary restraints of the relevant transaction.

Evaluation of ancillary restraints by the TCB – the regime throughout the years

Before Communiqué No. 2010/4 on Mergers and Acquisitions Requiring Board Approval ("**Communiqué No. 2010/4**"), the ancillary restraints were a hot-topic that was frequently dealt with by the TCB in terms of merger control. The Board *ex officio evaluated the non-compete and similar obligations in detail while assessing merger control notifications, and specifically set forth its assessment on these in its decisions.* There

were mainly cases where the TCB did not find the envisaged restraints proportionate or necessarily within the scope of the relevant transaction (*i.e.* they concluded that the non-compete (and/or similar obligation) could not be deemed to be an ancillary restraint), in which the TCB unconditionally cleared the transaction, but separately rendered its decision on the scope of the non-compete obligations[5]. Accordingly, if the parties chose not to comply with the limitations determined by the TCB (i.e. not to amend the non-compete and/or similar obligation in line with the TCB's decision), the TCB clearance decision was still valid for the transaction itself, but the parties carried the burden of exceeding the permissible boundaries of restraints, which may result in a breach of competition law, as explained above. That being said, the TCB did not have an established practice on the matter, as it did not follow the aforementioned approach in some cases[6] and had assessments in which it cleared the transaction conditionally, upon amendment of the relevant restrictions.

Article 13.5 of Communiqué No. 2010/4 introduced a new regime as for the evaluation of ancillary restraints by regulating that the TCB clearance decision should also cover the envisaged ancillary restraints in merger or acquisitions, and the responsibility of assessing whether the restrictive obligations were within the permissible scope would be borne by the parties[7]. Accordingly, for notifiable mergers and acquisitions, the parties were left with the choice of detailing the non-compete obligations to the TCA under the filing form along with their justifications, or simply remaining silent on this, which eventually led to a drastic decrease in the number of decisions that evaluated ancillary restraints within the scope of merger control.

Three recent decisions – what's new?

It seems that the TCB has recently redirected its focus on this matter. In its recent *Vinmar/Arısan*[8], upon the parties' request, the TCB conducted a detailed assessment on whether the non-compete and non-solicit obligations to be imposed on the seller could be considered ancillary restraints, within the scope of the relevant guidelines. The TCB eventually concluded that the transaction did not give rise to any competition concerns, but it did decide that the competitive restraints to be imposed on the seller were too broad to be considered as ancillary restrains. As such, despite the parties' detailed justifications on established customer loyalty and high level of know-how due to the nature of the respective markets, the TCB came to the conclusion that the term of the relevant non-compete and non-solicitations obligations must be limited to a 3-year term (rather than 5 years, as intended by the parties) and eventually decided to grant *conditional* clearance to the transaction despite the lack of competitive concerns, basing this conditional clearance solely on its evaluation of the non-compete obligation to be imposed post-transaction. Within this context, the validity of the clearance decision, and thus the transaction, was strictly linked to implementation of the requested amendments to the non-compete and non-solicitation obligations set out in the transaction agreements.

The TCB followed a similar approach in its *Adatıp/Lokman Hekim*[9] and *Checklas/LG Lastik*[10] decisions, showing that this approach is being

5 The TCB's *Ortadoğu/OTerminals decision dated* 26 November 2020 and numbered 20-51/708-316; *UCZ/Park Holding* decision dated 26 March 2014 numbered 14-12/221-97

6 The TCB's *USAŞ decision dated* 29 December 2006 and numbered 06-96/1225-370; *THY/DoCo* decision dated 29 December 2006 and numbered 06-96/1224-369; *AVM/Mfi decision dated 3 January 2008 numbered 08-01/4-3; Karbondioksit ve Kurubuz/Linde decision dated 6 July 2006 and numbered 06-47/647-181; Med-İlaç/Asaph decision dated 11 June 2007 and numbered 07-59/688-243.*

7 It is important to note that the parties must make the relevant assessment not only for notifiable transactions subject to TCB clearance but also for other transactions that do not trigger a mandatory merger control filing in Turkey.

8 The TCB's *Vinmar/Arısan decision dated 24 February 2022 and numbered 22-10/155-63 regarding the notification concerning the acquisition of sole control of Arısan Kimya Sanayi ve Ticaret Anonim Şirketi and Transol Arısan Kimya Sanayi ve Depolama Limited Şirketi by Vinmar group.*

9 The TCB's *Adatıp/Lokman Hekim decision dated 24 March 2022 and numbered 22-14/233-101 regarding the notification concerning the acquisition of sole control of Adatıp Sağlık Hizmetleri Ticaret Anonim Şirketi by Lokman Hekim Engürüsağ Sağlık Turizm Eğitim Hizmetleri ve İnşaat Taahhüt Anonim Şirketi.*

10 The TCB's *Checklas/LG Lastik decision dated 14 April 2022 numbered 22-17/286-130 regarding the notification concerning the acquisition of Checklas Otomotiv A.Ş. by LG Lastik Girişim A.Ş.*

established by the TCB as a general practice and should be taken into consideration while assessing ancillary restraints in mergers and acquisitions.[11]

Indeed, the TCB is entitled to conditionally approve a transaction under Article 14 of Communiqué No. 2010/4 if the parties opt to submit commitments on the transaction in question. That being said, it remains questionable whether the TCB may grant a conditional clearance *per se* upon requesting the amendment of ancillary restraints. There is no clear provision in Law No. 4054 or secondary legislation, and, according to the public records, the three recent decisions have not been taken to the courts for judicial review so far.

Conclusion – what to expect?

The consecutive TCB decisions that scrutinize the ancillary restraints in detail signal a new era in the evaluation of non-compete and similar obligations in merger and acquisition transactions from a competition law perspective. In line with the firm position of the TCB recently established in the abovementioned decisions, the risk assessment of the parties, in terms of ancillary restraints, becomes more crucial for M&A transactions, regardless whether or not they are notifiable in Turkey.

One may also reasonably expect administrative procedures against the said decisions, due to lack of legal grounds for a conditional clearance, which may swing the balance on the matter. In any event, there is no doubt that ancillary restraints will be under stricter TCB scrutiny in the near future.

Gamze Boran
Selen Toma

11 The TCB limited the duration of the non-compete and non-solicit obligations in *Vinmar/Arısan (3 years), Adatıp/Lokman Hekim (5 years) and Checklas/LG Lastik (3 years), while also limiting the scope of subjected persons in Checklas/LG Lastik.*

The new VBER and its potential impact in Turkey: the understandable confusion of global companies in their vertical activities in Turkey

Evaluation of Vertical Agreements under Turkish Competition Law

The European Commission's Vertical Block Exemption Regulation ("**VBER**") corresponds to Communiqué No. 2002/2 on the Block Exemption for Vertical Agreements ("**Communiqué No. 2002/2**") in Turkey. Communiqué No. 2002/2 basically sets out the main rules to create a safe harbour for certain vertical agreements, taken from the implementation of Article 4 of Law No. 4054 on the Protection of Competition, which is akin to Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**") prohibiting agreements between companies, trade associations and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market.

Amendments to the VBER and possible impact in Turkey

Before the adoption of new VBER, Turkey's Communiqué No. 2002/2 and the EU's VBER were largely similar. Indeed, in November 2021, the TCA revised the market share threshold for companies to benefit from exemption from 40% to 30%, as a result of its deliberate efforts to harmonize Turkish legislation with that of the EU.

The new VBER, on the other hand, introduced significant amendments on various matters. While these amendments aim to provide clear and up-to-date guidance that also takes into account the growth of online sales and online players, the new VBER now diverges from the Turkish regulation, particularly on matters of dual distribution and information exchange, parity clauses, non-compete obligations, territorial and customer restrictions, intermediary services and/or e-commerce platforms. To better demonstrate, differences between the

two jurisdictions in RPM and passive sales –two important topics where the TCB consistently adopts a rigid approach- are summarized below:

- *RPM* - The new VBER clarifies that the imposition of minimum advertised prices ("**MAP**") will be treated as an indirect form of resale price maintenance ("**RPM**") and it also provides certain justifications for RPM and MAP, for efficiency purposes, under four examples. In Turkey, on the other hand, RPM has been generally considered as a *restriction by object,* which consistently results in the TCA rejecting exemption requests. Indeed, in its recent *Philips*[12] and *Groupe SEB*[13] decisions, the TCB confirmed that that RPM was a *by object* infringement, and then found the existence of the object to interfere with the resale prices of the dealers sufficient to find a violation, without further analysing the existence of the effect.

- *Passive sales* – The new VBER gives clear definitions of active and passive sales. While the general distinction between the two has not changed, prohibiting distributors from using a specific search engine or online marketplaces may be now covered by the new VBER. The Turkish competition legislation, however, remains quite inflexible on that front. Indeed, the TCA's rigid attitude concerning passive sales was re-confirmed in its recent *BSH* decision[14], where it took a clear position and refused to grant exemption for prohibiting sales at online marketplaces.

In light of the foregoing, these amendments might create major gaps, in legislation and in practice, between the EU and Turkey, which might indeed result in certain costs for global companies from having different distribution regimes in the EU and Turkey. Many businesses would naturally prefer a single set of rules, as this enables efficiency of operation, even if that single set of rules is regarded as sub-optimal.

It is still uncertain what the impact of these changes will be on the Turkish competition law framework. Although there are no announcements or draft proposals to amend the current legislation, past TCA practice suggests that it usually follows the Commission's legislation. Thus, reformative steps on this front at some stage would be no surprise, considering the existing rules that might need revision due to the growth of e-commerce and digitalization. The next step for the TCA is currently an open question, and one that may only be answered in five years' time.

Büşra Aktüre
Lara Akça

12 The TCB's decision dated 05.08.2021 and numbered 21-37/524-258

13 The TCB's decision dated 04.04.2021 and numbered 21-11/154-63

14 The TCB's decision dated 16.12.2021 and numbered 21-61/859-423

Human Resources beware –the TCB scrutinizes Non-Poaching Agreements

The TCB has recently turned its eye to the competition issues in the labour markets, especially in terms of non-poaching and wage fixing agreements between undertakings.

Under Turkish competition law, non-poaching agreements are defined as "*agreements made directly or indirectly with an undertaking to not offer employment to another undertaking's employees or recruiting them*".[15] In other words, non-poaching agreements aim to standardize the potential employment conditions and fix the salaries of the employees by agreeing not to "poach" each other's employees.

Evaluation of non-poaching agreements by the TCB – the regime throughout the years

This is actually not a brand new topic under the Turkish merger control regime as the TCB previously decided against these types of agreements in the past. Up until the last few years, the TCB had a handful of decisions where it examined non-poaching and wage fixing arrangements between undertakings during preliminary inquiries, but consistently chose not to conduct a full-fledged investigation against the related undertakings, but rather sent letters of opinion, to cease the problematic conduct.[16] On the other hand, these decisions signalled the approach of the TCB against non-poaching and wage-fixing practices that these types of conduct are considered within the scope of Article 4 of Law No. 4054.

The TCB very recently re-established this approach in its *Container Carriers* decision in 2020, where it held that non-poaching and wage-fixing agreements constitute a violation of competition law and are no different than *cartels*. In fact, the TCB also concluded that there is also no difference between non-poaching and customer/market allocation agreements, or between wage-fixing and price-fixing agreements. Although the TCB decided not to initiate an investigation against the relevant undertakings similar to its previous preliminary inquiry decisions, the TCB suggested in its reasoned decision that the said violations should be considered as by-object violations, which demonstrates the TCB's strict approach to non-poaching and wage fixing agreements.

Latest developments – strict scrutiny of labour markets

The end of 2020 marked the beginning of a new era in the TCB's guiding and informative approach against the labour markets. In November 2020, the TCB initiated its first ever full-fledged labour market investigation of 29 private healthcare institutions, mainly established in the Samsun, Bursa and Balıkesir provinces of Turkey. The TCB firstly initiated an investigation of the hospitals in Samsun, to determine whether certain health institutions jointly determined the operating room service fees demanded from freelancer physicians and restricted the transfer of personnel between hospitals with a gentleman's agreement. During the course of the investigation, the TCB found that other institutions in Bursa and Balıkesir provinces were also conducting the alleged practices and thus initiated another investigation against these institutions and combined the two, in one file. As a result of the investigation, the TCB found that certain hospitals did in fact engage in such conduct and therefore fined 21 of 29 private hospitals due to violation of Article 4 of Law No. 4054.[17] In its long awaited reasoned decision that was recently published on 4 November 2022, the TCB once again emphasized that non-poaching agreements, preventing the qualified labour force from providing services under the desired conditions, prevents synergies and the productivity that may arise as a result of employee transfers. In addition to this, the TCB reiterated its views on the *Container Carriers* decision,

15 See the TCA's Glossary here

16 Please see e.g. the TCB's *TV Series Producers decision dated 28.07.2005 and numbered 05-49/710-195; Private Schools decision dated 03.03.2011 and numbered 11-12/226-76; Chemical Producers decision dated 26.05.2011 and numbered 11-32/650-201; B-Fit decision dated 07.02.2019 and numbered 19-06/64-27; Izmir Container Carriers decision dated 02.01.2020 and numbered 20-01/3-2.*

17 The TCB's *Private Health Institutions decision dated 24 February 2022 and numbered 22-10/152-62.*

highlighting again the lack of difference between such conduct and customer/market allocation and price-fixing agreements.

It is important to note that the TCB has two other on-going labour market investigations, which will shed light on this matter even further. After having initiated the *Private Health Institutions* investigation back in 2020, the TCB also jumped on investigating similar conduct in the e-commerce sector and initiated another investigation in April 2021 against 32 undertakings (which was then increased to 49) to investigate allegations on whether these companies, which include almost every digital platform operating in Turkey alongside other e-commerce giants, engaged in anticompetitive practices in the labour markets. During the course of the said investigation, one of the investigated parties, Getir, an on-demand delivery service provider for grocery items, submitted commitments to the TCA to end the investigation.[18] However, the TCB rejected the commitments due to the fact that non-poaching agreements were to be considered as a *hard-core restriction*, and the commitment procedure is not applicable for such violations. This decision is of significance showing the TCB's zero-tolerance approach on the matter.

Another investigation of seven companies active in the technology sector was also initiated in April 2022 for their alleged gentlemen's agreement in the labour market. The TCB investigation is still on-going.

Conclusion

The consecutive TCB decisions show that it will continue to scrutinizing labour markets. The TCB will not tolerate the non-poaching agreements to preserve an unrestrained labour market, and we may soon see competition cases targeting employment issues more broadly. The TCB seem to follow the by-object violation approach to non-poaching agreements, and in its decisions has not yet signalled any potential changes to this. However, it remains to be seen how the courts will choose to react to this approach and whether the TCB will issue any guidelines to assist the market players. Until then, it would be advisable for companies to act more cautiously in their related activities and not to neglect training their human resources departments with regard to competition law concepts.

Gamze Boran
Sena Sasani

18 The TCB's *Getir decision dated 11 November 2021 and numbered 21-55/765-381.*

Commitments as a useful tool in Turkish Competition Law

The relatively recent commitment mechanism was introduced to Law No. 4054 on 4 June 2020.[19] With the introduction of the commitment mechanism, undertakings were allowed to voluntarily submit a commitment text in order to terminate an ongoing investigation, without an infringement decision by the TCB.

General Legal Framework

As per Article 43 (3) of Law No. 4054, undertakings may offer commitments to the TCA, to eliminate the competition concerns under Article 4 or Article 6, within the scope of an ongoing preliminary inquiry or a full-fledged investigation. If the TCB decides that the proposed commitments are of the nature to eliminate the competition concerns, the TCB may render these commitments binding for the relevant undertaking and hence may decide not to further initiate a full-fledged investigation or terminate an ongoing full-fledged investigation.[20] That being said, Law No. 4054 imposes limitations on the infringement types for which the undertakings may offer commitments. Indeed, hard-core competition law restrictions, such as price fixing, territory and customer sharing or supply restriction agreements between competitors as well as anti-competitive information exchange and resale price maintenance practices are all excluded from the application of the commitment procedure.

Submission of commitments and its monitoring procedure

The undertakings under examination may request to offer commitment during the preliminary investigation or the investigation process. The request to offer a commitment during a full-fledged investigation can only be submitted within three months, and in writing, following the investigation notification and until the end of the investigation.[21]

Following the submission of a commitment request, the TCB initiates discussions with the parties to the investigation and conveys the possible competition concerns. After the commitment discussions, a commitment text is submitted to the TCA. *Inter alia*, the commitment text include the competitive concerns, the duration and manner of implementation of the commitments, their effect on the market and how they will eliminate the competitive concerns.[22] If the TCB evaluates the commitments as appropriate, the TCB renders these commitments as binding for the concerned undertaking.[23]

Considering the binding nature of the commitments, Law No. 4054 also provides for a sanction mechanism for non-compliance. Accordingly, if the undertaking does not comply with the offered commitments, the TCB may decide to re-launch the investigation. Although Law No. 4054 provides that the TCB will take into consideration whether the undertaking complies with the commitments given, it appears that the imposition of administrative monetary fine is at the TCB's discretion, as there is no clear guidance in this regard.[24]

Relevant case-law

Although the commitment mechanism is relatively new under Turkish law, there are a considerable number of cases in which the TCB evaluated the commitment requests and terminated the investigations accordingly,[25] and only a few in which the TCB did not accept the suggested commitments.[26]

19 Law No. 7246 Amending Law No. 4054 on the Protection of Competition entered into force by being published in the Official Gazette dated 4 June 2020 and numbered 31165.

20 Article 43 sub-paragraph 3 of the Law No. 4054.

21 Article 43 sub-paragraph 3 of the Law No. 4054 and Article 5 of the Communiqué No. 2021/2. With regards to the time period to provide the commitment, the TCB's *Arslan Nakliyat* (20-36/485-212, 28.07.2020) decision conveys that the commitment offer submitted after the third written defence shall not be accepted as the investigation process is deemed to have ended with the submission of the third written defence.

22 Article 8 of Communiqué No. 2021/2.

23 Article 14 of Communiqué No. 2021/2.

24 Article 15 of Communiqué No. 2021/2.

25 *See* the TCB's Baymak decision (24.03.2022; 22-14/221-95), Şişecam decision (21.10.2021; 21-51/712-354), Coca Cola decision (02.09.2021; 21-41/610-297), Çiçek Sepeti decision (08.04.2021; 21-20/250-106), THY decision (11.03.2021, 21-13/169-73), Yemek Sepeti decision (28.01.2021; 21-05/64-28), TSB decision (07.01.2021; 21-01/8-6) Havaş decision (05.11.2020; 20-48/655-287), S Sistem decision (10.12.2020; 20-53/746-334) MNG decision (10.12.2020; 20-53/746-334).

26 Of 19 commitment applications, the TCB has rejected only 7 of them. *See* the decisions where the TCB rejected the commitment

The Yemek Sepeti decision can be seen as an illustrative example in which the TCA used the commitment mechanism as an effective tool to address the competition concerns and further re-establish effective market competition. [27]

The TCB initiated an investigation against Yemek Sepeti Elektronik İletişim Perakende Gıda Lojistik A.Ş.'s ("**Yemek Sepeti**") into whether Yemek Sepeti had violated Article 4 and 6 of Law No. 4054 by engaging in exclusionary practices in the online food ordering and delivery platform services market. The TCB evaluated that (i) the narrow most -favoured customer ("**MFC**") clauses may prevent restaurants from developing their own channels and may further increase the restaurants' dependence on Yemek Sepeti, (ii) the Joker system may force the restaurants to use their limited resources for the Yemek Sepeti platform, (iii) the minimum cart amount application causes an increase in takeaway prices and prevents the development of competitor platforms, and that (iv) Yemek Sepeti Vale business model's below-cost pricing in the platform for online food service and courier services market may disrupt competition.

To eliminate the above competition concerns, Yemek Sepeti submitted the below commitments:

- The narrow MFC condition applied would be terminated for all restaurants,
- The mandatory Joker system would be abolished and made voluntary,
- The application of the minimum cart amount would be set as determined by the restaurants,
- Yemek Sepeti Vale would cover the courier personnel's expenses such as wage, meals, communication and fuel expenses.

Finally, the TCB decided that the commitments submitted by Yemek Sepeti were sufficient to eliminate the abovementioned competition concerns and thus terminated the investigation by rendering the commitments binding on Yemek Sepeti.

Conclusion

This relatively new mechanism is an important step for the TCA in aligning with EU competition law. It provides quick reestablishment of effective market competition as well as effectiveness on the basis that commitment decisions do not need to be based on full-scale investigations. Furthermore, it is fair to say that fewer procedural steps are taken with the commitment mechanism, which allows for more appropriate use of the TCA's resources and hence procedural economy. Likewise, for the investigated undertakings, faster proceedings and the absence of a decision finding an infringement are appealing. These advantages are also reflected in the recent decisional practice of the TCB. Indeed, in recent decisions, there are clear indications of the investigated parties voluntarily consenting to the commitment mechanism, especially with regards to abuse of dominance allegations under Article 6 of Law No. 4054, for a fast and cost efficient proceeding.

Kansu Aydoğan
İrem Deyneli

texts: the TCB's Baymak decision (24.03 2022; 22-14/219-94); Private Healthcare decision (24.02.2022; 22-10/152-62); Getir decision (11.11.2021; 21-55/765-381); Arnica decision (30.09.2021; 21-46/671-335); Philips I decision (26.08.2021; 21-40/589-286); Beypazarı decision (19.08.2021; 21-39/557-270); Philips II decision (05.08.2021; 21-37/524-258).
In the *Philips* decision (26.08.2021; 21-40/589-286), the TCB stated that it did not find the relevant commitments sufficient to eliminate the relevant competition concerns.

27 The TCB's *Yemek Sepeti* decision (21-05/62-28, 28.01.2021).

Settlement decisions expected to pick up pace under Turkish competition law

The settlement procedure was introduced into Turkish competition law with Law No. 7246 on the Amendment of the Law on the Protection of Competition, dated 24 June 2020, and has been applied in various TCB decisions thus far. The Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position ("**Settlement Regulation**") was published in the Official Gazette on 15 July 2021 and entered into force on the same day. Accordingly, the TCB may settle with the investigated parties, provided that they accept the existence and scope of the violation specified in the settlement text by notification of the investigation report. Accordingly, as a result of the settlement procedure, the administrative fine to be imposed on the investigated parties may be reduced by ten to twenty-five percent. The adoption of the settlement procedure further aligned Turkish competition law with the EU regime as it has mostly adopted the same rules and principles as in the EU.

Overview of the TCB' main settlement decisions

The TCB has applied the settlement procedure in numerous decisions as of today. According to the statistics published on the TCA's website, in the first half of 2022, 14 investigations were finalized with a settlement, while only 7 have investigations were carried through to completion and imposition of administrative fines. Within this framework, the TCB's recent *Philips, Singer Beypazarı* and *Olka/ Marlin* decisions will be addressed below in order to review the TCB's application of the settlement procedure:

- *Philips Decision*

In its decision[28], the TCB ruled that Türk Philips Ticaret A.Ş., Dünya Dış Ticaret Ltd. Şti., Melisa Elektrikli ve Elektronik Ev Eşyaları Bilg. Don. İnş. San. Tic. A.Ş., Nit-Set Ev Aletleri Paz. San. ve Tic. Ltd. Şti. and Gipa Dayanıklı Tüketim Mamülleri Tic. A.Ş. violated Article 4 of Law No. 4054 by determining the resale price and restricting the online sales of dealers and other resellers that made internet sales. In the settlement letter submitted by Philips, the undertaking expressly acknowledged the existence and scope of the violation, and accepted the amount of the administrative fine stipulated in the interim settlement decision of the TCB. In this regard, the TCB decided to apply the maximum rate of 25% reduction in the administrative fine. The Philips decision was important, as it was the first time the TCB settled an antitrust investigation.

- *Singer Decision*[29]

The TCB ruled that Singer Dikiş Makineleri Ticaret A.Ş had violated Article 4 of Law No. 4054 through resale price maintenance, and determined that a rate of between 0.5% and 3% of Singer's 2020 gross revenue should be taken as basis in determining the baseline fine. As Singer benefited from the settlement procedure, the TCB applied a 25% reduction to the administrative fine calculated in this respect. The Singer decision was the first decision where a detail illustration of the settlement mechanism was provided by the TCB.

- *Beypazarı*

In the *Beypazarı* case[30], Beypazarı İçecek Pazarlama Dağıtım Ambalaj Turizm Petrol İnşaat Sanayi ve Ticaret A.Ş. and Kınık Maden Suları A.Ş. applied for both leniency and a settlement. As both parties expressly acknowledged the existence and scope of the violation and cooperated with the TCA in this respect, the TCB granted Beypazarı a 35% leniency discount and an additional 25% settlement discount, and Kınık was granted 30% and 25% reductions respectively. The Beypazarı decision was the first instance where the leniency and settlement procedures were combined. Given the highly beneficial outcome for the investigated parties, there is reason to expect more applications that combine both.

28 The TCB's decision numbered 21-37/524-258 and dated 05.08.2021

29 The TCB's decision numbered 21-46/672-336 and dated 30.09.2021

30 The TCB's decision numbered 22-17/283-128 and dated 14.04.2022 and numbered 22-23/379-158 and dated 18.05.2022.

- *Natura Gıda*

Natura Gıda[31] is the most recent decision where the settlement mechanism was implemented. The TCB ruled that Natura Gıda Sanayi ve Ticaret A.Ş. violated Article 4 of the Law no. 4054 by determining resale prices of its retailers. Once more, after reviewing the settlement text where Natura Gıda acknowledged the existence and the scope of the violation, the TCB granted a 25% reduction in the administrative fine imposed on the undertaking.

Conclusion

Considering the lengthy and expensive investigation procedures and the considerable administrative fines that undertakings may be subject to in case of violation, the settlement mechanism will no doubt become an increasingly popular risk mitigation method for market players in Turkey. Settlement also creates efficiencies on the regulator side by speeding up the investigation process and freeing more time and resources to further support the TCA's enforcement efforts. Conscious of the many efficiencies created by settlement, the TCB seems to deliberately apply the maximum rate of 25% reduction of administrative fines in many of its settlement decisions in order to increase the attractiveness of this newly introduced mechanism.

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31 The TCB's decision numbered 22-52/771-317 and dated 23.11.2022