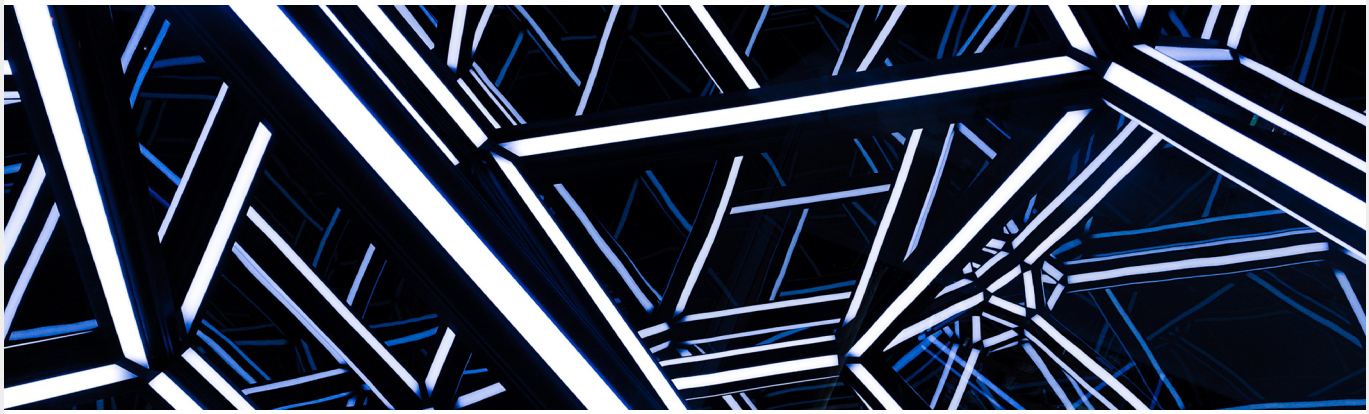
Recent Developments in Turkish Competition Law

2023 Winter Issue



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Introduction

In this Winter edition, we begin our remarks by saying that the Turkish Competition Authority (the "TCA") completed its 25th year with impressive work, including forward-thinking studies, legislation proposals about digital economy and active competition law enforcement in various sectors. Indeed, in 2022, the TCA concluded 27 investigations and imposed monetary fines totaling approximately EUR 100 million. While this is lower than the amount of total fines imposed in 2021, which was EUR 267 million, it still confirms the current administration's aggressive enforcement in comparison to five years ago. Most of the fine in 2021 arose from the TCA's first-ever hub-and-spoke cartel decision, where the TCA imposed a record-breaking fine of EUR 162.5 million on a supplier and five food and hygiene retailers that fixed prices in 2021. This was followed by a second hub-and-spoke cartel decision in 2022 in the same sector.

Digital markets were also under the TCA spotlight in 2022, which has led to proposals for specialised legislative framework in relation to such markets. Indeed, in addition to the introduction of the concept of technology undertakings with the goal of catching killer acquisitions in digital markets, the TCA also recently introduced a proposal to amend the main competition law legislation to ensure fair competition and promote consumer welfare in digital markets.

This Issue starts with a look at the TCA's Merger and Acquisition Outlook Report of 2022 in an effort to provide insight into the Turkish merger control regime based on the 245 merger filings the TCA received in 2022. Although the TCA significantly increased the jurisdictional turnover thresholds applicable to transaction parties through an amendment in 2022, there only

seems to be a slight decrease in the total number of cases. We consider that the newly introduced concept of technology undertaking might be the main reason for this slight decrease. We will aim to shed light on the technology undertaking concept through the limited number of precedents that are available thus far as another article here. We will then turn our focus to the legislative amendments needed because of digitalisation, as well as the TCA's continuous attention to some large online marketplaces (such as Trendyol). This Issue is also intended to provide brief summaries of the increasing number of hub-and spoke cases in Turkey, as well as the TCA's increased enforcement in the fast moving consumer goods (FMCG) sector, where the prices were excessively increased following the emergence of COVID-19 in Turkey. Last but not least, this Issue finally will refer to a number of precedents, where the TCA fined companies for submitting misleading information, which once again confirms the TCA's aggressive approach to competition law enforcement.

We hope you will find this Issue helpful.

Togan Turan

2022 Recap of Merger Control Cases, Highlighting Phase-II Cases

On 6 January 2023, the TCA has published the 2022 Merger and Acquisition Outlook Report (the M&A Outlook Report), which provides an overview of the TCA's activity in relation to M&A transactions and includes comparisons between the previous years in several different aspects of M&A transactions such as the nationality of the companies involved, most invested areas, etc.

Overview

First and foremost, a total of 245 M&A and privatisation transactions were reviewed by the TCA in 2022. The number of the notified transactions in 2022 decreased by 21 per cent compared to 310 transactions filed in 2021. The most significant factor behind this decrease seems to be the increased turnover thresholds pursuant to the TCA's Communiqué No. 2022/2 on Amending Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Requiring the Approval of the Turkish Competition Board (Communiqué No. 2022/2), which entered into force on 4 May 2022. Although the number of transactions contemplated in 2022 decreased compared to 2021, the total number of transactions is above the average of 219 in the last 10 years.

Excluding privatisations, target companies in 82 transactions were established in Turkey and the approximate value of these transactions totalled TRY 72 billion in 2022. This is almost 70 per cent higher than the average annual transaction value of the last 10 years, which was TRY 32 billion. The sector where the most frequent transactions, in which the target company was Turkish, was the "electricity generation, transmission, and distribution" sector with 11 per cent of the total value of the transactions, followed by the "supporting activities for transportation" and "software program publishing" sectors.

The M&A Outlook Report suggests that Turkish companies received investments from foreign investors in 36 separate M&A transactions. Investors were mostly from the Netherlands and United Arab Emirates, with five from each country completing transactions. The total investment value of the transactions contemplated by foreigners in which the target companies are Turkish is approximately TRY 43 billion.

A total of 145 mergers and acquisitions were carried out by foreigners. These transactions, which did not involve direct investment in Turkish companies, had a total transaction value of approximately TRY 5 trillion. The following sectors were the most popular: (i) wholesale and retail trade and repair of motor vehicles and motorcycles, (ii) programming and publishing activities, (iii) installation and repair of machinery and equipment, (iv) manufacture of basic pharmaceutical products, and (v) financial services.

Focus on Phase-II cases

In 2022, the TCA took three cases into Phase-II review, two of which are ongoing.

First, the Board initiated a Phase-II review in relation to the establishment of joint control by Dalsan Yatırım ve Enerji A.Ş. and Saint-Gobain Weber Yapı Kimyasalları Sanayi ve Ticaret A.Ş. over Dalsan Alçı Sanayi ve Ticaret A.Ş. controlled by Dalsan Yatırım ve Enerji A.Ş. and Saint-Gobain Rigips Alçı Sanayi ve Ticaret A.Ş. controlled by Saint-Gobain Weber Yapı Kimyasalları Sanayi ve Ticaret A.Ş.[1] During its Phase-II review, the Board evaluated whether there would be a significant reduction in effective competition in any market in the country or a part thereof, particularly by creating or strengthening a dominant position, in violation of Article 7 of the Law No. 4054. As a result of the Board's Phase-II review, the Board granted clearance as there was no significant reduction in effective competition as a result of the transaction.[2] While the Board's reasoned decision has not been made public, it is likely that horizontal competitive concerns had been evaluated, given that the parties are in fact competitors. The most notable aspect of this decision is that the length of the Board's review process. Accordingly, Phase-II review process began on 8 September 2022 and was completed within a remarkably short period of three months, on 8 December 2022.

Another transaction that the Board undertook a Phase-II review was the acquisition of the sole control of Sörmaş Söğüt Refrakter Malzemeleri A.Ş. by RHI Magnesita NV.[3] The fact that the parties involved are competitors suggests that there were concerns regarding horizontal competition, similar to the Dalsan decision. It is worth noting that, in the case of Sörmaş Söğüt Refrakter Malzemeleri A.Ş., the Phase-II review has not been concluded yet, despite the Board's previous rulings indicating that the target company, Sörmaş Söğüt Refrakter Malzemeleri A.Ş., was not the market leader and the acquirer had a small share in the Turkish market.[4]

Another transaction which the Board initiated a Phase-II review was the transfer of the assets of several facilities within Çimsa Çimento San. ve Tic. A.Ş. to Çimko Çimento ve Beton San. Tic. A.Ş.[5] While the Phase-II review was ongoing, Çimsa Çimento San. ve Tic. A.Ş. announced that the statute of limitation set forth under the transaction agreements were expired and the transaction was no longer in effect on 1 April 2022. Subsequently, the sale of the same assets by to Ferpa Çimento A.Ş. was quickly cleared by the Board's decision on 21 July 2022, leaving the ongoing Phase-II review irrelevant and without an object.[6]

Last but not least, the Board initiated a Phase-II review for the transaction concerning the transfer of Ay-mar Ticaret Ltd. Şti.'s tenancy rights and fixed assets of 25 stores in Trabzon and Giresun to Migros Ticaret A.Ş.[7] The Board granted clearance to the transaction in a considerably short period as well, in three months, similar to Dalsan decision.[8]

In conclusion, the year 2022 saw several significant developments in merger control cases in Turkey, especially with a new concept of technology undertaking and increased jurisdictional thresholds. Nevertheless, due to the rapid increase of technology that more and more companies start utilising in their course of business and the latest instability of the Turkish lira against foreign currency, more transactions are expected to be caught by the TCA in the upcoming years.

Büşra Aktüre
İrem Uysal

1 The Board's *Dalsan* decision dated 08.09.2022 and numbered 22-41/576-M.

2 The Board's *Dalsan* decision dated 08.12.2022 and numbered 22-54/829-339.

3 The Board's *Sörmaş* decision dated 03.02.2022 and numbered 22-07/93-M.

4 The Board's *Haznedar* decision dated 12.11.2020 and numbered 20-49/669-293.

5 The Board's *Çimsa* decision dated 24.02.2022 and numbered 22-10/142-M.

6 The Board's *Ferpa* decision dated 21.07.2022 and numbered 22-33/537-216.

7 The Board's *Ay-mar/Migros* decision dated 17.03.2022 and numbered 22-13/201-M.

8 The Board's *Ay-mar/Migros* decision dated 23.06.2022 and numbered 22-28/449-181.

Turkish Competition Board's Decisions Shed Some Light on the Scope of the Newly Introduced Concept of Technology Undertaking

On 4 March 2022, the TCA amended the main legislation of the Turkish merger control regime, that is, Communiqué No. 2010/4 on the Mergers and Acquisitions Calling for the Authorization of the Competition Board (Communiqué No. 2010/4) with Communiqué No. 2022/2 (Amendment Communiqué), and increased the turnover thresholds regulated under Communiqué No. 2010/4 and sought for mandatory merger control filing in Turkey. The TCA also introduced a novel concept in the Amendment Communiqué and brought new rules for the merger control requirement analysis for transactions involving acquisitions of so-called technology undertakings.

The definition of technology undertakings in the Amendment Communiqué is quite broad and covers undertakings and assets active in the following sectors: (i) digital platforms, (ii) software and gaming software, (iii) financial technologies, (iv) biotechnology, (v) pharmacology, (vi) agrochemicals and (vii) health technologies. If the target of a transaction has activities that may be in the said fields, and is also active or has research and development (R&D) activities in the Turkish market, or provides services to customers in Turkey, then the target is deemed to be a technology undertaking, and the analysis on whether the relevant transaction triggers a mandatory merger filing in Turkey needs to conducted accordingly (i.e. the TRY 250 million turnover threshold sought for the target is no longer applicable).

The TCA has not yet published any secondary legislation or guidelines to outline the details of the scope of the technology undertaking exception and to clarify how the new rules will apply; therefore, it is expected that the TCB will establish practices by way of its case law. While the TCB's published reasoned decisions on the matter are still limited, these could be helpful to clarify what kinds of activities are deemed to fall under the technology undertaking definition.

- In its *Citrix&TIBO/Elliot/Vista* decision,[1] the TCB found that the targets' activities in digital workspace solutions and infrastructure and analytics software services are caught by the technology undertaking definition. Similarly, in *Providence/Airties*,[2] the target that provides residential Wi-Fi solutions to broadband operators and provides software services that enable broadband operators to deliver and manage Wi-Fi networks to residential customers was considered as a technology undertaking because of to its software-related activities.
- In *Cinven/IFGL*[3] the TCB considered activities of a local broker in relation to the provision of savings and investment products through life insurance packages to individual investors to be within the scope of the technology undertaking definition. The decision is especially noteworthy given that (i) although insurance sector is not necessarily one of the exempted sectors, the target was deemed as a technology undertaking as it provides services to its customers with digital access via digital platforms, and (ii) although the target's activities in the relevant sectors are quite limited – there are approximately 230 registered users in Turkey who have access to and use these digital platforms – the TCB did not recognise this as a determining factor in its decision-making process.
- In *Astorg/Corden*[4] the TCB assessed that the target, which produces APIs active pharmaceutical ingredients (APIs) and ready-to-use drugs on behalf of pharmaceutical companies, would be a technology undertaking because of its activities in the pharmacological field. Furthermore, in *CD&R/TPG/Covetrus*[5] the TCB considered that the target's activities

1 *Citrix&TIBO/Elliot/Vista* decision dated 12.05.2022 and numbered 22-21/344-149.

2 *Providence/Airties* decision dated 02.06.2022 and numbered 22-25/403-167.

3 *Cinven/IFGL* decision dated 18.05.2022 and numbered 22-23/372-157.

4 *Astorg/Corden* decision dated 02.06.2022 and numbered 22-25/398-164.

5 *CD&R/TPG/Covetrus* decision dated 07.07.2022 and numbered 22-32/512-209.

in supply of animal health products and related services could be included in "health technologies" and "pharmacology" and therefore, applied the technology undertaking exception to determine whether it was subject to the TCB's clearance.

- In *Mandiant/Google*[6] the TCB decided that the provision of corporate cybersecurity consultancy services would fall under the technology undertaking definition because of its software-related activities.
- In *Affidevia/Groupe Bruxelles*[7] the target's diagnostic imaging activities were considered to be caught by the technology undertaking definition under biotechnology.
- In *Oplog/Espro*[8] the target active in the e-commerce logistics market, providing storage, handling, boxing, packing and packaging and mailing services to its customers, was considered as a technology undertaking. Again, in *Klaravik/Castic*[9] the TCB concluded that the target that operates as an online auction platform for buying and selling forestry vehicles (harvesters, log haulers, forest trailers), lifts and cranes, trucks, lifting machines, vans, motorcycles, cars, boats, and construction machinery (scaffolding, fans, compressors), was a digital platform and therefore, the target was a technology undertaking.

While there are still many uncertainties surrounding the application of the newly introduced concept, the TCB's case law continues to shed some light on the application of the new rules. In January 2023, the TCB published its reasoned decision for the acquisition by Berkshire Hathaway Inc. (Berkshire) of Alleghany Corporation (Alleghany),[10] a company developing software to manage the systems of reinsurance companies and selling these systems to third parties. Despite the fact that Alleghany's activities in the financial technology sector take place outside of Turkey and its activities in Turkey are irrelevant to the regulated sectors in the Amendment Communiqué, the TCB concluded that Alleghany should be deemed as a technology undertaking as its activities outside of Turkey are caught by the technology undertaking definition and it fulfils the criteria of having a presence in the Turkish market. Accordingly, no specific consideration was given to whether Alleghany operates in the financial technology sector in Turkey, and the exception regulated for technology undertakings was applied during the notifiability test of the relevant transaction.

The decision is of significance, especially when the notifiability test is applied to foreign-to-foreign transactions, as the decision clarified that the technology undertaking exception would still apply even if the target operates in the regulated sectors globally, but not in Turkey.

Conclusion

Overall, all these reasoned decisions shed some light on the newly introduced concept. Especially in its *Berkshire/Alleghany* decision, the TCB clarified that the technology undertaking exception would apply as long as the target operates in one of the exempted sectors (either in Turkey or abroad), and has a presence in Turkey. Although this decision shed some light on the relatively new concept, there are still ambiguities surrounding the application of the technology undertaking exception, which indicates the need of more guidance from the TCA in order to minimise the legal uncertainties and avoid potential gun-jumping issues.

Gamze Boran
Lara Akça

6 *Mandiant/Google* decision dated 09.06.2022 and numbered 22-26/425-174.

7 *Affidevia/Groupe Bruxelles* decision dated 16.06.2022 and numbered 22-27/431-176.

8 *Oplog/Espro* decision dated 08.08.2022 and numbered 22-35/543-219.

9 *Klaravik/Castic* decision dated 08.09.2022 and numbered 22-41/582-242.

10 *Berkshire/Alleghany* decision dated 15.09.2022 and numbered 22-42/625-261.

Digital markets remain a central focus in Turkish competition law

Digitalisation and digital services have brought significant benefits to businesses and consumers, providing better and more efficient choices for end users and increasing competition within the digital markets sector. However, as digitalisation has brought about unique regulatory challenges, competition authorities worldwide increased enforcement in this area. Following this trend, the TCA has paid particular attention to digital markets in the recent years, which culminated in the enactment of a specialised legislative framework in this respect. On the enforcement front, digital markets remain a hot topic in Turkish competition law.

A specialised legal framework to tackle competition concerns in digital markets

Following on the footsteps of the Digital Markets Act ("**DMA**") of the European Union ("**EU**"), which entered into force in November 2022, the TCA introduced a proposal for amending Law No. 4054 with the aim to ensure fair competition and promote consumer welfare in digital markets. The amendment proposal, which was submitted for public review and comments in October 2022, introduces the concept of "undertaking with significant market power" and regulates the obligations and responsibilities of such companies. The proposed amendments followed and concretised the TCA's policy recommendations, issued following a sectoral inquiry in e-marketplace platforms concluded in April 2022. The policy recommendations mainly focused on ensuring fair competition in the e-marketplace sector and promoting consumer welfare, and include the implementation of ex-ante rules governing the behaviour of undertakings with significant market power. Another significant legal development affecting digital markets was introduced in July 2022, with amendments to the Law on Regulation of Electronic Commerce, which address competitive concerns arising from unfair practices and asymmetries in information and bargaining power of e-commerce platforms. It is also worth noting that Turkish merger control rules were amended in March 2022, introducing the notion of technology undertaking. Accordingly, technology undertakings benefit from an exception to the turnover-based jurisdictional test, which is aimed at ensuring better review of transactions in the digital markets by effectively catching killer acquisitions.

Unabated competition law enforcement in digital markets

As hinted by the President of the TCA in a speech from 2021 stating that "as digitalization transforms today's societies, it is presenting competition law practitioners and the general competition law regime around the world with the most serious test of institutional innovation in its history. With this awareness, the Competition Authority has scrutinized digital markets from multiple perspectives." The TCA has also increased its scrutiny of digital markets on the enforcement front. In a number of recent decisions, the TCA fined undertakings operating in the digital sector for abuse of dominance cases such as implementing excessive prices and artificial entry barriers.[1] There are also ongoing investigations in the digital sector. Most notably, Sahibinden.com, a leading classified ads platform, is under investigation for the sixth time regarding allegations that it has abused its dominant position in the markets for online platform services for the sale/rental of real estate and motor vehicles by imposing excessive prices. Moreover, Trendyol, a leading online marketplace platform, is being investigated for allegations of abusing its dominant position by engaging in exclusionary practices in the market for online platform services for the sale of second-hand goods.

Conclusion

In recent years, the TCA has taken significant action to provide regulatory guidance on the competition law scrutiny of digital markets. Accordingly, as the President of the TCA has emphasised in a speech in April 2021, the TCA has introduced amendments, reports and decisions introducing new concepts and rules to ensure effective competition in digital markets. Some of these concepts and rules require clarifying through case law, which surely will not lag given the TCA's notable enforcement record in digital markets.

Deniz Benli
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1 See the Board's *Nadirkitap* decision (07.04.2022; 22-16/273-122) where Nadirkitap, a book-selling platform, was found to have engaged in exclusionary practices in the market; *Google Local Search* decision (08.04.2021; 21-20/248-105) where Google was found liable for market foreclosure. See also, e.g. the Board's *Google Search and AdWords* decision (12.11.2020; 20-49/675-295); *Google Shopping* decision (13.02.2020; 20-10/119-69); *Sahibinden* decision (01.10.2018; 18-36/584-285); *GoogleAndroid* decision, (19.09.2018; 18-33/555-273).

Hub-and-Spoke Cases on the Rise

In recent years, hub-and-spoke cartels have been increasingly in the spotlight in competition law and catching the of eye competition authorities around the world. This increase has also been reflected in Turkish competition law practice, where the TCA published several decisions on the important topic.

Legal Framework

As per the TCA's publication on competition law terms, a hub-and-spoke cartel is defined as "a type of triadic cartel, also referred to as atypical or centre-end cartel, which is formed by competing distributors in a vertical relationship with the same supplier through indirect communication through this supplier".[1]

The Law No. 4054 on the Protection of Competition (Law No 4054) and the Guidelines on Vertical Agreements do not explicitly define or regulate hub-and-spoke violations. That being said, the Guidelines on Horizontal Cooperation Agreements emphasise that exchanging information among undertakings can occur in different ways, even including an indirect exchange of information through third parties, suppliers or distribution networks and such information exchange can potentially be considered a violation under Law No. 4054.[2] This definition is quite akin – if not the same – as the EU's approach to hub-and-spoke arrangements.

Case Law

As hub-and-spoke cartels require the involvement of both supplier(s) and retailer(s) and therefore concern a more complex organisation, it has been fairly difficult for the agencies to determine a violation in relation to cartels. Indeed, the TCA never fined companies for hub-and-spoke arrangements until 2021. The *FMCG I and II* decisions, however, appeared to change the entire landscape in Turkey and established a solid approach by the Board on the subject. Before delving into details on these two recent cases, a brief history of the TCA's handling of hub-and-spoke allegations is provided below.

The first two landmark decisions were the Turkish Competition Board's (TCB or Board) *LASID*[3] and *Aral Oyun*,[4] rendered in 2015 and 2016 respectively, where the Board determined that there was no violation of competition law. More specifically, in the *LASID* decision, the Board primarily referred to the Tesco[5] decision of the UK Competition Appeal Tribunal (CAT) and evaluated the case in line with the CAT's findings. It noted that resellers communicated information to the competitor manufacturers in order to negotiate better prices. In this respect, the TCB determined that the undertakings in question (i.e. Goodyear, Pirelli and Brisa) exchanged information through common dealers who acted as a central point of exchange (hub), and that the information exchanged between the competitors via the hub included strategies for future pricing. However, the Board concluded that the dealers provided this information to the manufacturers as a bargaining tool, with the aim of securing lower prices for tire purchases. Based on this reasoning, the TCB determined that there was no violation of competition law because of the lack of the objective to restrict competition. Furthermore, in *Aral Oyun*, which concerned an investigation into the markets for computer and game consoles and consumer electronics, the TCB found that undertakings operating in the computer and game console market complained to the dealer, stating that their competitors were offering lower prices. They requested the dealer's intervention to increase their competitors' prices. Accordingly, the TCA concluded that there was no sufficient evidence that indicated an indirect communication among retailers and therefore no horizontal agreement between competitors was in place.

The *FMCG I & II* decisions are therefore of significance, since the lack of regulation showed the need for precedents to provide guidance on

1 Dictionary of competition law terms, p. 148, available at https://www.rekabet.gov.tr/Dosya/geneldosya/rk-terimleri-sozlugu-2018-pdf .

2 Guidelines on Horizontal Cooperation Agreements, para. 40.

3 The Board's *LASID* decision (15-44/731-266; 16.12.2015).

4 The Board's *Aral Oyun* decision (16-37/628-279; 07.11.2016).

5 The CAT, *Tesco v Office of Fair Trading*, Case No: 1188/1/1/11, [2012].

the subject and these decisions were the first precedents in which the Board concluded a violation of a hub-and-spoke cartel.

In the first *FMCG* decision,[6] the Board initially noted that hub-and-spoke cartels essentially constitute horizontal cooperation agreements, although they signal vertical qualities, and they were comparably novel as they have atypical organisation. The investigation involved almost all retailers active in fast-moving consumer goods business in Turkey, including major supermarkets such as BİM, Carrefour, Migros, Şok and A101, as well as Savola as their common supplier. In the decision the Board provided separate assessments related to the nature of the violation conducted by and between the relevant supermarkets. The Board also analysed the role of the Savola, as the hub, in the establishment of a cartel between the supermarkets. Accordingly, the Board determined that the relevant supermarkets, *through the supplier*, coordinated prices and price switches and exchanged competitively sensitive information such as future prices, price increase dates, periodic activities and campaigns. The Board also found that the supermarkets interfered with each other's and other local chain markets' sales prices to increase prices to the same level with the assistance of the common supplier, Savola. The Board reached this conclusion by evaluating not only evidence of contact/information exchange, but also price analyses for the undertakings in the market, which demonstrated coordinated and parallel sales prices. Accordingly, an administrative monetary fine of approximately EUR 173,8 million was imposed on A101, BİM, Carrefour, Migros, Şok and Savola for their involvement in a hub-and-spoke cartel.

Similar to its decision in 2021, on 21 December 2022, the TCB published its short-form decision involving administrative fines on major undertakings active in the food and beverage sector on the basis that they violated Article 4 of Law No. 4054 by way of engaging in a hub-and-spoke cartel and practising resale price maintenance. Five supermarket chains were not fined due to the protection afforded by *ne bis in idem* principle, also known as double jeopardy.[7] In this decision, the Board initiated a full-fledged investigation into 21 companies operating in the FMCG sector, which include suppliers such as Coca Cola, Pepsi, Red Bull, Frito-Lay, GlaxoSmithKline and Haribo, and supermarket chains like BİM, Carrefour, Migros, Sok and A101. As a result, by a majority of votes, the Board concluded that the aforementioned supermarket chains and Coca Cola, Doganay, Düzey, Eti, Frito-Lay, GlaxoSmithKline, Haribo, Pasifik, Pepsi, Red Bull, Sölen Çikolata and Uno formed a hub-and-spoke cartel. That said, the Board only imposed monetary fines on the mentioned suppliers, since the five supermarkets were already fined the *FMCG I* decision for collaborating with each other through their common supplier. In addition to concluding that the suppliers formed a hub-and spoke cartel, the Board also concluded that numerous suppliers in the FMCG sector were practising resale price maintenance, and accordingly imposed additional administrative monetary fines on Coca Cola, Doganay, Eti, Frito-Lay, Haribo, Kent, Pasifik, Pepsi, Sölen Çikolata and Uno. Eventually, the TCB imposed administrative monetary fines amounting approximately to EUR 44.3 million on the undertakings mentioned above.

Conclusion

Overall, it appears that the Board has been closely monitoring potential hub-and-spoke cartels in the last decade. It should be noted that FMCG receives special attention, given that twice in two years the TCB has issued heavy administrative fines to several undertakings operating in the sector. However, due to the limited number of cases and lack of regulation, more case law is definitely needed in order to fully grasp and shed light on this pressing topic.

Büşra Aktüre
Lara Akça

6 The Board's *FMCG I* decision (21-53/747-360; 28.10.2021).

7 The Board's *FMCG II* decision (22-55/863-357; 15.12.2022).

Turkish Competition Authority's Continued Focus on the FMCG Sector

During the COVID-19 pandemic, competitive concerns about the pricing behaviour of chain markets, manufacturers and wholesalers engaged in the retail trade of food and cleaning supplies led to increased scrutiny of the fast-moving consumer goods ("**FMCG**") sector by the TCA. Despite the end of the pandemic, the TCA's interest in this sector has not diminished, as demonstrated by its recent enforcement record.

The following investigations provide valuable insight on the TCA's current approach to competitive concerns in the FMCG sector.

Overview of the Short-form Decisions

- *Supermarket chains and FMCG suppliers*[1]

On 21 December 2022, the TCA concluded its investigation against 21 undertakings operating in the FMCG sector, some of which included major suppliers like Coca Cola, Pepsi, Red Bull, Frito Lay, GlaxoSmithKline and Haribo, as well as well-known supermarket chains such as BİM, Carrefour, Migros, Sok and A101. The TCB ruled that some of the investigated supermarket chains engaged in a hub-and-spoke cartel by way of coordinating prices and exchanging information through their common suppliers. Moreover, some of the investigated suppliers (including Coca Cola, Doganay, Eti, Frito Lay, Haribo) were found to have engaged in resale price maintenance. As a result of the investigation, the Board imposed total administrative fines amounting to approximately EUR 44 million on 12 undertakings.

This decision follows the Board's 2021 decision[2] where the same supermarket chains and their common suppliers were fined for a hub-and-spoke type violation. As a result of the fines imposed in 2021, the supermarket chains avoided penalties under the 2022 decision based on the *non bis in idem* principle, even though they were held to be in violation of Law No. 4054. Similarly, Beypazarı, a supplier, also avoided penalty as it was sanctioned for similar facts seven months previously (see details under paragraph (ii) below).

- *Natura Gıda*[3]

The Board ruled that Natura Gıda, an ice cream manufacturer, violated Law No. 4054 by determining resale prices of its retailers. Natura Gıda applied for settlement, 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 Board. As a result of the settlement process, the Board granted a 25 per cent reduction in the administrative fine imposed on Natura Gıda, which amounted to TRY 5,431,289.02 (approximately EUR 269,542).

Overview of the Reasoned Decisions

- *Beypazarı/Kınık*[4]

The Beypazarı/Kınık decision relates to the investigation of the allegation that Beypazarı and Kınık, Turkish mineral water companies, exchanged competitively sensitive information. According to the reasoned decision published on 17 January 2023, following examination of correspondence evidence between high-level executives of both companies regarding price increases, the Board found that the rival entities shared information on future prices and mutually determined their prices. The Board held that the parties violated Law No. 4054 by fixing prices in the natural mineral water market. As both parties applied for both leniency and settlement procedures, both were granted appropriate reductions in the fines imposed in this respect, which amounted to TRY 9,848,395.48 (approximately EUR 487,393) for Beypazarı and TRY 928,931.50 (approximately EUR 46,100) for Kınık.

1 The Board's decision numbered 22-55/863-357 and dated 15.12.2022. See the TCA's official announcement on https://www.rekabet.gov.tr/Dosya/hizli-tuketim-nihai-karar-duyurusu.pdf.

2 The Board's decision numbered 21-53/747-360 and dated 28.10.2021.

3 The Board's decision numbered 22-52/771-317 and dated 23.11.2022.

4 The Board's decision numbered 22-23/379-158 and dated 18.05.2022; the Board's decision numbered 22-17/283-128 and dated 14.04.2022.

- *Duru Bulgur*[5]

In 2018, following a preliminary investigation examining allegations that Duru, an undertaking active in the production, packaging, processing and distribution of bulgur, legumes, and rice products, has engaged in resale price maintenance,[6] the Board had ruled that there was no need to open a full-fledged investigation. However, this decision was later annulled by the administrative courts. Accordingly, the Board initiated an investigation against Duru and ruled that Duru has intervened in the resale prices and profit margins of the products sold by the distributors. According to the reasoned decision published on 23 January 2023, the Board employed an object-based review of resale price maintenance as opposed to the traditionally applied effect-base analysis, which was used in the previous decisions of the Board. As a result, it was concluded that Duru had engaged in resale price maintenance and therefore was imposed an administrative fine of TRY 4,407,979.26 (approximately EUR 218,758).

- *Dydo Drinco*[7]

The Dydo Drinco decision relates to the investigation examining allegations that Dydo Drinco, an undertaking active in the sale, marketing and distribution of soft drinks, has been interfering with the retail prices of its products. According to the reasoned decision published on 19 January 2023 the undertaking's initial proposition regarding commitments was rejected by the Board because of the serious and conspicuous nature of the allegations. Dydo Drinco ended up settling with the Board and was granted a 20 per cent reduction in the fine imposed in this respect, which amounted to TRY 11,441,624.472 (approximately EUR 568,386).

- *Numil Gıda*[8]

The Numil Gıda decision relates to the investigation examining allegations that Numil Gıda, an importer active in the distribution of baby food, had engaged in resale price maintenance of its products and imposed sanctions on retailers that failed to comply with its mandated resale prices. Numil Gıda ended up settling with the Board and was granted a reduction in the fine imposed in this respect, which amounted to TRY 48,521,080 (approximately EUR 2,410,386). According to the reasoned decision published on 13 February 2023, in calculating the turnover-based fine, Numil Gıda requested that the export turnover be excluded in accordance with the recent decisions of the Board, which the Board accepted. However, two Board members expressed dissenting opinions, stating that the fine should be calculated based on the total turnover, including the export turnover.

Overview of Ongoing Investigations

- *Nuh'un Makarna*[9]

On 7 July 2022, the Board initiated an investigation against Nuh'un Makarna, an undertaking active in the manufacturing of pasta, semolina, bulgur and wheat bran, and İs-Ra Gıda, a retail food and beverage store, following a preliminary investigation regarding allegations that Nuh'un Makarna and its distributors engaged in resale price maintenance in the retail market.

- *Nestle*[10]

On 15 December 2022, the Board initiated an investigation against Nestle Turkey following a preliminary investigation examining allegations that Nestle Turkey imposed resale prices as well as regional and customer restrictions on its distributors.

- *Nestle and Danone*[11]

On 15 December 2022, the Board initiated an investigation against Danone, Eti Gıda, Horizon and Nestle Turkey following a preliminary investigation examining allegations of anti-competitive information exchange.

5 The Board's decision numbered 22-09/130-50 and dated 17.02.2022.

6 The Board's decision numbered 18-07/112-59 and dated 08.03.2018.

7 The Board's decision numbered 22-32/508-205 and dated 07.07.2022.

8 The Board's decision numbered 22-29/483-192 and dated 30.06.2022.

9 See the TCA's official announcement on https://www.rekabet.gov.tr/tr/Guncel/nuh-un-ankara-makarnasi-sanayi-ve-ticare-9ff45d93ae17ed11a2280050568595ba.

10 See the TCA's official announcement on https://www.rekabet.gov.tr/tr/Guncel/nestle-turkiye-gida-sanayi-as-hakkinda-s-0a38e636c88ced11a23100505685ee05.

11 See the TCA's official announcement on https://www.rekabet.gov.tr/tr/Guncel/danone-tikvesli-gida-ve-icecek-san-ve-ti-cbc63a1ec88ced11a23100505685ee05.

Conclusion

The Board's recent enforcement record in the FMCG sector involves a variety of anti-competitive behaviour such as resale price maintenance, exchange of competitively sensitive information and formation of hub-and-spoke type cartels. The Board's recent decisions in the FMCG sector do not provide much insight into the Board's review of the facts, as most of them were concluded by settlement. However, the reasoned decisions reveal that in reviewing allegations of anti-competitive behaviour, the Board heavily relies on correspondence evidence, including internal correspondence and correspondence between undertakings at various levels of the supply chain. It should also be noted that most of the Board's recent investigations in the FMCG markets have been initiated ex officio, which indicates a strong focus by the TCA on this sector.

The FMCG sector has caught the TCA's eye, especially following steep price increases for food and other FMCG products in the aftermath of pandemic, which was followed by high inflation rates in Turkey. In April 2022, the TCA's President Birol Küle described the TCA's chain market investigations as "a situation that keeps us awake at night". It appears that the FMCG sector will remain in spotlight of Turkish competition enforcement in the near future, especially as it is one of the major sectors where consumers are directly impacted.

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Ece Bezmez

Beware of Presenting Misleading Information to the TCA

Competition authorities have extensive powers to collect information and utilises their punitive powers to dissuade undertakings from providing inaccurate or misleading information. Fining decisions for providing inaccurate or misleading information were rare in Turkey until2022. That said, they have started to appear more often within the context of antitrust investigations as much as M&A filings.[1]

For instance, in its recent *Martı* decision,[2] the TCB imposed an administrative fine on Martı İleri Teknoloji A.Ş. (Martı), a Turkish e-scooter venture in the amount of 0.1 per cent of its 2021 turnover on the grounds of submission of incorrect and misleading information provided in the context of requests for information during the preliminary investigation initiated because of Martı's alleged violations of the Law No. 4054 by abusing its dominant position and engaging in exclusionary behaviours, which was then followed by a full-fledged investigation. On 8 September 2022, the Board accepted the commitments submitted by Martı, thereby ending the full-fledged investigation in relation to Martı's alleged violations.[3] Nevertheless the administrative fine in relation to submission of incorrect and misleading information prevailed, which can be interpreted as a reminder for undertakings to be careful when responding to requests for information and documents.

Indeed, as part of the preliminary investigation, the Board requested Martı to provide certain information on the pricing of their e-scooters and any campaigns they ran pursuant to Article 14 of the Law No. 4054. Initially, Martı only provided a brief summary of their prices, but after being asked for more detailed information, they eventually submitted monthly data on prices and campaign details for three provinces, including average discounts. The TCA's case handlers and the Board compared the periodic

1 See the Board's *Türk Telekomünikasyon A.Ş.* decision numbered 16-15/255-110 and dated 03.05.2016; see also the Board's *GIC/BLACKSTONE* decision numbered 18-04/64-37 and dated 08.02.2018, in which the Board imposed an administrative fine on GIC Pte. Ltd. in the amount of 0.1% of its 2016 turnover on the grounds of submission of incorrect and misleading information provided in the merger filing notification.

2 The Board's *Martı* decision numbered 22-33/527-213 dated 21.07.2022.

3 The Board's *Martı* decision numbered 22-41/587-247 dated 08.09.2022.

prices and campaign data submitted by Martı with the user data and visuals in the complaint, and found inconsistencies. This cross-check led to the Board concluding based on the examination conducted under Articles 14 and 16 of the Law No. 4054 that Martı had not provided accurate price data and had initially claimed to have no collective data on discount periods and amounts. However, after being made aware of the discrepancies, Martı eventually provided correct and detailed data to the TCA. Despite the fact that Martı eventually provided the accurate data, the Board still decided to impose a fine of one-thousandth of its 2021 turnover, in accordance with Article 16/1(c) of the Law No. 4054.[4]

In line with the foregoing, in its recent Lotte decision,[5] the Board evaluated the responses submitted in relation to activities of Lotte Chemical Corporation Türkiye (İstanbul) İrtibat Bürosu (Lotte İstanbul Liaison Office) by Lotte Chemical Corporation (Lotte), a Korean-based chemistry company, during different proceedings including a first examination and merger filing. Initially, Lotte stated that Lotte İstanbul Liaison Office does not constitute a separate legal entity in Turkey and does not generate turnover within the response petitions submitted to the TCA. However, it was then discovered, through audits conducted by the Ministry of Industry and Technology and the issued invoices, that Lotte İstanbul Liaison Office had been engaging in sales operations since 2015. Therefore, the Board decided to impose an administrative fine on Lotte in the amount of 0.1 per cent of its 2021 turnover on the grounds of submission of incorrect and misleading information.

Anti-trust investigations and merger filings require input from parties on both legal and economic aspects, which also leaves room for human mistakes. After considering the above, it appears that the TCA has become stricter in enforcing rules against providing misleading information. Therefore, it is crucial for undertakings to approach all communications with the TCA with utmost care and ensure accuracy as much as possible regardless of the context.

Gülçin Dere
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4 Article 16/1(c) of the Law No. 4054 includes the following provision:
"Article 16 (Administrative Fine) – In those cases where in implementation of Articles 14 and 15 of the Act, incomplete, false or misleading information or document is provided, or information or document is not provided within the determined duration or at all, ... the Board shall impose on natural and legal persons having the nature of an undertaking and on associations of undertakings or members of such associations, an administrative fine by one in thousand of annual gross revenues of undertakings …. which generate by the end of the financial year preceding the decision, …."

5 The Board's *Lotte* decision numbered 22-29/470-189 dated 30.06.2022.