

# Turkish Competition Board's top cases in 2019

*December 2019*



*From investigations in the digital, fintech and mobile network service sectors to scrutiny from administrative courts, 2019 has been a busy year for the Turkish Competition Board (the Board). It is safe to say that while the Turkish watchdog did not overlook small-scale infringements by modest players (here's to street food salesmen and hot air balloon operators!), the Board also did not refrain from tackling both local and global moguls. Following the footsteps of leading competition authorities worldwide, 2019 was marked by increased competition law scrutiny in the Turkish digital and fintech sectors. Paksoy has picked the below cases from the most controversial and trending bunch of 2019, which make way for welcome anticipation when it comes to Turkish competition law enforcement in 2020.*

Here are the cases that have shaped 2019:

## **1. A new chapter in the Google saga: Turkey.**

Global tech giant Google was fined by the Turkish Competition Authority following a complaint lodged by its Russian rival Yandex Limited (Yandex), alleging that Google had violated Turkish competition law by abusing its dominant position in the market for licensable mobile operating systems. The Board's ruling was the outcome of the annulment of a previous decision whereby the Board decided not to initiate a full-fledged investigation against Google back in 2015. After having re-assessed the findings of the case, the Board held on 19 September 2018 (with decision no. 18-33/555-273) that agreements between Google and OEMs forcing the latter to pre-install and set as default certain Google applications constituted an abuse of Google's dominant position, and imposed an administrative fine of TRY 93,083,422.30.

In addition to the monetary fine, the Board held that Google should amend its agreements with the OEMs to remove any provisions pre-conditioning the licensing of Google products to requisites like pre-installation and

exclusivity. Google was supposed to amend all such agreements to comply with the Board's decision within six months following the receipt of the reasoned decision. Instead, Google announced in December that should they not reach an agreement with the Turkish Authority, Google will not be able to work with its Turkish business partners on new Android phones to be released in Turkey. The statement followed a decision of the Board rendered on 7 November 2019 (with decision no. 19-38/577-245) to impose a daily fine on the undertaking for each day that it fails to comply with the requirements of the Board's 2018 decision, starting from the decision date. The daily fine was set at 0.05% of Google annual Turkish turnover in 2018.

It should be noted that earlier in 2019, the Turkish Authority had initiated yet another investigation against Google. As such, the Board is currently looking into allegations that Google abused its dominant position in the search engine and advertising market through self-preferencing practices, obstructing its competitors' activities by putting forward its own local search services. The feud between the Turkish watchdog and the global tech giant creates considerable uncertainty for the Turkish businesses and consumers alike. Whether this would be of a scale to reshuffle cards in the competitive landscape in the Turkish tech market is yet to be seen.

## **2. Predatory pricing allegations in mobile network services: Huawei is cleared of violation claims.**

The Board concluded its preliminary investigation against Huawei Telekomünikasyon Dış Ticaret Ltd. Şti. (Huawei) on 30 May 2019 with decision no. 19-20/286-122, rejecting predatory pricing allegations in telecom infrastructure sector. As such, the Board closed the case without initiating a full-fledged investigation. The Huawei case, which was the Chinese tech giant's first antitrust investigation in Turkey, marks the first instance whereby the Turkish Authority assessed the telecom infrastructure sector in Turkey.

Huawei is one of the prominent figures in the wireless mobile telecommunications technology around the world, and among major providers of 3G and 4.5G technology in Turkey, also supplying mobile network equipment and services to mobile operators through tenders. Turkey being on the verge of building country-wide 5G connection, the results of this pre-probe set the foundation to further understand the complexities of local telecom infrastructure sector, examining its development and potential future dynamics.

Mobile networks, the focal point of the pre-investigation, consist of three segments: antenna, base station and site infrastructure. The Board conducted its examination under two separate product markets without making conclusive market definitions: (i) base station hardware and software market, and (ii) base station antenna market. It is worth noting that while these products are manufactured and supplied independently for 3G and 4.5G technologies, they are expected to become a single unit with the emergence of 5G technology.

The pre-investigation concerns predatory pricing allegations in mobile network tenders under Article 6 of Turkish Competition Act (Law no. 4054). Upon analysing market shares and conditions, the Board proceeded under the assumption that Huawei was in a dominant position, without making a definitive assessment, and found that Huawei has been profitable in both the base station and base station antenna markets (i.e. it competitively made above-cost bids to all tenders). Based on these findings, the Board decided that Huawei's behaviour did not constitute an abuse of dominance, and the case does not merit a full-fledged investigation.

## **3. Fintech cases: E-payment is in focus.**

The emerging fintech industry has been under the radar of the Turkish Authority in 2019, with two major cases addressing competition issues and shaping the structure of the market. On 30 May 2019 (with decision no. 19-20/291-126), in one of the most prominent decisions of the year, the Board ordered the termination of BKM Express, the digital wallet service provided by Bankalararası Kart Merkezi (BKM - *Interbank Card Centre*), revoking the exemption granted in 2016. The initial deadline for termination of the BKM Express service by November 2019 was extended to June 2020 by the Board on 7 November 2019 (with decision no. 19-38/563-232), upon request from BKM.

BKM is a legal entity owned by 13 banks and acts as an association of undertakings accepting membership of banks and financial institutions. The Board had granted exemption to BKM Express on 23 September 2016 (with decision no. 16-31/525-236) for an unlimited period on the grounds that BKM Express provided improvements in payment services by eliminating security risks inherent to e-commerce, as well as consumer benefits by eliminating security concerns associated with sharing credit card information online.

In its latest decision, however, the Board decided that BKM Express no longer fulfilled the individual exemption conditions. The Board ruled that BKM Express did not provide any particular efficiencies in the provision of digital wallet services that could not be provided equally efficiently by third parties, and therefore did not result in any particular consumer benefits. The Board also concluded that the consolidation of various services such as payment services, digital wallet and determination of credit card exchange rates under BKM resulted in the elimination of competition in a substantive part of the market. The decision provokes curiosity as to how the Turkish fintech and electronic payment services market will react to the withdrawal of the exemption. On the other hand, BKM is not expected to divest its BKM Express business to a third-party within 2020.

In addition, 2019 was marked by rapid growth in the Turkish payments industry through R&D endeavours and M&A deals. The Board granted clearance to the acquisition of iyzi Ödeme ve Elektronik Para Hizmetleri A.Ş. (iyzico) by MIH PayU B.V. (PayU), an e-payment subsidiary of Naspers, on 5 September 2019 with decision no. 19-31/466-199. The iyzico/PayU deal was recorded as the most remarkable fintech merger of the year, whereby the Board examined the local fintech market and established the general principles for the assessment of market power for e-payment services.

The Board found that the activities of PayU and iyzico overlapped horizontally in two markets: (i) virtual POS services and (ii) card data storage services. The Board described the virtual POS services market as competitive with a large number of players including banks and payment institutions. Additionally, the card data storage services market, traditionally viewed as an ancillary service to payment services, was considered as a separate market, with a large number of players and no high-level regulatory entry barriers. The Board also found a vertical relation between the parties' virtual POS services (upstream), and the online classified ad platform services (downstream) provided by Letgo Mobil İnternet Servisleri ve Ticaret A.Ş., another subsidiary of Naspers.

Given the rapidly growing nature of the e-payment market and the handicaps in picturing its overall size, the Turkish watchdog conducted an extensive analysis in calculating the parties' market power. For its analysis, it resorted to the BKM database and the parties' internal estimates, but also requested internal data from other players in the market and cross-checked what has been submitted. As such, the iyzico/PayU decision emerged as a landmark in the Turkish e-payment market and paved the way for similar subsequent mergers in terms of product market definition and market share calculation.

#### **4. Resale price maintenance danger continues!**

Following a spree of resale price maintenance (RPM) investigations concluded in 2018 against Türk Henkel Kimya San. ve Tic. A.Ş. and Sony Eurasia Pazarlama A.Ş., RPM investigations remained a hot topic in 2019. On 1 January 2019 (with decision no. 19-03/23-10), the Board concluded that Turkcell İletişim Hizmetleri A.Ş. (Turkcell), a Turkish telecommunications giant, had violated Article 4 of Law No. 4054 by fixing resale prices of its distributors in the sales of prepaid units, and imposed an administrative fine of TRY 91,942,343.31 on the undertaking.

The decision resulted from the re-assessment of the outcome of the Turkcell investigation concluded in 2011, whereby the Board concluded that Turkcell's practices regarding its distributors did not violate Article 4 by a majority of votes. However, the Board's 2011 decision was partially annulled by the Council of State, which ruled that the Board did not sufficiently consider findings and evidence pointing to Turkcell's RPM practices. It should be noted that, in its 2019 ruling, the Board did not conduct a thorough analysis of the evidence gathered

during the investigation. Instead, the Board based its decision on the Council of State's assessment of the evidence, such as tables prepared by Turkcell to set the profit margins for all levels of the supply chain.

Turkcell decision falls within a succession of infringement decisions stemming from increased scrutiny by administrative courts. Similarly, on 20 June 2019 (with decision no. 19-22/353-159), the Board held that Maysan Mando Otomotiv Parçaları San. ve Tic. A.Ş. (Maysan), a producer of shock absorber products for the transportation industry, had breached Law No. 4054 by fixing resale prices of its dealers. The decision followed the annulment by the administrative court of the Board's previous decision not to initiate a full-fledged investigation against Maysan back in 2016.

Another interesting development in the RPM field relates to the civil procedure notion of legal interest. On 8 March 2018 (with decision no. 18-07/112-59), the Board decided not to initiate a full-fledged investigation into allegations of RPM practices by Duru Bulgur Gıda San. ve Tic. A.Ş. (Duru Bulgur), a producer of packaged wheat products. An annulment action against the Board's Duru Bulgur decision brought by a consumer was rejected by the first instance administrative court based on lack of legal interest of the claimant. The court held that the mere title of consumer did not justify a legitimate, personal and actual interest between the claimant and the administrative decision at hand. However, on 20 November 2019 (with ruling no. E. 2019/1829, K. 2019/2624) first instance ruling was subsequently reversed in appeal and sent back to the lower court for reassessment. While the outcome of the Duru Bulgur case remains unclear, it will no doubt shed light on consumers' capacity to seek judicial scrutiny of the Turkish Authority's decisions.

#### **5. AbbVie/Allergan merger.**

AbbVie's acquisition of Allergan, 2019's 2<sup>nd</sup> largest pharma merger, was unconditionally cleared by the Board on 11 October 2019 (with decision no. 19-35/517-213). The \$63 billion deal was triggered as AbbVie's most famous drug Humira (the world's top-selling drug) is losing its patent protection and AbbVie risks losing 60% of its total revenue when generic and biosimilar versions become available. By acquiring Allergan and inheriting its portfolio, AbbVie can make rapid product diversification and make up for its potential loss in revenue.

Allergan is best known for its medical aesthetics products, Botox in particular, and active in the areas of eye care, central nervous system, and gastroenterology. On the other hand, AbbVie, the owner of the top-selling drug Humira that brought nearly \$20 billion in 2018, has a portfolio focused on immunology, oncology, virology, neurological disorders, metabolic diseases and women's health. The Board found no horizontal overlaps between the parties' activities in Turkey and the vertical overlap on a global level was decided by to produce no adverse effects in Turkey. The clearance has been granted unconditionally.

#### **6. Ro-Ro cartel.**

The investigation launched in 2017 against five undertakings and one association of undertakings active in ro-ro transportation lines was concluded on 18 April 2019 with decision no. 19-16/229-101. The Board held that five undertakings providing ro-ro transportation services in Ambarlı-Bandırma and Ambarlı-Topçular lines violated Law No. 4054 by fixing transportation prices. Accordingly, the Board imposed administrative fines between 0.8% and 4% of the undertakings' annual gross revenues, amounting to TRY 7,404,850.77 in total. The Ferry Operators Association, on the other hand, was found not to have violated Law No. 4054.

The Board assessed the undertakings' argument that exchange of future pricing information between them was justified in light of the oligopolistic nature of the market. However, it was concluded that the information sharing was not caused by the oligopolistic nature of the market; instead, the undertakings shared their future business strategies to restrict competition. The dissenting opinions suggested that the scope of the economic unit encompassing one of the undertakings (the consolidated turnover used in the calculation of the fine) was not sufficiently justified in the decision. The dissenting opinion further argued that there was no sufficient proof

of the same undertaking's anti-competitive behaviour. As such, in case the Board's decision is subject to judicial scrutiny, its outcome would provide valuable guidance as to the standard of proof sought by the courts in establishing horizontal infringements.

This decision is the latest ring of the chain of scrutiny conducted by the Board in the ro-ro transportation sector in Turkey, as the market faced a number of investigations in the past years, mainly focused on price fixing, as well as exclusionary conduct and predatory/excessive pricing allegations.

#### **7. Will the Turkish Authority unscramble eggs in ABI/SAB Miller acquisition?**

One of the long-standing hot topics of the Turkish competition enforcement is once again under the Board's radar following the annulment of the Board's approval of the acquisition of SABMiller plc (SABMiller) by Anheuser-Busch InBev (ABI) by the administrative court. On 1 June 2016 (with decision no. 16-19/311-140), the Board had cleared SABMiller's worldwide acquisition of ABI in Turkey without any commitments. The Board had ruled that the concentration did not pose any competitive concerns in Turkey in light of the market shares of the parties. It should be noted that the decision was subject to the dissenting opinion of the President of the Board (at the time), which put forth that commitments offered by the parties should have been taken into consideration in order to remedy competitive concerns arising from the transaction.

However, the Board's decision was consequently annulled by the administrative court upon proceedings initiated by Turk Tuborg, the second largest player in the Turkish beer market. The administrative court mainly based its ruling on the Board's failure to examine the market conditions. The administrative court also held that, the Board's omission to impose any commitments on the parties was not justified by any legal or technical arguments, especially given the fact that the parties had submitted a commitment plan, and that the transaction was conditionally approved in other jurisdictions.

While it is unclear whether the Board will change its stance with respect to the transaction, which was implemented some three years ago, the outcome of the SABMiller/ABI case no doubt highlights the increasing scrutiny of competition law litigation in Turkey, particularly over problematic merger cases.

#### **Paksoy Antitrust and Competition Team**

*tturan@paksoy.av.tr*

This briefing is for information purposes; it is not a legal advice. If you have questions, please call your usual Paksoy contact.

All rights are reserved.

Paksoy is an independent full-service law firm in Istanbul, Turkey focused on helping clients in a wide range of legal areas including cross-border investments, acquisitions, international business transactions, banking and finance, projects, infrastructure, investigations, compliance, disputes, litigation and arbitration.