

Recent Developments under Turkish Competition Law

2023 Autumn Issue

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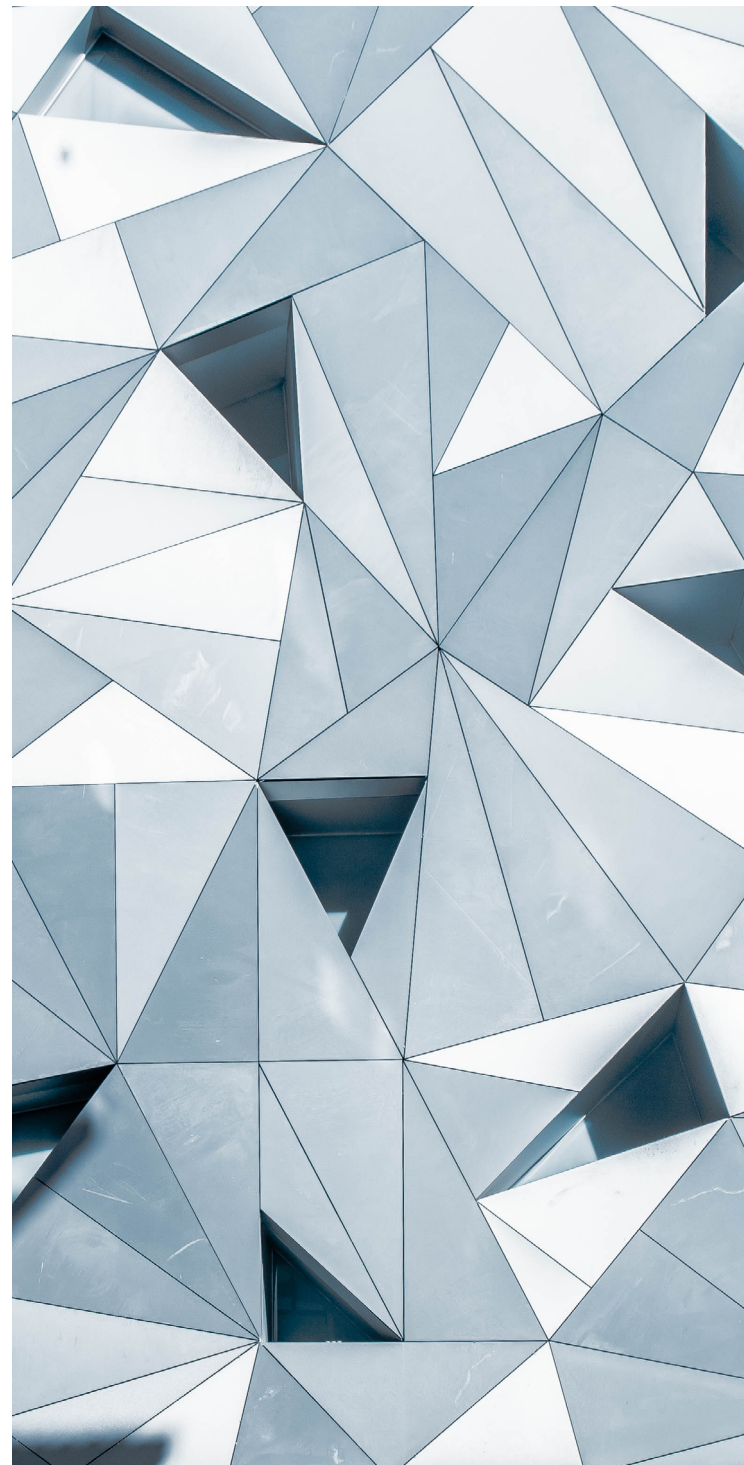
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Introduction

We usher in this Autumn season with another eventful agenda from the Turkish Competition Authority (the “**Authority**” or the “**TCA**”). Before delving into the headlines of the season, we believe a brief overview of the Authority’s activities could be insightful to underscore our point: The Authority initiated six new investigations in the first half of the season and concluded six different existing investigations. Moreover, it cleared twenty transactions across various industries and published sixty reasoned decisions, which involve highly debated probes, levying fines on major technology entities such as Meta and Elon Musk.

Starting with Meta, the company was fined EUR 18.6 million for abusing its dominant position by collecting personal data through changes to WhatsApp’s privacy policy. It is reasonable to assume that this case, along with the increasing use of personal data by other tech giants, prompted the Authority to delve deeper into the intersection between data protection and competition, making this topic one of the highlights of the season. This is substantiated by a recent announcement from the Authority stating they have signed an official information exchange and cooperation protocol with the Turkish Personal Data Protection Authority, aiming to foster effective competition in the relevant market and to enhance consumers’ control over their personal data.

Another notable event this year was the monetary fine imposed on Elon Musk, marking the TCA’s first gun-jumping case involving the novel technology undertaking concept. The Authority recently published the reasoned decision of the Musk case, revealing interesting details on why Musk/Twitter did not notify the transaction. One of the main arguments raised by Twitter was that the deal was signed before the enactment of the technology undertaking amendment. The Authority, however, rejected Twitter’s arguments, accepting the closing date as the date when the control change occurred and decided to fine the acquirer, Elon Musk, for violating the suspension requirement.

These developments underscore the Authority’s diligence in identifying violations and imposing monetary fines. The President of the TCA publicly acknowledged that the Authority has ramped up its investments and capacity to analyse digital data and information technology, naturally leading to an uptick in the number of investigations as well as on-site inspections. This is also reflected in the Authority’s recently published annual report for the year 2022, showcasing the Authority’s enforcement activity in numbers: A total of 342 cases were concluded, encompassing 78 competition infringement cases, 19 exemption/negative clearance applications, and 245 merger control cases. Moreover, the TCA conducted an astonishing number of on-site inspections - 831 in total - and 54 investigations, resulting in a total of TRY 1.73 billion in administrative fines.

In this regard, we will explore a variety of the aforementioned topics in this Autumn Issue, which we trust you will find beneficial.

Togan Turan



A Snapshot of the Turkish Competition Authority's 2022 Annual Report

by Kansu Aydoğan Yeşilaltay, Ece Bezmez

The TCA recently unveiled its highly anticipated Annual Report for the year 2022 (“**Report**”), offering valuable insights into the authority’s endeavours and its progression throughout the year. The Report not only highlights the TCA’s enforcement actions and cases but also underscores strategic insights, regulatory amendments, and the monetary repercussions of competition law violations.

Stricter Enforcement and Expanded Scope

In the foreword of the Annual Report, the President of the TCA, Birol Küle, accentuates the importance of adapting to new business models and atypical infringements. The Report underscores how competition law has been deployed across various sectors in a gradual manner, necessitating an economic perspective to address structural market issues. Notably, the TCA broadened its scope to markets significantly impacting citizens’ daily lives and financial facets.

In 2022, the TCA concluded 342 cases, encompassing 78 competition infringement cases, 19 exemption/negative clearance applications, and 245 merger and acquisition cases. This represented a slight dip in the total number of cases compared to the previous year.

2022 in Figures

- *Merger and Acquisition Decisions*

The TCA reviewed 245 transactions in 2022, marking a 21% decrease compared to the preceding year. This decline was partly attributed to increased turnover thresholds following the regulatory amendments introduced in 2022. Most of these transactions entailed acquisitions, joint ventures, and

privatisations, with the top industries being chemistry and mining, IT & platform services, and healthcare services. The Competition Board (“**Board**” or “**TCB**”) unconditionally cleared 209 of these transactions, while conditionally approving two transactions. Additionally, 34 transactions were deemed beyond the scope or not requiring approval. The Report notes that five transactions advanced to Phase II review, with all but one concluded this year.

- *Cases on Competition Violations*

The TCA concluded 78 cases related to competition violations in 2022, marking a slight decrease from the previous year. These cases pertained to anti-competitive agreements and abuse of dominance, with 58 of these cases concerning anti-competitive agreements, 14 concerning abuse of dominance, and six being hybrid cases. The TCA dismissed the allegations in 20 out of 24 preliminary investigation files.

The distribution of these cases across sectors revealed a significant focus on the food industry, machinery industry, healthcare services, and information technologies. The Report also spotlighted an increase in the number of investigations and on-site inspections, credited to augmented IT and human resource capacity within the TCA.

- *Exemption and Negative Clearance Cases*

The TCA concluded 15 cases regarding exemptions and four cases regarding negative clearances in 2022, spanning nine different industries primarily in sectors such as banking, capital market, finance, and insurance services. The TCA granted five individual exemptions, three block exemptions, and four conditional exemptions. One undertaking’s exemption was revoked, and in two decisions, individual and block exemptions were evaluated together.

Monetary Fines

In 2022, businesses incurred a total of TRY 1.73 billion in administrative fines. These penalties primarily stemmed from anti-competitive agreements, concerted practices, and decisions of associations of undertakings (amounting to TRY 1.37 billion), and abuse of dominance (amounting to TRY 352 million). Additionally, fines totalling TRY 115 million were levied for obstruction of on-site inspections during the year, while fines for false or misleading information in response to requests for information and on-site inspections amounted to TRY 3.5 million. A sector-by-sector analysis reveals that the highest fines, totalling TRY 1.06 billion, were imposed on businesses within the food industry sector, followed by the information technologies and platform services sector (TRY 347 million), and the agriculture and agricultural products sector (TRY 186.7 million). These three sectors represented approximately

92% of the total fines imposed for breaches of competition regulations. Notably, no fines were imposed for gun-jumping in 2022.

Regulatory Amendments

Significant amendments were made to Communiqué No. 2010/4 in 2022, extending its scope to cover “killer acquisitions.” This implies that acquisitions of undertakings engaged in critical sectors now require clearance, regardless of their turnover. The turnover thresholds for notification were also revised to reflect changes in the calculation of turnovers for financial institutions. Moreover, the TCA updated its guidelines on the assessment of mergers and acquisitions to align them with the Significant Impediment to Effective Competition (SIEC) test introduced in 2020. The Report includes remarks on its efforts towards a legislative study concerning the Digital Markets Regulation, which is anticipated to foster a higher degree of competition in digital markets and accordingly regulate the gatekeeper power of large companies with significant market power, influenced by the European Commission’s Digital Markets Act.

Final Thoughts

The Report concludes that 2022 was a dynamic and productive year for the TCA, highlighting its steadfast efforts to uphold competition principles. It reaffirms the TCA’s dedication to enforcing competition laws effectively while adapting to evolving market dynamics. Through strategic initiatives, regulatory amendments, and vigilant enforcement, the TCA continues to play a pivotal role in promoting fair competition, ultimately contributing to a robust and competitive Turkish business environment.

The Long-awaited Meta (Facebook) Decision Finally Published

by Gülçin Dere, İrem Uysal

On 11 January 2021, the TCA initiated an investigation against Facebook Inc., Facebook Ireland Ltd., WhatsApp Inc., and WhatsApp LLC to ascertain whether there had been a violation of Article 6 of Law No. 4054 on the Protection of Competition (“**Law No. 4054**”) concerning the obligation to share data with WhatsApp users pursuant to Article 40 of Law No. 4054¹. The reasoned decision

¹ The investigation was initiated to assess Facebook’s update, slated to take effect on 8 February 2021, requesting permission to utilise the data of WhatsApp users in Türkiye in the context of other Facebook services, within the scope of Article 6 of Law No.



regarding the allegation that Meta Platforms, Inc. (formerly Facebook Inc.), Meta Platforms Ireland Limited (formerly Facebook Ireland Limited), WhatsApp LLC, and Madoka Turkey Bilişim Hizmetleri Ltd. Şti. violated Article 6 of Law No. 4054, which regulates the abuse of dominant position, was published on the official website of the TCA on 11 September 2023.

The Board’s Decision

The Board unanimously found that Facebook’s economic unity, comprising Meta Platforms, Inc., Meta Platforms Ireland Limited, and WhatsApp LLC, holds a dominant position in the markets for personal social networking services, consumer communication services, and online display advertising. It was also unanimously decided that by amalgamating the data collected by the so-called basic services of Facebook, Instagram, and WhatsApp, a restriction on competition was created, violating Article 6 of Law No. 4054 by hindering the activities of its competitors operating in the personal social networking services and online display advertising markets and by establishing a barrier to entry therein.

Pursuant to the provisions of the Regulation on Fines, it was resolved to impose an administrative fine of TRY 346,717,193.40 on Meta Platforms, Inc., Meta Platforms Ireland Limited, and WhatsApp LLC jointly and severally, based on the annual gross revenues generated at the end of the fiscal year 2021 and determined by the Board.

4054. However, following the decision to initiate the investigation, it was revealed that the data transfer in question had been ongoing since 2016 and that the aforementioned update would not alter the nature or scope of the said data transfer. Subsequently, with the decision of the Board dated 11 March 2021 and numbered 21-13/162-M, the scope of the investigation was broadened to include “determination of whether the use of the data obtained in Türkiye within the framework of each product and service offered by Facebook Inc., WhatsApp LLC, Facebook Ireland Limited, Madoka Turkey Bilişim Hizmetleri Ltd. Şti., within the framework of other products and services offered by companies of the Facebook group, including the aforementioned companies, violates Article 6 of Law No. 4054”.

The decision evaluated the alleged data merging as an exclusionary abuse and analysed its impact in both the social networking and online display advertising services markets. It was discerned that the data in question is crucial for the provision of both social networking and online advertising services and that it is not feasible for competitors to create or access a data set equivalent to the one amalgamated by Facebook. This scenario was recognized as creating an entry barrier in both markets. It was noted that due to Facebook's data combining, advertisers prefer to utilise the advertising mediums on Facebook, while the access of competing publishers, including competing social networking service providers, to advertisers has been curtailed.

In light of the foregoing, the following obligations have been imposed on Facebook: (i) to submit the necessary measures to the Authority within 1 (one) month at the latest from the notification of the reasoned decision, (ii) to implement the necessary measures within 6 (six) months from the notification of the reasoned decision, and (iii) to submit annual reports to the Authority periodically for 5 (five) years from the commencement of the implementation of the first compliance measure, subject to dissenting opinions of several Board members.

Dissenting Opinions

Various members of the Board voiced dissenting opinions and proffered different rationales for the decision. In one such dissenting opinion, the Board members contested the decision to delegate the implementation of the remedies to the investigated party. They posited that entrusting the remedies to the discretion and guidance of the investigated party, and postponing them by stipulating a deadline in the decision, perpetuates the existing competition restriction effects, while concurrently obstructing the swift implementation of an effective remedy. In this vein, the Meta Group will concurrently continue to augment its market power through the data and integration within its ecosystem, and will further fortify the efficient barriers to entry and expansion, thereby favouring data-driven incumbents. The dissenting opinion articulates that since structural separation in digital markets serves as the most efficacious solution to remove the motivational structure causing the behaviour, the remedy envisaged in the decision should encapsulate the following:

- Cease the merging of data collected by Facebook, Instagram, WhatsApp, and Messenger services, the so-called core services, and technically segregate such data,
- Restrict the utilization of data amassed through each core service solely to the enhancement of that core service and the online advertising marketplace proffered through that service,

- Archive the data collected under each core service in separate databases.

Conversely, another Board member, whilst concurring with the infringement finding and the fine imposition, forwarded a disparate rationale contending that the infringement duration should not be factored into the fine assessment in this instance. The decision revealed that Facebook has been exploiting WhatsApp's data since 2016, establishing a more than five-year span of cross-use data behaviour between the two companies. Consequently, the basic fine amount was augmented "by a multiple" pursuant to Article 5(3) of the Regulation on Fines. In this context, the Board member argued that since the infringement pertains to the abuse of a dominant position through data amalgamation and utilization to thwart competitor activities and erect market entry barriers, the information and findings within the investigation file fall short of conclusively demonstrating that the infringement commenced the moment WhatsApp data was shared with Facebook. The Board member contended that it isn't the data collection or usage that constitutes the infringement, but rather the complication wrought upon competitor activities and the erection of market entry barriers. They concluded that the precise extent to which previous data collection and usage either constitutes a competition element or an abuse of dominant position would solely be ascertainable through the Authority's detailed examination and decision.

Implications for the Industry and Digital Platforms' Future

This decision holds significance for evaluating data combining as an exclusionary abuse under Article 6 of Law 4054, and the theory of harm concerning data combining's exclusionary effects. The investigation scrutinized the effects of Facebook's ongoing data collection and combining activities in terms of market foreclosure or complicating market entry for competitors, considering these effects distinctly concerning the online advertising market and the social networks market. It's noteworthy that this decision accentuates the duty of undertakings in fostering fair and equal competitive practices. It transcends merely imposing hefty fines, extending to terminating violations and cultivating a healthily competitive market environment. Additionally, this decision ranks amongst the paramount decisions analysing the nexus between competition law and Personal Data Protection Law No. 6698 ("**Law No. 6698**"), alongside the intervention domains where Law 4054 and Law No. 6698 intersect, coupled with the interests they safeguard. In this regard, this decision beckons undertakings to prioritize transparent, fair, and competitive practices.



Amendments on the Horizon for the Leniency Regulation

by Gamze Boran, Oğulcan Halebak

The Regulation on Active Cooperation for Detecting Cartels (“**Leniency Regulation**”), which offers an avenue for cartel members to attain leniency or reduced fines (or even total exemption) in exchange for cooperation with the TCA in unearthing cartels, has been operative for over a decade and four years. While it is widely seen as a beneficial tool for both the TCA and potential infringers of Law No. 4054, the evolving landscape of Turkish competition law, particularly the amendments to Law No. 4054 in 2022, underscores the necessity for a revision of the extant Leniency Regulation. In alignment with this, the TCA promulgated a new Draft Regulation on Active Cooperation for Detecting Cartels (“**Draft Regulation**”) for public scrutiny on 28 September 2023.

The Draft Regulation introduces several revisions to the Leniency Regulation aimed at elucidating certain ambiguities emanating from practical applications, especially in light of the TCA’s vigorous enforcement against cartels.

Foremost, the proposed amendments seek to delineate clearly between the leniency mechanism, which enables the TCA to unearth cartels and amass evidence from cartel members in exchange for reduced fines, and the settlement procedure unveiled in 2022. The latter is an alternate route to case resolution where investigated entities can acknowledge the allegations for a reduction in fines.

Moreover, the Draft Regulation clarifies that entities acting as “hubs” in a hub-and-spoke cartel, termed “cartel

facilitators” in the Draft Legislation, who are traditionally liable for administrative sanctions akin to cartel members, will now be entitled to the leniency mechanism under the Leniency Regulation. This amendment appears to be inspired by the Board’s Chain Markets Decision² of 2021, wherein it held five prominent retailers in the Turkish Fast-Moving Consumer Goods (FMCG) market culpable for horizontal price-fixing. This pivotal decision also implicated their common supplier, Savola (a Turkish edible oils manufacturer), for cartel infringement, citing Savola’s role as an informational hub for the anti-competitive exchange between retailers. With the amendments proposed in the Draft Regulation, an entity in a comparable position to Savola, i.e., a cartel facilitator, will now be distinctly eligible for a leniency application.

Additionally, the Draft Regulation stipulates that an applicant can still reap the benefits of leniency and reduced fines if it has tendered a leniency application for a cartel infringement, yet the Board subsequently deems the infringement as non-cartel in nature. This provision is likely to assuage concerns of entities that might have shied away from leniency applications, fearing the infringement may not qualify as a cartel.

The Draft Regulation also enshrines certain temporal constraints for leniency applications and stipulates a deadline for the submission of newly acquired information and documents by the applicant. While the current rules allow for an application until the notification of the investigation report to be eligible for a fine discount, the Draft Regulation proposes a three-month deadline from the notification of the investigation notice—provided it is still before the notification of the investigation report—to qualify for such a discount. Furthermore, it mandates that if the applicant procures additional information and documents concerning the alleged cartel post-application, such must be promptly submitted to the TCA’s records before the conclusion of the second written defence period.

Final Reflections

Given the TCA’s proactive enforcement stance and the fluid nature of competition law, the amendments to the Leniency Regulation have been a long time coming. The incentivising character of the proposed amendments and the potential positive ramifications suggest that the Draft Regulation is a step in the right direction. With the closure of the window for submitting opinions on the Draft Regulation, the onus is now on us to keenly observe the TCA’s forthcoming moves.

² The Board’s *Chain Markets Decision* dated 28 October 2021 and numbered 21-53/747-360.



Hub-and-Spoke Cartel and Resale Price Maintenance in the FMCG Sector: The Second Round

by Büşra Aktüre, Sena Sasani

The Authority recently published its reasoned decision concerning the fast-moving consumer goods (FMCG) sector. This publication was keenly anticipated, especially after the TCA's declaration that major suppliers and retailers—including Coca Cola, Doğanay Gıda, Frito Lay, GlaxoSmithKline, Haribo, Pepsi Cola, and Red Bull—violated Article 4 of Law No. 4054 through hub-and-spoke cartel arrangements and resale price maintenance practices³. The decision is significant as it involved both hub-and-spoke and RPM violations and featured dissenting opinions by Board members.

Background

This is the second investigation the Authority conducted in the FMCG sector based on allegations of hub-and-spoke and RPM arrangements. The first investigation, initiated during the COVID-19 pandemic, probed 29 undertakings comprised of major retailers and suppliers. Following this investigation, the Board imposed a total administrative fine of approximately TRY 2.6 billion on five major retailers and their common supplier of edible oils, Savola Gıda, for facilitating hub-and-spoke arrangements⁴. The Board also concluded that Savola had determined the resale prices for its retailers.

In the recent decision, the Authority examined 15 suppliers and retailers, imposing total fines of approximately EUR 44.3 million. Notably, the TCB refrained from sanctioning the

supermarkets due to the principle of non bis in idem, as they had already been fined in the first investigation in 2021.

Key Takeaways from the Decision

The reasoned decision delved into the coordination among the investigated parties, determining that price transitions were facilitated through the indirect sharing of forward-looking, competition-sensitive information. Retailers, aware of this coordination, used the information in their forward-looking pricing strategies, and intervened in prices. The decision highlighted several significant issues:

Firstly, it touched upon the buyer power of the suppliers, noting that concentration could foster more favourable conditions for forming and maintaining a hub-and-spoke cartel. Citing the Preliminary Sector Inquiry Report Regarding the FMCG⁵ published on 5 February 2021, it emphasised that while national chain supermarkets possess significant buyer power, it does not legitimise indirect information sharing regarding future prices and price transition dates.

Secondly, the decision discussed the standard of proof/evidence, referencing a precedent from the 13th Chamber of the Council of State, which stated that due to the secretive nature of cartels, evidence may not be available from every undertaking, and expecting such would reward those most adept at destroying evidence.

Dissenting Opinions

The decision is exceptional for containing more than five dissenting letters on various subjects, primarily concerning parties' involvement in hub-and-spoke and RPM violations, the standard of proof for hub-and-spoke cartels and RPM, and the proper implementation of the ne bis in idem principle. These discussions hint at the decision being a reference precedent for numerous future cases given the multifaceted nature of allegations and the academic discourse it encapsulates.

Conclusion

The decision underscores the Authority's increasing focus on hub-and-spoke and RPM behaviour in the FMCG sector, offering detailed discussions by various Board members on the hub-and-spoke cartel. It provides enlightening evaluations on the standard of proof/evidence, oligopolistic dependence, and countervailing buyer power, marking a significant step in the Authority's ongoing scrutiny of competition practices within the FMCG sector.

³ The Board's decision dated 15.12.2022 and numbered 22-55/863-357.

⁴ The Board's decision dated 28 October 2021, No. 21-53/747-360

⁵ Please see. Preliminary Sector Inquiry Report Regarding Fast-Moving Consumer Goods (FMCG) Retailing, <https://www.rekabet.gov.tr/Dosya/geneldosya/htm-perakendeciligi-sektor-incelemesi-on-raporu-pdf>.



An Examination of the ‘Technology Undertaking’ Concept Post-Introduction: Dispelling Ambiguities?

by Büşra Aktüre, Lara Akça

In March 2022, the Authority incorporated a new terminology into Turkish competition law, namely “technology undertakings”⁶, with the primary objective of identifying so-called “killer acquisitions”. Should a target entity fit this definition, a simplified turnover threshold is applied; if other thresholds are satisfied, the transaction may warrant notification without adhering to the TRY 250 million turnover threshold designated for the target.

We have previously delved into the broad scope of this novel concept in earlier editions, underscoring the resultant confusion among practitioners of Turkish competition law. The absence of secondary legislation or guidelines explicating the specifics of this exception is at the root of this perplexity, rendering the case-law of the Board invaluable for establishing the practice.

A milestone development occurred when the Authority published its reasoned decision, imposing a fine on Elon Musk for premature acquisition of Twitter, marking a precedent as the first gun-jumping case following a year since the introduction of the technology undertaking concept. This reflects the Authority’s stringent enforcement of this new rule, notwithstanding Twitter’s counterarguments.

⁶ The Authority defines technology undertakings as undertakings operating in various sectors, such as digital platforms, software, gaming software, financial technologies, biotechnology, pharmacology, agrochemicals, and health technologies.

Understanding Technology Undertakings: Gleaning Insights from Case Law

The Authority has disclosed over 20 decisions within less than two years concerning technology undertakings, offering valuable insights into this burgeoning area.

- In its inaugural decision on a technology undertaking⁷, the TCB ascertained that the targets’ endeavours in digital workspace solutions, infrastructure, and analytics software services were encompassed by the definition of a technology undertaking. Predominantly, firms within the software sector have been identified as technology undertakings by the Board⁸. In a more recent case, Elon Musk/Twitter⁹, Twitter, delineated as a digital platform pursuant to its engagements in social networking, online advertising, and data licensing services, was recognized as a technology undertaking. This case garnered attention as the Board imposed an administrative fine on Elon Musk for failing to notify the Authority of the acquisition, despite Twitter being a technology undertaking and the acquisition necessitating the Board’s approval.
- The Musk/Twitter case is particularly noteworthy as the inaugural gun-jumping case concerning a technology undertaking. The decisions elucidate that Twitter presented several arguments, such as; (i) Twitter and Meta signed the agreement before the amendment on the technology undertaking, (ii) the Authority lacked any precedents or the secondary legislation that properly directs the undertakings, (iii) the transaction would not particularly have an impact in Turkey and (iv) Twitter financially had negative outcomes in Turkey at the time of the notifiability analysis. However, they were not accepted by the Authority.
- Following the software sector, pharmacology is emerging as a significant sector concerning technology

⁷ *Citrix&TIBO/Elliott/Vista decision dated 12.05.2022 and numbered 22-21/344-149.*

⁸ *Cinven/IFGL decision dated 18.05.2022 and numbered 22-23/372-157; Providence/Airties decision dated 02.06.2022 and numbered 22-25/403-167; Mandiant/Google decision dated 09.06.2022 and numbered 22-26/425-174; Oplog/Espro decision dated 08.08.2022 and numbered 22-35/543-219; Klaravik/Castic decision dated 08.09.2022 and numbered 22-41/582-242; Softline/Macronet decision dated 03.11.2022 and numbered 22-50/733-305; EBRD/Invent decision dated 10.11.2022 and numbered 22-51/744-308; Open Text/Micro Focus decision dated 10.11.2022 and numbered 22-51/745-309; Iron Mountain/CBK decision dated 23.11.2022 and numbered 22-52/788-324; Mitsubishi/HERE decision dated 01.12.2022 and numbered 22-53/796-326; Playtika/ACE decision dated 08.12.2022 and numbered 22-54/823-336; Cascade/Nitro decision dated 05.01.2023 and numbered 23-01/22-9; TCI Kabin/Cornea decision dated 12.01.2023 and numbered 23-03/35-15; Altor&Marlin/Meltwater dated 30.03.2023 and numbered 23-16/276-95.*

⁹ *Elon Musk/Twitter decision dated 02.03.2023 and numbered 23-12/197-66.*

undertakings¹⁰. For instance, in Astorg/Corden¹¹, the TCB deemed that the target entity, engaged in the production of active pharmaceutical ingredients (APIs) and ready-to-use drugs on behalf of pharmaceutical companies, qualifies as a technology undertaking due to its activities in the pharmacology domain. More recently, in the Werfen/IVD¹² case, the Board recognized the target as a technology undertaking operating within the realms of pharmacology and/or health technologies sectors. This was based on the provision of (i) serology-based reagents, equipment, and molecular products aimed at ensuring patient-donor compatibility and facilitating accurate pre-transfusion test results in an efficient and effective manner, and (ii) products designated for determining the most suitable pathways for organ or bone marrow transplantation and for monitoring potential organ/tissue incompatibility post-transplantation.

- The financial technology sector also presents notable instances of technology undertakings¹³. In Berkshire/Alleghany¹⁴, despite Alleghany's financial technology activities occurring outside Turkey and bearing no relevance to regulated sectors in the Amendment Communiqué within Turkey, the TCB adjudged Alleghany as a technology undertaking since it satisfied the criteria of having a presence in the Turkish geographic market. More recently, in Turan Teknoloji/Birleşik Ödeme,¹⁵ the Board stated that since the target was developing a digital finance application for international money transfers, it operated in the field of financial technologies and therefore qualified as a technology undertaking.
- A singular decision in Affidevia/Groupe Bruxelles¹⁶ identified the target's diagnostic imaging activities as falling under the technology undertaking definition in terms of biotechnology, marking the Board's only decision involving a technology undertaking in the biotechnology sector thus far.

¹⁰ CD&R/TPG/Covetrus decision dated 07.07.2022 and numbered 22-32/512-209; AmerisourceBergen/Pharmalex decision dated 23.11.2022 and numbered 22-52/775-319.

¹¹ Astorg/Corden decision dated 02.06.2022 and numbered 22-25/398-164.

¹² Werfen/IVD decision dated 22.11.2022 and numbered 22-56/874-360.

¹³ Re-Pie/Hızlıpara decision dated 08.12.2022 and numbered 22-54/842-347; Hedef/Vepara decision dated 01.12.2022 and numbered 22-53/816-335.

¹⁴ Berkshire/Alleghany decision dated 15.09.2022 and numbered 22-42/625-261.

¹⁵ Turan Teknoloji/Birleşik Ödeme decision dated 29.12.2022 and numbered 22-57/900-370.

¹⁶ Affidevia/Groupe Bruxelles decision dated 16.06.2022 and numbered 22-27/431-176.

Conclusion

These reasoned decisions indeed elucidate the newly incepted concept to some extent. Nevertheless, the absence of comprehensive guidance could potentially engender complications in the future, especially as technology increasingly intertwines with various facets of contemporary business operations. A plethora of firms are inevitably transitioning towards technology-centric operations, and may inadvertently fall within the technology undertaking definition irrespective of their association with killer acquisitions. To mitigate legal uncertainties and avert potential gun-jumping dilemmas, further guidance from the Authority remains a pressing necessity.



Turkish Competition Authority Concludes Inquiry into Ophthalmic Lens Manufacturers

Kansu Aydoğan Yeşiltay, Lara Akça

On September 22, the Authority disclosed its reasoned decision on its website regarding the preliminary inquiry initiated against entities engaged in the production and wholesale of ophthalmic lenses, investigating potential violations of Article 4 of Law No. 4054 through price fixing activities. Following a thorough examination, the Board decided to close the case without initiating a full-fledged investigation, pursuant to Article 41 of Law No. 4054, citing an absence of unequivocal evidence pertaining to information exchange and price fixing among the investigated entities.

Investigation Scope and Phases

The TCA received a complaint on 4 May 2021, accusing EssilorLuxxotica S. A ("EssiLux") of infringing Article 4 (which prohibits cartels and other agreements that could disrupt competition) and Article 6 (which prohibits abuse

of dominance) of Law No. 4054 through exclusionary and complicating conduct towards competitors. Consequently, a preliminary investigation commenced on 15 June 2021 against EssiLux, Beta Optik Sanayi ve Ticaret Ltd. Şti. (“**Beta**”), Hoya Turkey Optik Lens Sanayi ve Ticaret Anonim Şirketi ve Seiko Optical Europe GmbH Merkezi Almanya İstanbul Merkez Şubesi (“**Hoya**”), Cemfa Optik San. ve Tic. AŞ, Gelişim Optik AŞ (“**Gelişim Optik**”), Merve Gözlük Camı San. ve Tic. AŞ, Opak Lens San. ve Tic. AŞ (“**Opak Lens**”), and the Turkish Eyewear Manufacturers Association to explore potential anti-competitive information exchange and price fixing engagements in the ophthalmic lens production and wholesale markets. The TCA determined that a full-fledged investigation was unwarranted for the said entities, except possibly for Opak Lens and Gelişim Optik, who might have partaken in customer sharing and price fixing. Nevertheless, the Board exonerated all entities, citing insufficient evidence of price fixing or anti-competitive information exchange.

The Board’s Evaluation

The Board observed attempts by ophthalmic lens manufacturers/wholesalers to acquire sensitive competitor information, typically via their customers, yet deduced that such endeavours aimed at devising competitive pricing strategies and fostering competitive trading conditions against competitors. The Board scrutinized price alterations by market players from 2016 to 2022 to ascertain any price or quantity fixing agreements, revealing that price changes predominantly occurred at disparate times, barring Beta and Opak Lens, and Merve Optik and Altra Optik Sanayi ve Ticaret A.Ş. (an EssiLux subsidiary, “**Altra**”) - each having a single overlapping date within the pertinent time span. The Board opined that a solitary overlapping date amidst numerous other price alterations does not substantiate an agreement between the implicated entities. For Merve Optik and Altra, the Board attributed the coinciding date for price change (i.e., November 2021) to abrupt exchange rate hikes during the month, thereby disassociating the price updates from any agreement between the entities. The Board decided that price alterations largely signified competitive undertakings, devoid of concerted practices. This conclusion drew reference to a prior precedent¹⁷, underscoring that similar timing and rates of price increases do not inherently denote a concerted practice, and competitors monitoring each other’s pricing activities is a commonplace commercial phenomenon, which doesn’t invariably dictate their pricing strategies. Based on the on-site inspection documents and case facts, the Board discerned no explicit indicators of an anti-competitive agreement nor evidence of detailed, consistent, and systematic sharing of competitively sensitive information among the investigated entities.

¹⁷ The Board’s *Particle Board* decision dated 23.11.2017 and numbered 17-38/609-265.

Remarks

The decision reveals that information exchanges in the ophthalmic lens production and wholesale markets neither aimed nor resulted in competition restriction, rather they bolstered competition within the relevant markets. The decision underscores the requisite standard of proof for price fixing arrangements, dismissing speculative conclusions bereft of solid evidence. It bears significance as it amplifies the Board’s demand for the TCA to substantiate its investigative conclusions on price-fixing agreements and anti-competitive information exchanges through price/market analysis of the alleged market conducts, particularly when only internal correspondences hint at such wrongdoings, which do not inherently prove agreement existence – thus necessitating a certain level of standard of proof.



A New Dawn of Multijurisdictional Dawn Raids? - Joint Efforts of Turkey’s and EU’s Antitrust Regulators in Onsite Inspections at Cement Companies

Gamze Boran, İrem Deyneli

On 17 October 2023, the European Commission (“**Commission**”) divulged its engagement in unscheduled on-site inspections, colloquially known as dawn raids, targeting various entities within the construction chemicals sector across multiple European Union member states. The inspections primarily scrutinize chemical additives for cement, and chemical admixtures for concrete and mortar, aiming to unearth potential competition infringements within the construction chemicals and materials domains.

In a novel collaborative endeavour, the Commission's officials were accompanied by representatives from pertinent national competition authorities of the Member States, alongside select competition agencies from non-Member States, including Turkey's Competition Authority and the UK's Competition and Markets Authority ("CMA"). This collaborative venture, especially between the Commission and the TCA, signifies a remarkable stride, as Commission-led raids in Turkey aimed to discern potential antitrust transgressions under the EU's competition law regulations, hinting at prospective collaborative initiatives between these agencies in impending investigations.

Concurrently, the TCA has amplified its endeavours to rectify competition discrepancies within the construction chemicals and materials sectors. In a recent discourse, the TCA's president, Birol Küle, disclosed the initiation of investigations against 17 entities within the same sector for suspected price-fixing and customer allocation violations¹⁸ under Law No. 4054. Küle further alluded to additional ongoing inquiries targeting certain entities within the construction chemicals sector, focusing on accusations of anti-competitive agreements on pricing strategies, information exchange, and potential collusive conduct during tender processes. Following Küle's statements, on 7 November 2023, the TCA also announced on its official website that the Board, with its decision dated 19 October 2023, has initiated two separate investigations against certain undertakings operating in the production and sale of cement and ready-mixed concrete. One of the investigations cover 17 undertakings active in ready-mixed concrete sector in Ankara and aims to reveal any potential anticompetitive in the labour market, which the TCA has maximized scrutiny in for the last two years¹⁹. The latter investigation on the other hand targets undertakings operating in the ready-mixed concrete and cement markets in Hatay and Malatya provinces of Turkey, which were struck by the devastating earthquakes in the southeast region of Turkey earlier this year. Allegations within the scope of the said investigation involves price-fixing and customer allocation violations²⁰.

Küle confirmed in its interview that the liaison with the Commission's Directorate-General for Competition concerning the construction chemicals market probe. The extent of further collaboration between the TCA and the Commission amid these investigations remains to be seen.

This international collaborative venture potentially heralds an imperative epoch of competition agencies' cooperation to address competition law concerns transcending national boundaries. The coordinated dawn raids by the Commission and the TCA underscore the global essence of these concerns, even within the ostensibly traditional domain of construction materials and cement, contrasting with the dynamic and burgeoning digital markets currently under the microscope. Multinational corporations, with subsidiaries or operations across multiple jurisdictions, are bound to factor in potential inter-agency cooperation, as such collaborations could culminate in synchronized antitrust infringement allegations across different jurisdictions.

In summation, this multinational, encompassing approach accentuates the global resolve of competition regulatory bodies to uphold fair competition and ensure global adherence to competition stipulations. It is irrefutable that such international cooperation augments the efficacy of competition authorities' endeavours in identifying and addressing anti-competitive practices, propelling significant strides towards a globally competitive and transparent market ecosystem.



Intersection of Competition Law and Data Protection: Navigating the Digital Economy Landscape

Deniz Benli, Mert Karakaşlar

¹⁸ <https://www.dunya.com/ekonomi/rekabet-kurulundan-17-cimento-firmasi-icin-sorusturma-haberi-708419> (last accessed 30 October 2023).

¹⁹ <https://www.rekabet.gov.tr/tr/Guncel/ankara-ilinde-faaliyet-gosteren-bazi-haz-15589466797dee118ec700505685da39> (last accessed 8 November 2023).

²⁰ <https://www.rekabet.gov.tr/tr/Guncel/hatay-ve-malatya-illerinde-cimento-ve-ha-0f4268227a7dee118ec700505685da39> (last accessed 8 November 2023).

As economies navigate the digital transformation tide, data has emerged as a cornerstone of economic dynamism. The surge in personal data processing carried out by big data technologies evokes considerable concerns surrounding effective competition and personal data protection. A delicate equilibrium between personal data protection

and data privacy, and data-driven economic activity is thus imperative. The ensuing relationship impacting the execution of both competition and data protection laws necessitates synergies between relevant regulatory authorities.

The existing collaboration channel between the Turkish Personal Data Protection Authority (the “DPA”) and the TCA established through a cooperation protocol signed on 12 April 2019²¹, fortified further through a recent cooperation and information-sharing protocol inked on 26 October 2023.²² Such reinstated cooperation is pivotal in harmonizing the protection of personal data with the data-centric economy.

Data Protection Dimensions in Data Economy

The Turkish Personal Data Protection Law No. 6698 (“**Law No. 6698**” or the “**DPL**”), enacted in 2016, predominantly mirrors the EU Directive 95/46/EC, the precursor to Regulation (EU) 2016/679 (General Data Protection Regulation) (the “**GDPR**”), overseen by the DPA. It delineates principles pertaining to accountability, transparency in personal data processing, transfer, and obliteration, besides outlining data subjects’ rights. While the DPL largely echoes European data protection lexicon, distinctions from the GDPR do exist. Critical data protection tenets intersecting with competition law include:

- **General Principles of Data Processing and Information Obligation:** The DPL mandates lawful, fair personal data processing for specific, explicit, and legitimate objectives. It necessitates transparent communication to data subjects regarding the nature and aims of data processing activities, ensuring no overstepping beyond initial collection intents. As such, personal data should not be processed for any reasons other than its initial collection purposes and/or in a manner beyond information that should have been provided to the data subjects.
- **Explicit Consent:** The DPL allows personal data processing with explicit consent, or under specific legal exemptions. Valid consent must be freely granted, well-informed, and specific to certain data processing activities, devoid of any coercion or perceived negative repercussions. The consent should not be conditional upon any advantage, including the provision of goods or services, as described by the DPA in its WhatsApp

decision.²³ Otherwise, such consent would be considered as void and the relevant data processing activities that have been performed based on such consent would be deemed illegal.

- **Right to Data Portability:** The right to data portability under the GDPR allows data subjects to retrieve, reuse, and transfer their data seamlessly and securely between different IT environments. This right increases the control of data subjects over their personal data and is considered as an important competitive tool as it allows users to simultaneously use multiple online service providers and easily switch among them. Although the DPL doesn’t encapsulate data portability rights, the inclusion of such a right seems inevitable given competitive digital market dynamics. In fact, as per the Medium Term Programme of the Turkish Government²⁴, new concepts in line with the GDPR are expected to be introduced in the DPL as part of the European Union harmonisation process.

Competition Law Facets Concerning Data-Driven Practices

There are several intersections between data protection law and competition law, most importantly both aim to enhance consumer welfare. However, when it comes to data-driven economies, user data or competitively sensitive data which may include such as amalgamated user data or big data and governed by competition law, may transcend personal data boundaries.

Abuse of dominance is the main aspect of competition law where data-based considerations come to play. Dominant entities restricting data accessibility, portability, interoperability, and engaging in data combination practices are typical manifestations of exclusionary abuse of dominance, aimed at barricading competitor entry by monopolizing data as a precious input. The Board’s approach to data combining is best illustrated in the Meta (previously Facebook) and Trendyol decisions. In the Meta decision, the Board ruled that Meta abused its dominant position in the markets for social network services for personal purposes, consumer communication services and online display advertising by combining user data collected from Facebook, Instagram and WhatsApp, resulting in the exclusion of its competitors from the market.²⁵ Previously, the Board had ruled that DSM Grup Danışmanlık İletişim ve

²¹ See <https://www.rekabet.gov.tr/tr/Haber/rekabet-kurumu-ile-kisisel-verileri-koru-cdcd250e245de91180f400505694b4c6>. (last accessed 3 November 2023)

²² See <https://www.rekabet.gov.tr/tr/Guncel/kisisel-verileri-koruma-kurumu-ile-rekab-6df0abc2d373ee118ec700505685da39>. (last accessed 3 November 2023)

²³ DPA’s *WhatsApp Decision* dated 3 October 2021 and numbered 2021/891.

²⁴ See Medium Term Programme (2024-2026) published by the Presidency of Strategy and Budget on 6 September 2023, available at https://www.sbb.gov.tr/wp-content/uploads/2023/09/Orta-Vadeli-Program_2024-2026.pdf. (last accessed 3 November 2023)

²⁵ Board’s *Meta Decision* dated 20 October 2022 and numbered 22-48/706-299.

Satış Ticaret A.Ş. (owner of Trendyol, a leading B2C online marketplace) abused its dominant position by using data gathered from third-party sellers to self-preference its own retail offering.²⁶ Regarding data portability, the Board ruled that Sahibinden.com (a leading Turkish online classified advertisement platform) abused its dominant position by restricting advertisers on its website from using multiple platforms simultaneously by preventing data transfers to rival platforms.²⁷ Similarly, the Board held that NadirKitap (an online platform for the sale of second hand books) abused its dominant position by refusing to allow its users from transferring their data to rival platforms.²⁸

Breach of data protection or privacy norms can manifest as exploitative abuse, where end-users may relinquish more data for subpar products or services. In this sense, data privacy can be considered as a quality metric for products/services and lack of privacy would imply a decrease in quality in such product/service. While the Board considered the exploitative aspect of Meta's practices, the question of whether such practices led to an abuse of dominance was

ultimately left open.²⁹ In that case, Meta was combining data from multiple platforms based on the explicit consent of users that was conditional upon the provision of Meta's services, thereby rendering the consent invalid under personal data protection rules as explained in the first section of in this essay.

Conclusion

The recent cooperation and information-sharing protocol between the DPA and the TCA heralds a closer collaborative chapter, expected to facilitate extensive information exchange, especially during sector-specific reviews and investigations. This collaboration should notably augment the DPA's investigation and enforcement prowess, drawing from the TCA's extensive investigative experience. The outlined aspects and considerations are anticipated to be focal points in these authorities' assessments, reflecting a concerted effort to foster a competitive, data-protected digital economy landscape.

26 Board's *Trendyol Decision* dated 30 September 2021 and numbered 21-46/669-334.

27 Board's *Sahibinden.com Decision* dated 17 August 2023 and numbered 23-39/754-263.

28 Board's *NadirKitap Decision* dated 7 April 2022 and numbered 22-16/273-122.

29 Board's *Meta Decision*.

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