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Recent Developments under Turkish Competition Law

2024 Summer Issue

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Introduction

This is the Summer Edition of Paksoy's Turkish Competition Law Newsletter. In this Summer Edition, we will be looking at a multitude of intriguing topics, ranging from certain ones that are always under the surveillance of watchdogs around the globe to ones that are creeping into antitrust landscapes and competition law discussions.

Following the Spring Edition, in which we had closely examined the Turkish Competition Authority's ("**TCA**") focus of attention on the tech sector, we delve into a recent announcement of the TCA relating to a full-fledged investigation with Apple being in the crosshairs this time around.

Thereafter, we analyse two topics that have often come under the global antitrust spotlight in recent years. We give a rundown of the Turkish Constitutional Court's take on non-compete clauses in employment contracts, as well as examining recent decisions relating to obstruction of on-site inspections through deletion of data, handled recently by both the TCA and the European Commission (the "**Commission**").

Furthermore, we crunch some numbers as we take a look at the semi-annual statistics for the first half of 2024 published by the TCA and highlight certain behavioural patterns of undertakings vis-à-vis the TCA that surely will pique your interest. In this vein, we examine the behaviour of undertakings while interacting with the TCA, we take a gander at a recently published reasoned decision, the outcome of which has the potential to alter the tendencies undertakings have in engaging the TCA with solutions to investigations.

Last but not least, we will explore recent amendments made to the Law No. 4054 on the Protection of Competition ("**Law No. 4054**"), as well as analysing a recent negative clearance decision pertaining to one of the major players in the Turkish automotive sector.

In short, this Summer Issue seeks to offer a comprehensive overview of the most recent developments and significant cases guiding the competitive landscape. We hope you find this Summer Issue helpful.

Togan Turan

Amendments to Law No. 4054 entered into force upon publication in the Official Gazette

by Gülçin Dere, İrem Uysal

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Law No. 7511 on Amendments to the Turkish Commercial Code and Certain Laws, published in the Official Gazette of 29 May 2024, No. 32560, has introduced certain amendments to the Law No. 4054, with respect to investigations conducted by the TCA ("**Amendment to Law No. 4054**").

The provisions of the Amendment to Law No. 4054 are summarised under two headings below:

The obligation of undertakings to submit a first written defence has been abolished

Prior to the amendment, Article 43(2) of Law No. 4054 provided that the Competition Board (the "**Board**", decision-making body of the TCA) would notify relevant undertakings within 15 days from the date of the decision to initiate the investigation, and that the undertakings were obliged to submit their first written defence to the TCA within 30 days of being notified of the investigation.

The Amendment to Law No. 4054 abolished the obligation for undertakings to submit a first written defence. The Amendment to Law No. 4054 stipulates that the Board will notify the investigated undertakings within 15 days, but undertakings are no longer obliged to submit a first written defence at the stage of notification of the investigation, when there is no allegation of an infringement in relation to the claims subject to the investigation and the investigation report has not been finalised. The Amendment to Law No. 4054 states that the reasoning behind such an amendment is to enable the parties to present their defence more effectively and to ensure that the investigation procedures are proceeding faster.

Regulation on the additional written opinion

The Amendment to Law No. 4054 also stipulates that, in order to expedite and improve the efficiency of the investigation process, if the Case Team in charge of the investigation, changes its opinion in the investigation report as a result of the written defence submitted by the undertakings, it will communicate its written opinion to the undertakings concerned within 15 days. Upon receipt of the written opinion, the undertakings will have 30 days to respond to this opinion.

Accordingly, the Case Team may only issue an additional written opinion in case its opinion in the investigation report has changed as a result of the parties' defences. If the Case Team does not change its view, no additional written opinion will be issued, and that there will be no obligation for the undertakings to submit an additional written defence. On the other hand, if an additional written opinion is issued, the undertakings will be obliged to respond to it within a maximum period of 30 days.

In conclusion, the amendment to Article 45 of the Law No. 4054 implies that undertakings are obliged to respond to the additional written opinion only within a maximum period of 30 days. Therefore, it would be appropriate for undertakings to prepare their written defence more carefully and expeditiously, considering that they are not entitled to request an extension of the deadline for responding to the additional written opinion. As regards the amendment to Article 43 of Law No. 4054, which is the abolition of the obligation on undertakings to submit a first written defence, this should not be interpreted as a way of preventing the voluntary submission of a written defence by the undertakings to the Board. In particular, Article 44 of Law No. 4054 provides that during the investigation phase, undertakings alleged to have infringed competition rules may, at any time, submit any information and evidence to the Board that may affect the Board's decision. In this connection, it is

expected that in the future, parties to the investigation will more frequently resort to submitting information and documents pursuant to Article 44 of Law No. 4054.

The Amendment to Law No. 4054 published in the Official Gazette of 29 May 2024, No. 32560 can be accessed here.

TCA Announced Its Half-Year Statistics for 2024

by Onur Okur

On 31 July 2024, the TCA announced its semi-annual statistics concerning the Board's decisions issued between 1 January and 30 June of the 2024 calendar year. Compared to the 447 decisions issued in 2023, the TCA's newly issued semi-annual statistics signal an increasing pace with 283 decisions issued in the first half of 2024, sustaining its growth in terms of enforcement of competition regulations in Türkiye.

According to the detailed breakdowns of the decisions provided by the TCA, merger filings continue to constitute a significant majority of the Board's decisions, corresponding to nearly half of all decisions issued by the Board during the relevant period. Among 143 merger filings, the Board conditionally approved three and issued negative clearances for 13 of the notified transactions while unconditionally approving the rest of the transactions. Arguably as a result of the revision of merger control thresholds and the enactment of the "technology undertakings" exemptions conducted by the TCA in 2022, information technologies and platform services were the leading fields of activity among the notified transactions, constituting a quarter of all the merger filings.

The Board's inclination towards concluding relatively low numbers of individual exemption/negative clearance cases continues in 2024, as there were only four such cases concluded so far this year. The Board accordingly granted two individual exemptions, recognised that one other filed scheme can benefit from the group exemption, and issued one negative clearance.

Merger filings are followed by the Board's decisions on infringement of competition with 96 such cases, of which 90 referred to infringements under Article 4 of Law No. 4054 regarding agreements, concerted practices and decisions of association of undertakings; a further four on infringements as per Article 6 on the abuse of dominance and the other 2 including both types of infringement. In terms of sectors under scrutiny, the food industry and retail sectors constituted nearly half of the 23 cases concluded in the first half of 2024, followed by chemicals/mining.

While distribution of the cases in 2024 so far are similar to 2023 in terms of types of infringements, details of the cases differ significantly. While the cases of infringement in 2023 overwhelmingly concerned vertical relations/restraints (i.e. between undertakings active in the different levels of the value chain), the majority of the decisions of the Board in 2024 were in reference to horizontal relations (i.e. agreements, concerted practices and decisions of the association of the undertakings, active in the same level of the value chain).

Among the abovementioned 96 cases, 10 resulted in decisions that there had been no infringement, nine resulted in the imposition of monetary fines, 11 were concluded as a result of the submission of appropriate commitments, and 66 were concluded following settlement with the TCA. In this timeframe, the TCA imposed monetary fines totalling just over 4 billion Turkish liras, almost doubling the total figure of 2.6 billion Turkish liras from 2023, in the first half of 2024 alone.

Another important take from the statistics of the decisions on infringements is the ever-increasing number of cases resulting in settlements, as 66 of 96 cases resulted in the investigated undertakings' settlement with the TCA. Such a significant majority of two-thirds of all infringement cases indicates that undertakings under scrutiny by the TCA increasingly prefer to settle with the TCA and obtain a significant reduction in the monetary fine (up to 25%), rather than enduring a stressful and costly in-depth investigation process. In comparison to the 2023 calendar year, where 68 of 145 cases were concluded with settlements. The increased tendency towards settling is of special interest in 2024, since it is frequently argued that a high demand for settlement resolution was particularly desired by the undertakings due to timing reasons. As the Board's decisions impose administrative monetary fines on the undertakings based on their latest completed financial year, the settlement mechanism was a preferable option for the undertakings that desire to face imposition of monetary fines based on an older turnover figure, which would be significantly lower from the following year due to significant changes on the Turkish lira exchange rates. Having said that, even though changes in the exchange rate were significantly stagnant throughout 2024, undertakings increasingly prefer to settle with the TCA, despite having fewer financial advantages in comparison to past years.

Accordingly, we can conclude that the settlement procedure has a lot to offer to undertakings apart from being a mere timing device for conclusion of an investigation before the TCA, as it relieves the undertakings from allocating a significant number of staff for data collection, correspondence and on-site inspection purposes, provides cost efficiencies in terms of legal representation, and provides clarity on the following procedures along with a deduction of up to 25% in the potential administrative monetary fine.

Turkish Constitutional Court's Take on Non-Compete Clauses in Employment Contracts

by Gülçin Dere, İrem Uysal

In recent years, the TCA has increased scrutiny in labour markets by investigating gentlemen's agreements between competing undertakings for not hiring each other's employees and exchange of competitively sensitive information between them, resulting in high administrative fines.[1]

While the TCA has mostly focused on gentlemen's agreements between competing undertakings, competition concerns in relation to non-compete agreements between employers and employees are also subject to scrutiny. As is known, employers often enter into non-compete agreements with their employees as a legal measure to protect their competitive advantage in the labour markets. Non-compete clauses and limits of these obligations are regulated under the Turkish Code of Obligations No. 6098 ("**TCO**"). Articles 444 et seq. of the TCO state that the non-compete clause to be signed by an employee against an employer after termination of the contract is valid only if the service relationship

1 See the Board's *Private Hospitals* decision dated 24.02.2022 and numbered 22-10/152-62, *Labour Markets* decision dated 26.07.2023 and numbered 23-34/649-218, *Labour Markets II* decision dated 27.02.2024 and numbered 24-10/170-66, *Private French Schools* decision dated 24.04.2024 and numbered 24-20/466-196, *Pharmaceutical Sector* decision dated 09.11.2023 and numbered 23-53/1004-M.

provides the employee with the opportunity to obtain information about the customer environment, production secrets or the employer's business, and at the same time if the use of this information is likely to cause significant damage to the employer. The TCO also limits the duration of non-compete clauses to two years, except in special circumstances and conditions.

Indeed, in a recent decision of the Board, in a case where employees entered into reciprocal and indefinite non-compete agreements with undertakings with which they had previously been employed, the Board made assessments indicating that these agreements could be characterised as cartel agreements aimed at customer allocation[2]. In its decision, the Board stated that the agreements in question went beyond the employee-employer context, that the reciprocal restrictions and the indefinite duration of these agreements led the parties to be considered as independent economic units. Therefore, on and after the date the agreement was signed and entered into force, the boundaries of the employee-employer relationship were exceeded and the relationship with competitors gained more prominence. For this reason, the Board considered that the agreements in question were to be considered as "agreements between undertakings" and fell within the scope of Law No. 4054.

On the other hand, the press release dated 23 April 2024, published by the United States Federal Trade Commission ("**FTC**"), stated that, within the scope of the FTC's final decision on the subject, provisions regarding non-compete agreements between employees and employers will be completely prohibited and such clauses will be considered as "*unfair methods of competition"* and therefore as an infringement of competition law[3].

In its final decision, the FTC announced that the non-compete agreements already in place for senior executives in "*policy-making positions*" who earn more than USD 151,164 annually will remain in place, underlining that these senior executives represent approximately 0.75% of the market.

While all these developments on non-compete clauses are ongoing and remain current, the Constitutional Court, in its decision of 4 April 2024, numbered 2023/153 and 2024/93, published in the Official Gazette on 6 June 2024 (the "**Decision**")[4], ruled that the non-compete clauses imposed after termination of the service contracts are not unconstitutional on the grounds that are explained below.

In its Decision, the Constitutional Court concluded that the contractual relationship with regard to the non-compete clause did not result in an excessive burden to the detriment of the employee; the conflicting interests of the parties were balanced within the context of the freedom of contract and the freedom of enterprise. Therefore, the Constitutional Court concluded that the rule did not infringe the freedom of contract and the freedom of enterprise. In addition, it was highlighted that the judge may limit the scope and duration of a non-compete clause that is excessively burdensome for the employee, freely assessing all the circumstances and conditions and taking into account the counter-obligation provided by the employer in an equitable manner. In this regard, the judge may determine the limits of the non-compete clause in accordance with the characteristics of the specific case, changing circumstances and conditions, and evolving needs.

Moreover, the Constitutional Court stated that, even if the requirement of the written form for the non-compete clause constitutes a restriction on the freedom of contract, this restriction is regulated in a clear, unambiguous and foreseeable manner, it is based on a legitimate purpose of avoiding difficulties of proof, and it does not impose an excessive and disproportionate burden on the parties and therefore, the provision does not conflict with the freedom of contract and the freedom of enterprise.

The Decision contains valuable assessments and guidance for evaluating employers' non-compete clauses in service contracts with their employees. Given that the TCA has yet to publish guidelines in the field of labour markets but is expected to do so in the upcoming period, it is reasonable to consider that the Constitutional Court's decision will shed light to the undertakings in the meantime.

2 See the Board's *Biopharma/Transorient/Tunaset* decision dated 26.05.2022 and numbered 22-24/390-161.

3 The full text of the FTC's press release dated 23 April 2024 is available here.

4 The Constitutional Court's decision published in the Official Gazette can be accessed here.

A New Precedent in the Labour Markets: the Board Concludes that the Recommended Base Wage Lists of Doğuş Otomotiv for its Dealers Fall within the Scope of the Block Exemption for Vertical Agreements

Gamze Boran, Selen Toma, Deniz Özmen

The Board has recently assessed an application by Doğuş Otomotiv Servis ve Ticaret A.Ş. ("**Doğuş**") for negative clearance of a recommended base wage system for employees of its authorised dealers pursuant to the Block Exemption Communiqué on Vertical Agreements ("**Communiqué No. 2002/2**"), in its decision dated 7 September 2023 and numbered 2022-5-021 (the "**Decision**"). Doğuş proposed this system in order to increase employee satisfaction through competitive wages. Doğuş expects this initiative to improve service quality, thereby boosting customer satisfaction and brand loyalty – a strategic move to leverage quality as a competitive edge. The Decision represents the first occasion on which the Board has dealt with the setting of minimum wages in the context of a vertical relationship, representing a significant precedent in the labour markets, which are under close scrutiny by the Board since 2020.

Details of the recommended base wage system

Doğuş's application concerns introduction of a base wage recommendation lists for four different occupational groups in the automotive sector: Sales Management, Service, Spare Parts, and Management and Operational Support positions.[5] This recommendation seeks to enhance the corporate structures of dealers and authorised resellers and to attract qualified human resources by setting wages above the sector average. The recommended base wages will vary across different provinces and regions, and notably, will not include fringe benefits such as bonuses, meals, training, travel, clothing, and telephones. It is important to note that this wage list serves merely as a recommendation, and authorised dealers and resellers will have the autonomy to set their employees' wages above or below the suggested amounts. Furthermore, the recommended base wage lists are targeted at and provided to the senior management only and will not be disclosed to the employees of the dealers.

The relevant product and geographic market definitions

The Decision marks the initial instance, where the Board has considered setting minimum wages in a vertical relationship. In this regard, the Board has determined that the relevant product market could be unusually narrowly defined as the *"labour market for automotive sales and after-sales services"*.[6] When determining the geographic market for such a relevant market definition, the Board noted that individual characteristics, such as workers' preferences, age, family and health status, etc., were significant, but a broader geographic market can be taken into consideration since there is no obstacle for employees to work in the country. The Board emphasised that a narrower market may be defined according to changes in the employees' living/regional conditions, but ultimately defined the relevant geographic market as "*T*ürkiye", as it will affect the employees employed in Doğuş's dealerships and authorised dealers throughout the country.

The Board's assessment on the negative clearance request

Within the scope of Law No. 4054, the Board concluded that the agreements between Doğuş and its dealers were vertical in nature and focused on automotive sales and after-sales services rather

5 Sales Management, Service, Spare Parts and Management and Operational Support positions were together referred to as the "job families", and each a "job family".

6 Similarly, in its *Private Hospitals* decision numbered 22-10/152-62 and dated 24.02.2022, the Board defined the relevant product market as the labour market in the relevant sector, i.e. "labour market for healthcare services". However, this Decision expands the criteria further by including elements such as sales services within the automotive sector.

than on direct employment relationships. Despite the voluntary nature of the recommendation, the Board expressed concern that it could influence dealer employees' wages and restrict wage scales, potentially standardising employees' wages across authorised dealers and hindering competition between them as well as the resellers in terms of labour and wages. Consequently, the Board determined that the application fell under Article 4 of Law No. 4054, which is akin to Article 101 of the TFEU, and could not be granted with a negative clearance.

The Board's assessment on the application of Block Exemption for Vertical Agreements under Communiqué No. 2002/2

Following its assessment on the negative clearance application and the vertical nature of the relationship between Doğuş and its dealers, the Board continued with an exemption review of the application under Communiqué No. 2002/2, which sets forth the regulatory framework for block exemption that allows certain types of agreements to be exempt from the general prohibition of anti-competitive agreements, provided that these agreements meet specific criteria. The Board highlighted that setting a minimum of fixed prices should be considered in terms of output and input markets: in the output market, it would constitute an infringement for the provider to set a minimum or fixed price, whereas in the input market, it would constitute an infringement to set a maximum or fixed price. Under Article 4 of Communiqué No. 2002/2, the provider may set a maximum or recommended selling price in the output market and a minimum or recommended price/wage in the input market. Additionally, Doğuş's market share, which was determined to be below 20% in each job family and for the spare parts and services job families combined, met the requirement for a block exemption under Communiqué No. 2002/2, which necessitates a market share below 30%. However, the Board highlighted that the primary factor in assessing the anti-competitive impact of a recommended wage practice is the supplier's market position and whether the recommended wage leads to uniform price levels.

The most important potential impact of the proposed system is that it could lead to intra-brand wage competition. Although officially classified as a "recommendation" in nature, there is a possibility that the dealers might adopt the recommended wage as a fixed standard to maintain supply relationships with Doğuş. This could result in a cost burden by suppressing employee wages and potentially raising the service costs for end consumers. However, dealer perspectives are largely contrary to these concerns: while 82% of dealers viewed the recommendation as beneficial for attracting qualified employees, 15% of them expressed no anticipated negative impact and planned to continue with their own wage policies.

Conclusion

The Board determined that Doğuş did not have a pivotal role over its dealers in the automotive sales and after-sales services labour market, and that granting an exemption to the recommended practice would not raise competitive concerns. Therefore, the Board decided that the practice could benefit from a block exemption, hence this precedent underscores a deeper comprehension of the interplay between price setting and wage recommendations within vertical relationships.

Obstruction of On-Site Inspections through Deletion of Data: A Multijurisdictional Phenomenon

by Kansu Aydoğan Yeşilaltay, Oğulcan Halebak

The deletion of electronic data poses a significant challenge to the enforcement of competition laws, as it undermines the integrity of investigations and the ability of authorities to gather critical evidence uncovering competition law infringements. On this note, three very recent and notable cases will be

assessed herein—two from Türkiye and one from the European Union—that highlight the authorities' approach to data deletion and wiping during onsite inspections.

European Union: International Flavors & Fragrances Case

On 24 June 2024, the Commission imposed a fine of EUR 15.9 million on International Flavors & Fragrances Inc. and its French subsidiary, International Flavors & Fragrances IFF France SAS (together "**IFF**"), for obstructing an antitrust inspection by deleting WhatsApp messages exchanged with a competitor.[7] The infringement occurred during a Commission inspection in 2023, where a senior employee of IFF deleted business-related messages after being informed of the inspection.

According to Article 20(4) of Regulation No 1/2003, companies are required to submit to inspections and provide all relevant information. The intentional deletion of data during an inspection is therefore an infringement of this regulation. The Commission's forensic IT experts detected the deletion and were able to recover the deleted data, but the act of obstruction itself warranted the fine.

The Commission emphasised the importance of preserving all data during inspections, as any deletion or manipulation could significantly hinder the investigation. The Commission accordingly imposed a monetary fine and whilst determining the percentage of the fine, it has regard to the gravity and the duration of the obstruction. In assessing the gravity of the infringement, the Commission took into consideration certain factors, such as the nature of the infringement, the intentional nature of the conduct, the type of information deleted and the position of the employee who carried out the deletion.

That said, the Commission also highlighted IFF's immediate admission of the deletion on the spot, its efforts to restore the data to its fullest ability on the same day of the inspection, and its overall proactive cooperation with the investigation. The Commission has therefore decided to reduce the amount of the monetary fine by 50% and imposed a fine of 0.15% of its total turnover.

Türkiye: Koyuncu Elektronik Case

In a similar vein, the Board dealt with a case of obstruction during an on-site inspection at Koyuncu Elektronik Bilgi İşlem Sistemleri Sanayi ve Dış Ticaret A.Ş. ("**Koyuncu**").[8] The Board's investigation, initiated on 11 May 2023, was not directly against Koyuncu and focused on potential infringements of Law No. 4054 by Epson Italia S.P.A. Turkish branch in Istanbul and Kadıoğlu Kırtasiye Pazarlama Ticaret A.Ş. During an inspection at Koyuncu on 6 September 2023, it was discovered that employees had deleted emails from their Microsoft Outlook accounts after the inspection had commenced.

The Board's findings revealed that employees conducted deletions during the inspection period, despite clear instructions to preserve all data. This obstruction was considered an infringement under Article 16 of Law No. 4054, which mandates administrative fines for hindering or complicating inspections. As a result, Koyuncu was fined 0.5% of its gross revenue for the 2022 financial year. The Board highlighted that the act of deletion, regardless of whether the data was later recovered or not, constitutes a significant impediment to the inspection process.

On the other hand, the dissenting opinion of the three board members put an emphasis on the context and nature of the deletions and they argued that, save for cases on cartel allegations, the context of the deletion should be taken into account, the deleted emails were tangential to the determination of the infringement, and the intent of deletion was not to obstruct the investigation. They also noted that all deleted emails were successfully recovered, suggesting that the fine might be disproportionate, given the circumstances.

Türkiye: Epson Italia S.P.A. Case

In another recent decision, the Board addressed obstruction during an on-site inspection at the Epson Italia S.P.A. Turkish branch in Istanbul ("**Epson Italia**").[9] The inspection on 5 September 2023 revealed that an employee had deleted emails from their Microsoft Outlook account after the inspection had begun.

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7 Press release of the Commission https://ec.europa.eu/commission/presscorner/detail/en/IP_24_3435.

8 Board's decision dated 21.09.2023 and numbered 23-45/839-295.

9 Board's decision dated 12.10.2023 and numbered 23-48/910-324.

Similar to the Koyuncu case, the Board found that the deletion of emails during the inspection period, despite instructions to preserve all data, constituted a significant obstruction. Epson Italia was fined 0.5% of its gross revenue for the 2022 financial year. The Board reiterated that any act of deletion, regardless of recovery, impedes the inspection process.

In this case, too, there was a dissenting opinion. The dissenting members highlighted the need to consider the context and intent behind the data deletions, save for cases on cartel allegations. They pointed out that the deleted emails were not central to the investigation and that the deletion was not meant to obstruct the inspection. The dissenting members argued that imposing a fine without considering these factors could lead to disproportionate penalties.

Comparative Analysis and Future Considerations

The cases of IFF, Koyuncu, and Epson Italia illustrate the strict measures taken by both the Commission and the Board to address the obstruction of on-site inspections through data deletion. However, the contrasting elements of proactive cooperation and dissenting opinions in these cases may imply that additional considerations may be warranted in addressing similar infringements and determining appropriate fines.

Discounts for Cooperation: The Commission's decision to reduce IFF's fine by 50% due to their cooperation during and after the inspection sets a precedent that could encourage other undertakings to adopt a more cooperative stance during investigations. Indeed, considering the momentary wrongdoing of a single employee, IFF as the entity taking immediate action and cooperating may pave the way for other undertakings that may find themselves in similar positions. On this note, this approach not only rewards undertakings for their transparency and efforts to rectify the situation, but also helps maintain the integrity of the investigation process.

Contextual Considerations: The dissenting opinions in the Koyuncu and Epson Italia cases introduce the possibility of considerations around the context and intent behind data deletions. That said, in terms of data deletion, which is a procedural infringement, the fact that the dissenting opinion requests the non-imposition of the penalty altogether instead of requesting a reduction of the penalty, distances these cases from the Commission's IFF decision and its overall approach. In any event, it should be noted that content assessment of recovered items is not an easy task specifically at the early stages of an investigation and when the case team has not had the opportunity to make a holistic assessment with information and data received from other parties or the investigated party in general.

Nevertheless, the fact that the Board decided to impose a penalty on the attempt, despite the dissenting opinions, further to a majority of the votes in the decisions, showing that the Board does not tolerate digital data deletion/wiping in general.

Conclusion

Both the Commission and the Board have demonstrated their commitment to upholding competition laws by imposing substantial fines for the obstruction of on-site inspections and confirmed that they will not tolerate any action that undermine the effectiveness of the investigations. In this respect, M. Vestager, Executive Vice-President in charge of competition policy of the Commission, commented on the Commission's IFF decision that *"Today's decision to fine IFF shows that we will not tolerate any action that could impact the effectiveness of our investigations and that we firmly pursue and sanction any such obstructions."* The robust actions taken by the Commission and the Board thus serve as a stern reminder of the consequences of obstructing justice in the realm of competition law enforcement, while also hinting at a possible evolution towards more nuanced enforcement practices.

It is important to note that businesses must recognise the critical importance of adhering to data preservation protocols during inspections to avoid severe legal and financial repercussions. Indeed, given the potential for administrative fines as well as the reputational risks involved, in today's environment, it is especially crucial for businesses to be prepared and properly react to unannounced on-site inspections.

The Board's Rejection of IGSAS' Request for Reversal of a Settlement Decision Following the Conclusion of the Investigation

by A. Göktuğ Selvitopu

To settle or not to settle? This may be the question on the minds of undertakings facing investigations by the TCA in the future, in the aftermath of the Board's IGSAS decision dated 31 August 2023 and numbered 23-40/763-267. The settlement mechanism that was introduced in 2020 has been an ever-present figure in the Turkish antitrust landscape since it came into force in July 2021. While the second half of 2021 saw four investigations being resolved through settlement, that number increased to 34 in 2022, 68 in 2023 and based on the newly published statistics of the TCA for the first half of 2024, 66 investigations were concluded through the use of the settlement mechanism already this year. That said, the IGSAS decision that is evaluated in detail below might lead undertakings to have second thoughts when it comes to settling in the early phase of possible future investigations.

Background

In the late summer of 2021, the Board launched a full-fledged investigation on certain fertiliser manufacturers, namely Bandırma Gübre Fabrikaları A.Ş., Ege Gübre San. A.Ş., Eti Bakır A.Ş., Gemlik Gübre San. A.Ş., Gübre Fabrikaları T.A.Ş., İstanbul Gübre San. A.Ş. ("**IGSAS**") and Toros Tarım San. ve Tic. A.Ş.

While IGSAS initially applied for the commitment mechanism rather than the settlement mechanism, this request was denied by the TCA on the grounds that the alleged infringements under investigation by the TCA were clear and severe infringements. Following the TCA's refusal to engage the commitment mechanism for the matter at hand, IGSAS submitted an application for the settlement mechanism, which was accepted by the TCA. Following the completion of the settlement negotiations, the Board rendered its final decision, stating that the IGSAS had infringed Article 4 of the Law No. 4054 by exchanging competitively sensitive information with its competitors and imposed an administrative monetary fine for IGSAS, albeit with a certain discount as part of the settlement negotiations.

However, unlike IGSAS, given that the remaining undertakings under investigation did not apply for the settlement mechanism, TCA moved forward with its investigation on the remaining undertakings and upon the conclusion of its review of the available evidence, the material within the file and the arguments presented during the investigated parties' written and oral defences, the Board determined that the remaining six undertakings did not infringe Law No. 4054 and thus no administrative monetary fines were imposed on these undertakings. Subsequently, IGSAS requested the reversal of the settlement decision that stated it had infringed Article 4 of the Law No. 4054, in accordance with Article 11 of the Administrative Procedure Law.

The Board's Review of the Reversal Request

Within the reversal request, IGSAS argued that since the investigation determined that the investigated undertakings did not infringe Article 4 of the Law No. 4054 and no infringement had been found with regard to the remaining undertakings due to the exchange of competitively sensitive information, which is a type of infringement that can only be carried out reciprocally, the outcome of the IGSAS being the only investigated undertaking that was found to have infringed Law No. 4054 and faced an administrative monetary fine would violate its right to a fair trial, the principle of equality, the principle of legal certainty and its right of property.

IGSAS stated that the Board has the discretionary power to accept or reject an undertaking's settlement application on the spot, or delay its decision with regard to the settlement application should it require further investigation to determine the scope and details of the alleged infringement and further argued that while the Board accepted IGSAS' request for settlement without further examination, it eventually did not find any infringements and did not impose any administrative monetary fine on the remaining undertakings which resulted in a deviation between the Board's eventual conclusion of the investigation and the settlement decision in which the IGSAS was deemed to have infringed Article 4 of Law No. 4054.

Article 11 of the Administrative Procedure Law mentioned by IGSAS states that a party may request the annulment, reversal and amendment of an administrative action or issuance of a new administrative action from the higher administrative authority or the administrative authority which issued the action, in cases where there are no higher administrative authorities, prior to filing an administrative lawsuit within the stipulated time period. That said, upon review of IGSAS' reversal request, the Board concluded that despite Article 11 of the Administrative Procedure Law, based on Article 43 of the Law No. 4054 along with the Regulation on the Settlement Procedure, settlement decisions are not subject to judicial review and thus IGSAS' annulment request of the settlement decision pursuant to Article 11 of the Administrative Procedure Law could not be processed.

Conclusion

Despite the decision of the Board regarding IGSAS' reversal request, it is likely that this matter is not yet concluded and that a ruling by the administrative courts is planned in future on this matter. Unlike the EU antitrust landscape, where final decisions taken by the Commission under the Settlement Notice are subject to judicial review, that is not the case in the Turkish antitrust landscape, and the Board's IGSAS decision is a recent example of the lack of appealability and revocability of decisions on fines imposed as part of the settlement procedure. While the Board's decision on IGSAS was taken almost a year ago, the reasoned decision was only published on 17 May 2024 and therefore, it is worth keeping an eye on whether this decision will have any effects on the willingness of undertakings to engage the TCA with regard to the settlement mechanism.

Apple is on the stage: the TCA has initiated a full-fledged investigation against Apple

by Sabiha Ulusoy, Deniz Özmen

On 6 June 2024, the TCA announced[10] that it has initiated a full-fledged investigation against Apple Inc. ("**Apple**") and its Turkish subsidiary, namely Apple Teknoloji ve Satış Ltd. Şti., (through the Board's decision dated 21 May 2024 and numbered 24-23/525-M) to determine whether they have violated Article 6 of Law No. 4054.

Background

In 2023, the TCA commenced its studies on the Mobile Ecosystems Sector Inquiry (the "**Sector Inquiry**") in order to analyse the structure and function of the sector as regards smartphones and related software as well as the structural and/or behavioural competitive concerns in the industry. During the period of the Sector Inquiry, TCA had reviewed the contracts executed between Apple and app developers as well as the App Review Guidelines. Subsequently, the TCA initiated a full-fledged investigation against Apple and its subsidiary, based on the suspicions that Apple imposed certain restrictions on app developers in the App Store regarding payment systems, such as (i) anti-steering practices, and (ii) mandating the use of its own payment system.

10 https://www.rekabet.gov.tr/tr/Guncel/apple-inc-ve-apple-teknoloji-ve-satis-li-013f35240324ef1193cb0050568585c9.

Key concerns

The announcement signals that Apple holds a dominant position, however, does not refer to a specific product market definition. The key concerns raised by the TCA are summarised below:

The announcement states that app developers encounter obstacles to inform their users about payment channels outside the app, such as the developer's own website. Due to this prohibition, the TCA considers that it is necessary to examine whether consumers are restricted from accessing better options (at lower prices), given that they cannot be made aware of any alternative payment channels as well as the price deviations between in-app subscriptions and those available elsewhere. In addition, the announcement highlights that links redirecting users to alternative channels outside the app are also prevented from being included in the apps.

Moreover, it is noted that another restriction imposed on app developers is mandating them to utilise Apple's own payment system for in-app purchases, from which Apple receives a 30% commission fee.

In this context, this anti-steering practice and mandating the use of Apple's own payment system raise competitive concerns such as whether Apple eliminates the freedom of choice of app developers by mandating the use of its own payment system and whether it prevents other payment systems from entering Apple's ecosystem.

The Commission's Investigation

This development mirrors the Commission's investigation in which it has fined Apple over EUR 1.8 billion for abusing its dominant position on the market for the distribution of music streaming apps to iOS users through its App Store. The Commission concluded that Apple imposed certain restrictions on app developers, preventing them from informing iOS users of alternative and cheaper music subscription services available outside of the app, and from providing any instructions as how to subscribe to such offers, which is similar to the allegations raised in the TCA's current investigation.

The Commission's press release states that such anti-steering provisions imposed by Apple are neither necessary nor proportionate in protecting its commercial interests pertaining to the App Store and have negative effects on the interests of iOS users.