

July 29 2021

Competition authority upholds interim measures against Facebook data sharing

ELIG Gurkaynak Attorneys-at-Law | Competition & Antitrust - Turkey



GÖNENC
GÜRKAYNAK



BETÜL BAŞ
ÇÖMLEKÇİ



ESMA AKTAŞ



ASLI SU ÇORUK

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The Turkish Competition Board (the Board) has published its decision⁽¹⁾ concerning Facebook and WhatsApp's requests for the exclusion of undertakings other than WhatsApp LLC from the scope of the Board's ongoing investigation, and the reassessment of the interim measure decision 21-02/25-10, dated 11 January 2021, within the scope of Article 11 of Law 2577 on Administrative Procedure.

Facts

In January 2021 the Board had previously decided⁽²⁾ to launch a fully fledged investigation against Facebook Inc, Facebook Ireland Ltd, WhatsApp Inc and WhatsApp LLC in order to assess whether these undertakings had violated Law 4054 on the Protection of Competition. In the same decision, the Board also decided to impose an interim measure against the popular messaging and VoIP application WhatsApp, pursuant to Article 9 of Law 4054. This interim measure obliged Facebook to cease the application of those terms brought into force as of 8 February 2021 regarding the usage of its users' data for other services, and also compelled Facebook to notify all its users, regardless of whether they have previously given consent to these terms or not, that it has ceased to apply these new terms regarding data sharing. (For further details please see "[Competition Board imposes interim measure against WhatsApp's updated privacy policy](#)".)

Further to the Board's decision, WhatsApp LLC and Facebook applied to the Turkish Competition Authority (the Authority) within the scope of Article 11 of Law 2577, requesting its reassessment.⁽³⁾

Scope of applications

In brief, WhatsApp's request highlighted that although the interim measure decision was devoid of any legal basis, WhatsApp had still complied with this decision. The first application mainly focused on the fact that:

- WhatsApp LLC is the sole provider of WhatsApp services in Turkey, and therefore the other undertakings should not be subject to the ongoing investigation;
- WhatsApp's update notice concerning the privacy policy and terms of service dated 4 January 2021 did not lead to any competitive concerns, mainly because this practice, which constitutes a part of WhatsApp's privacy policy, has been ongoing since 2016, and WhatsApp has been communicating its conditions to the users in a more understandable way, clarifying the properties of WhatsApp's texting services and giving information about WhatsApp's business integration with Facebook;
- WhatsApp had complied with the Board's previous decision; and
- WhatsApp had postponed the update globally until 15 May 2021 and publicly announced this decision on 15 January 2021.

The second application set forth in brief that:

- the interim measure lacked any legal basis as the update had not been applied yet;
- even if the update had been realised, the imposition of the interim measure would still be unlawful as the Board could not demonstrate the grounds leading to a competition law violation and irreparable damage;
- the interim measure should be applied solely under exceptional cases if there is a strong evidence of the necessity to do so; and
- even if the Board considered that the requirements for the implementation of interim measures existed, imposing an administrative fine for non-compliance with the interim measures would mean penalising an undertaking based on an action that had not yet been put into effect and therefore could have no effect on the market.

Decision

The parties' application requested the Board to reassess its decision 21-02/25-10 of 11 January 2021, within the scope of Article 11 of Law 2577; as well as with respect to the composition of the parties investigated.

First, the Board evaluated the request concerning the exclusion of the undertakings other than WhatsApp LLC from the scope of the ongoing investigation. The Board emphasised the difference between the terms "undertaking" and the "addressee of the investigation". The term "undertaking" is used in order to determine the limits of the economic entity that is responsible under the application in question. The Board stated that the investigation concerned the economic entity controlled by Facebook Inc, and that Facebook Inc's subsidiaries, which were the direct addressees of the ongoing investigation, had been determined by taking into consideration their acts and connections with the market. As Facebook Inc was the main company representing the economic entity and Facebook Ireland Ltd had a significant role on the online advertising services market, the Board decided that they cannot be excluded from the investigation. On the other hand, as WhatsApp Inc had changed its legal corporate structure to WhatsApp LLC and, therefore, WhatsApp Inc did not exist,

the Board decided that it could be excluded from the investigation.

Subsequently, the Board evaluated the request alleging that the imposition of an interim measure on an update that had yet to be realised was deprived of any legal basis. The parties stated that the pre-condition for the imposition of an interim measure had not been fulfilled in the case at hand, as interim measures cannot be imposed on future acts. The Board refuted this allegation and pointed out that the parties' reading of paragraphs 1 and 4 of Article 9 of Law 4054 together was a flawed argument. The Board further explained that while Article 9(1) refers to the cases where the Board has identified an infringement, Article 9(4) allows the Board to impose interim measures in cases where there is not yet any final decision, but only a continued suspicion of violation concerning existing or future conduct. As the main purpose of the imposition of an interim measure is to identify the possible harm and to enable the restoration of the pre-violation status, the Board is not limited by a specific time period to apply an interim measure. In the case at hand, considering the risk of violation, the Board explained that the intention was to preserve the status quo, before a violation occurred.

In addition, the application also alleged that in ruling for interim measures, the possible violation should be demonstrated by strong evidence. The Board stated that, just because the evidence had not been already shared with the parties at that stage of the investigation, that could not be interpreted as a lack thereof. Indeed, the Board explained that WhatsApp's data sharing with the various Facebook companies pointed to compelling evidence of a violation. In this regard, the Board evaluated that the main evidence was the undertaking's notice on this data sharing, which was communicated to its users. Also, the users' consent to this data sharing was presented as a pre-condition for the provision of the relevant service. In this respect, as this obligation might enhance the effects of the applications, which may lead to a violation, the Board deemed it necessary to bring it to an end.

As for the parties' allegation concerning the postponement of the update, the Board stated that since this postponement was made in order to comply with the Board's interim measure decision, it could not serve as a basis for arguing that the violation had not occurred. In this respect, the Board evaluated that the postponement could only be considered within the scope of the undertaking's compliance with the Board's interim measure decision, rather than a realisation of the acts that may lead to a violation.

Finally, the Board evaluated the parties' allegation stating that even if the update had been applied, the interim measure would still be deprived of any legal basis. The Board emphasised that conducting a preliminary investigation is not required for the imposition of an interim measure. In addition, the decision explains that since the estimated date for the realisation of the update had been determined as 8 February 2021, and that the notice regarding the update had been made in the beginning of January 2021, this required the Board to take rapid action to eliminate the possible harm relating to the update. In this regard, the Board stated that the mere fact that the Board did not conduct a preliminary investigation did not indicate that the Board had not conducted any evaluation with regard to the possible damages. As previously stated in the Board's decision, the update that brought an obligation for data sharing enabled:

- the possibility of linking WhatsApp data to other Facebook company products and data;
- the possibility of Facebook using its power in the consumer communication services market in such a way to hinder its competitors in the online advertising market; and
- the risk of consumer exploitation as a result of excessive data collection, and the use of such data for other services.

The Board stated that the fact that the data sharing between WhatsApp and Facebook had been ongoing since 2016 did not justify ignoring the irreversible anticompetitive effects of introducing data sharing as a pre-condition for the service provision.

The Board evaluated the parties' allegation that the Board was under a misunderstanding with regard to the nature of the shared data. The Board stated that its concern on which data could be accessed through the WhatsApp application mainly related to excessive data collection, and this constituted only one dimension of the investigation. In this respect, the Board provided that the interim measure decision focused on the obligation of data sharing, rather than the nature of the shared data and, therefore, this allegation did not have any impact on the imposition of the interim measure.

In light of these evaluations, the Board decided that there were no grounds to revoke, quash or amend the Board's decision to impose an interim measure, or to render a new decision.

On a final note, the case handlers had opined that WhatsApp LLC had not complied with the obligations set forth in the Board's previous decision and so an administrative fine within the scope of Article 17 of Law 4054 should be imposed on Facebook for non-compliance. However, the Board did not further scrutinise whether these undertakings complied with the interim measures imposed by the Board's previous decision. In this respect, the reassessment decision did not include any findings.

Recent decisions on interim measures

The Board's recent decisional practice indicates that the imposition of an interim measure against an undertaking is not common.

In *Nadir Kitap*,⁽⁴⁾ the complainant, Netarti, requested the imposition of an interim measure against Nadir Kitap, due to its activities such as refusal to give the data entered on the system of www.nadirkitap.com to data owners and hindering its competitors' activities. The Board stated that as there was no clear evidence that the practices of Nadir Kitap would be able to cause serious and irreparable damage, there was no need to implement an interim measure within the scope of Article 9(4) of Law 4054, pertaining to the allegations brought under Netarti's complaint.

Moreover, in *Domino Fuarçılık*,⁽⁵⁾ the Board first evaluated the dominant position of Ankara Uluslararası Kongre ve Fuar İşletmeciliği Merkezi (Congressium) in the market and the allegations concerning its activities leading to refusal to supply, tying, excessive pricing and discriminatory practices. With regard to the imposition of an interim measure, the Board rejected the request as Congressium's abuse of dominant position had not been established and it was concluded that the alleged practices would not lead to potentially irreparable and serious damage.

In *Çiçeksepeti*,⁽⁶⁾ the request made by Osevio İnternet Hizmetleri concerned the imposition of an interim measure against Çiçeksepeti İnternet Hizmetleri (Çiçeksepeti) due to the allegation that it had violated articles 4 and 6 of Law 4054. The case handlers opined that a fully fledged investigation should be launched against Çiçeksepeti in order to determine whether it had violated the aforementioned articles. However, they deemed it was not necessary to impose an interim measure within the scope of Article 9 of Law 4054. Ultimately, the Board concluded that an interim measure shall not be imposed, as the condition set forth under Article 9(4) of Law 4054 had not been fulfilled.

Most recently, the Board investigated the pricing behaviours of chain markets engaged in the retail trade of food and cleaning products,

and the supplier undertakings at the level of manufacturers and wholesalers during the covid-19 outbreak. The Board imposed an interim measure on the investigated parties that involved providing information to the Authority on all price increases to be applied for food and cleaning products, during the period starting from date of the official service of the short-form decision until the end of the investigation process regarding the case file, within a format and frequency to be determined by the Authority.⁽⁷⁾

Comment

The Facebook decision is noteworthy as it reveals the Board's approach towards undertakings' reassessment applications for interim measure decisions. Considering the Board's decisional practice regarding requests for interim measures, the precedents show the Board's imposition of an interim measure is a rare occurrence. In this respect, this decision highlights the Board's consistent reasoning with regard to the necessity of an interim measure in order to eliminate possible serious and irreparable damage, which, in this case, could have arisen as a result of the update concerning the data sharing.

For further information on this topic please contact Gönenç Gürkaynak, Betül Baş Çömlekçi, Esmâ Aktaş and Aslı Su Çoruk at ELIG Gürkaynak Attorneys-at-Law by telephone (+90 212 327 17 24) or email (gonenc.gurkaynak@eliglegal.com, betul.bas@elig.com, esma.aktas@elig.com or asli.coruk@elig.com). The ELIG Gürkaynak Attorneys-at-Law website can be accessed at www.elig.com.

Endnotes

- (1) The Board's decision dated 11 March 2021 and numbered 21-13/162-69.
- (2) The Board's decision dated 11 January 2021 and numbered 21-02/25-M.
- (3) Article 11 of Law No. 2577 sets out a reassessment mechanism of administrative decisions before filing a lawsuit before administrative courts, to resolve disputes without directly resorting to judicial remedies. The Board's decisions can be subjected to a reassessment under this article. The reassessment is requested from and conducted by the administrative authority at a higher level in the public body that issued the initial decision, or the same authority if a higher administrative level does not exist. In the case of the Turkish Competition Authority, the reassessment applications are also reviewed by the Board.
- (4) The Board's Nadir Kitap decision dated 17 December 2020 and numbered 20-54/753-333.
- (5) The Board's Domino Fuarçılık decision dated 27 August 2020 and numbered 20-39/538-239.
- (6) The Board's Çiçeksepeti decision dated 4 June 2020 and numbered 20-27/335-157.
- (7) The Board's interim measure decision dated 7 May 2020 and numbered 20-23/298-145.