

## **TURKEY: An Introduction to Competition/Antitrust**

The relevant legislation establishing competition law principles in Turkey is Law No. 4054 on Protection of Competition of December 13, 1994 ('Law No. 4054').

This legislation is reinforced by various regulations, communiqués and guidelines, which are adopted in parallel to secondary legislation of EU competition law. The national competition agency enforcing competition law rules is the Turkish Competition Authority (the 'Authority'), a legal entity with administrative and financial autonomy.

In 2020, Law No. 4054 was subject to essential amendments which passed through the Grand National Assembly of Turkey on June 16, 2020 and entered into force on June 24, 2020 ('Amendment Law') – on the day of its publication in the Official Gazette No. 31165.

The Amendment Law, which introduced, *inter alia*, the Significant Impediment to Effective Competition ('SIEC') test, the *de minimis* principle, settlement and commitment mechanism and expanded digital inspection authority of the Authority case handlers, continues to provide the main rules under Article 4 (Agreements, Concerted Practices and Decisions Restricting Competition), Article 6 (Abuse of Dominant Position) and Article 7 (Mergers and Acquisitions), yet the amendments which aim to achieve further compliance with the EU competition regime (i) introduced efficient enhancing procedures and mechanisms and (ii) clarified mechanisms to sustain legal certainty in practice, to a certain extent.

Since the Amendment Law, the majority of the newly introduced mechanisms and investigation methods were clarified via the enactment of secondary legislation. The relevant case law is still developing.

The Authority published its Guidelines on Examination of Digital Data during On-site Inspections on October 8, 2020, which set forth the general principles with respect to the examination, processing and storage of data and documents held in electronic media and information systems, during on-site inspections. Subsequently, the Board rendered many decisions for practices going against the Guidelines and constituting hindrance of the on-site inspections (i.e. Procter and Gamble 08 July 2021, 21-34/452-227; Sahibinden 27 May 2021, 21-27/354-174; n11 27 May 2021, 21-27/354-172).

Additionally, the Authority published a Regulation on The Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position on July 15, 2021, which set forth rules and procedures regarding settlement processes for undertakings that admit to the existence of the violation. Furthermore, the Authority published a Communiqué on The Commitments to be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition on March 16, 2021, and on Abuse of Dominant Position, that set out principles and procedures in relation to commitments submitted by undertakings in order to eliminate the competition problems.

The Singer decision can be given as an example of such a mechanism. The Board had initiated a full-fledged investigation against Singer sewing machines on March 4, 2020 with its decision numbered 21-11/147-M. In the investigation, the Authority assessed that the dealership agreements Singer had with its resellers included a non-compete clause that was exceeding the time limit set by the legislation (i.e. 5 years), alongside resale price maintenance practices. During the investigation, Singer applied to both settlement and commitment mechanisms. In this regard, whilst Singer submitted its commitments addressing the deletion of the non-compete clause, it also applied before the Authority for conclusion of the investigation through settlement mechanism by accepting its resale price maintenance violation. The Board accepted Singer's commitments as it was deemed that the commitments were adequate to restore competition (9 September 2021, 21-42/614-301). On top of agreeing to the commitments, the Board evaluated Singer's settlement application and the Board accepted settlement application and rendered its decision to decrease the administrative monetary fine by 25% for the resale price maintenance violation (30 September 2021, 21-46/672-336). Another decision where the commitment mechanism was used was the Coca-Cola decision. The Turkish Competition Board had launched an investigation against Coca-Cola and found that Coca-Cola held a dominant position in the "carbonated drinks", "cola drinks" and "aromatic carbonated drinks" markets, and abused its dominance by way of using its rebate system and refrigerator policies that restricted its competitor activities in the relevant market. The Authority addressed its competition concerns and in the assessment found that the exemption previously granted to Coca-Cola for the "non-carbonated drinks" had to be withdrawn, 40% of the space in refrigerators should be accessible to the competitors and the sales agreements and refrigerator commodatum (loan for use) agreements entered by Coca-Cola and/or its distributors must be amended within 4 months. In light of the Authority's assessments, Coca-Cola proposed its commitments including the amendment of the general agreements entered with sales points, executing separate agreements for "carbonated drinks" and "non-carbonated drinks" and the termination of transitional terms and conditions



across different product categories, increasing the refrigerator space accessible for the competitors by 25%. The commitments offered by Coca-Cola were deemed to address the concerns raised by the Authority (2 September 2021, 21-41/610-297).

The Authority also published a Communiqué on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings That Do Not Significantly Restrict Competition on March 16, 2021, which set out the principles regarding criteria to be used to identify the practices of the undertakings which can be excluded from the scope of the investigation.

Moreover, during the course of last year the Authority introduced some important legislative changes regarding vertical agreements. The Authority decreased the market share threshold set for the block exemption mechanism applicable to vertical agreements, aligning its assessment with the EU rules. Previously, Communiqué No. 2002/2 on Vertical Agreements provided a protective cloak for agreements where the respective parties' market shares did not exceed 40%, so long as they also satisfied the other conditions. Now, this market share threshold assessment has been moved to 30% with the Communiqué numbered 2021/4.

Moving on, the Board initiated important market research and rendered other significant reasoned decisions related to Articles 4, 6 and 7 in the past year. Additionally, important judicial review decisions were also rendered. On May 7, 2021, the Authority published its preliminary report on the electronic marketplace sector inquiry which provides insights on what constitutes competitive and anti-competitive behaviour within the electronic marketplace sector and suggests strategies and policies directed at platform businesses especially. Following its sector inquiry on the fast moving consumer goods retailers (FMCG), the Authority also published its preliminary report on February 5, 2021 which addresses the changes in dynamics in the retail sector. Lastly, on December 9, 2021, the Turkish Competition Authority published its report titled "Analysis Report on the Financial Technologies in Payment Services" which inter alia evaluates the effect of the use of financial technologies in the financial sector, the obstacles to innovation and competition in the relevant markets and the entry of big technology companies (e.g. Facebook, Amazon, Google, Apple) into the market.

Just like around the world, technology firms and digital platforms continued to be under the Authority's radar – especially in relation to Article 6. The Authority announced on its official website that it launched an ex officio investigation against Facebook and WhatsApp in relation to their data sharing arrangement (11 January 2021, 21-02/25-M). The Authority's interim measure decision, instructing Facebook to halt its data sharing arrangement and inform its users in this regard, was appealed by Facebook, yet the Ankara



4th District Administrative Court has dismissed the application (13 December 2021, E: 2021/749, K: 2021/2272). Meanwhile, in the investigation launched against Trendyol in relation to its algorithm and software system which enables its own brands and products to have an advantage over its competitors and to prevail over them, the Authority rendered an interim measure on Trendyol to abstain from any behaviour which will result in exclusion of its competitors operating in the e-commerce platforms (30 September 2021, 21-46/669-334).

Moving on to Article 4 and regarding the horizontal assessments, the Board investigated around 30 FMCG retailers and suppliers and rendered its first hub and spoke decision against five retailers and one supplier (the decision also included a resale price maintenance violation by one of the supplier undertakings), yet the reasoned decision is yet to be published (28 October 2021, 21-53/747-360). In another example, the Board determined that Novartis and Roche acted in unison to shift market demand towards Lucentis in intraocular treatment and dissuaded the use of Altuzan by providing misleading information that highlighted the endophthalmitis risk and side effects of Altuzan to administrative and judicial authorities. Thus, the Board finally determined that Novartis and Roche were engaged in cartel activity and acquired unlawful profits in order to shift demand towards the more expensive medication Lucentis (21 January 2021, 21-04/52-21). Additionally, in the MDF decision (01 April 2021, 21-18/229-96) the Board concluded that producers of medium density fibreboards and chipboards were involved in a cartel agreement to fix the price increase timing and the percentages regarding MDF and chipboard products.

In relation to vertical assessments under Article 4, the Authority rendered notable decisions. In its Groupe SEB decision, which assessed allegations that Groupe SEB and İlk Adım violated Article 4 by way of determining the resale prices and restricting the online sales of their distributors and other resellers, the Board examined the activities of Groupe SEB and İlk Adım including interfering with distributors' pricing strategies, imposing sanctions on distributors that disrupt the pricing strategy such as prohibiting the online sales and also notifying distributors to increase their prices (4 March 2021, 21-11/154-63). During this term, certain judicial reviews raised the standard of proof required for enforcement of Article 4 for resale price maintenance. In its Henkel Decision, the Council of State, upon the Board's appealed decision (19 September 2018, 18-33/556-274), decided that the Board has to prove with clear and tangible evidence, that the element of "coercion or incentive" by the supplier had reached a level that restricted the buyers' independent economic behaviour in terms of their freedom to set their own resale prices (06 July 2021, E:2021/969, K:2021/2654). Additionally, in the appealed fuel and LPG sector decision, where the Board investigated the practices of five entities and decided that four out of those five entities (BP, Petrol Ofisi, Shell

and OPET – excluding Total) interfered with their dealers' pump prices, OPET's appeal was granted by the Ankara 7th Administrative Court on the grounds that the assumption that the prices determined by the dealers are substantially similar to the recommended price of OPET itself is not sufficient for imposing penalty on the entity (30 June 2021 E: 2021/60; K: 2021/1364).

Moving on to merger control assessments under Article 7, the Board conditionally approved the acquisition of Biletal by Obilet, which is dominant in the online comparative flight and bus ticket sales market, upon finding that the transaction will not significantly impede effective competition, within the scope of the parties' commitments. The commitments involved the parties' refraining from any application that would potentially create exclusivity which will result in the foreclosure of the relevant market to the competitors, or have a negative impact on the number of players in the market (1 July 2021, 21-33/449-224). On the other hand, the Board refused to grant approval to the acquisition of sole control of Marport by Terminal Investment Limited (TIL). The Board stated that the relevant transaction led to a horizontal overlap in the relevant product market for "port management for container handling services" and a vertical overlap in the relevant product market for "container line transportation", indicating that TIL operated in the relevant product market or in the sub-segments of the relevant product market and that TIL already had a significant market share in those markets. In its reasoned decision published on March 12, 2021, the Board highlighted that the transaction would be subject to evaluation under the SIEC test within the framework of Article 7 of Law No. 4054. The Board ultimately concluded that the notified transaction would cause significant impediment of effective competition pursuant to Article 7 of Law No. 4054 (13 August 2020, 20-37/523-231).

Regarding the Mergers and Acquisitions that came before the Board, the Authority published its overview report on Mergers and Acquisitions for 2021 on January 7, 2022. According to the report, apart from 7 privatisation transactions, there were 118 mergers or acquisitions that were subject to an assessment by the Board. The Authority indicated that the privatisation transactions amounted to TRY95 billion, whereas the mergers and acquisitions amounted to TRY42.6 billion, a combined sum of TRY137.5 billion in total. Two of the applications were subject to final examination, whereas the Board allowed three applications within the scope of the commitments proposed by the parties of the notification.

As a very recent development, in relation to assessment of mergers and acquisitions, the Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 ("Amendment Communiqué") was published on the Official Gazette on March 4, 2022 and will enter into force on May 4, 2022.



One of the revisions foreseen by the Amendment Communiqué is the raise related to the turnover thresholds. As per the amended thresholds, if a transaction will be closed (i.e. the concentration will be realized) as of or after May 4, 2022, that transaction will be required to be notified in Turkey if one of the following alternative turnover thresholds is met: (i) The combined aggregate Turkish turnover of all the transaction parties exceeds TRY750 million (approximately EUR71.9 million or USD84.9 million) and the Turkish turnover of each of at least two of the transaction parties exceeds TRY250 million (approximately EUR23.9 million or USD28.3 million), or (ii) The Turkish turnover of the transferred assets or businesses in acquisitions exceeds TRY250 million (approximately EUR23.9 million or USD28.3 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY3 billion (approximately EUR287.9 million or USD339.7 million) or the Turkish turnover of any of the parties in mergers exceeds TRY250 million (approximately EUR23.9 million or USD28.3 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY3 billion (approximately EUR287.9 million or USD339.7 million).

The Amendment Communiqué also introduces a new merger control regime for undertakings active in certain markets/sectors. Further to the Amendment Communiqué, the “TRY250 million Turkish turnover thresholds” mentioned above will not be sought for the acquired undertakings active in the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies or assets related to these fields, if they (i) operate in the Turkish geographical market or (ii) conduct research and development activities in the Turkish geographical market or (iii) provide services to Turkish users.

Moreover, the recent updates allow notifying parties to submit the notification form via e-Devlet, an elaborate system of web-based services, one of which is electronic submission. E-Devlet was already made available for submissions, with increased usage during the pandemic period. The Amendment Communiqué explicitly mentions this alternative method – recognizing it as an official means for submission.

The Amendment Communiqué, *inter alia*, also revises the structure and content of the notification form, which is annexed to the Amendment Communiqué.

On a final note, over the past year, the Authority gave COVID-19 pandemic-related infringement warnings to various stakeholders and carried out investigations over different complaints received regarding price hikes in various sectors such as the fresh fruit and vegetables sector as well as the health, hygiene and food sectors.