

e-Competitions

Antitrust Case Laws e-Bulletin

Preview

The Turkish Competition Board imposes interim measures against the exclusive broadcaster of Turkish Super League football games (*Krea İçerik Hizmetleri*)

UNILATERAL PRACTICES, DOMINANCE (ABUSE), DISCRIMINATORY PRACTICES, DOMINANCE (NOTION), INTERIM MEASURES, SPORTS, EXCLUSIVE RIGHT (ART. 106 TFEU), ENTERTAINMENT, TURKEY, MEDIA

Turkish Competition Authority, *Krea İçerik Hizmetleri*, NCA Decision, 29 September 2022

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Introduction

The Turkish Competition Board (“**Board**”) initiated in September 2022 a preliminary investigation against Krea İçerik Hizmetleri ve Prodüksiyon A.Ş. (“**Krea**”), a company holding exclusive broadcasting rights of the Turkish Super League and Turkish First Division League football games, to find out whether Krea has been applying discriminatory practices in providing sub-broadcasting rights to other broadcaster [1]. Although the preliminary investigation is still on-going and the findings of the Board is therefore not yet clear, it is understood that the Board is looking into the allegations that Krea has been providing the sub-broadcasting rights to certain broadcasters earlier than other broadcasters. These sub-broadcasting rights are in relation “extended highlights” and “highlights for news” of the concerned football games (“**Krea Sub-Broadcasting Rights**”).

As part of this ongoing preliminary investigation, the Board imposed an interim measure with a view to prevent the competition law violations and irreparable damages in the “market for the broadcasting rights of the Turkish Super League and Turkish First Division League”, instructing in practice Krea to provide its Krea Sub-Broadcasting Rights to all the broadcasters at the same time, with respect to each football game of the Turkish Super League and Turkish First Division League (“**Krea Interim Measure**”) [2].

This article evaluates the Board’s Krea Interim Measure Decision by explaining the interim measure mechanism stipulated under Article 9(4) of the Law No. 4054 on the Protection of Competition (“**Law No. 4054**”) and the Board’s recent approach toward the interim measure mechanism.

Interim Measure Mechanism in Turkish Competition Law

Article 9(4) of the Law No. 4054 specifies that where the occurrence of serious and irreparable damages is likely until the final decision is rendered by the Board, the Board may impose interim measures in order to maintain the situation before the infringement, without exceeding the scope of the final decision.

As such, to impose an interim measure, the Board should establish the likelihood of serious and irreparable damage occurring until the final decision has been rendered. The notion of “serious and irreparable damages” is of importance in the sense that the interim measures directly intervene with the competitive process in the market and carry the risk of obscuring the competitive conducts of undertakings. Therefore, the Board assesses whether there is a possibility of the occurrence of serious and irreparable damages on a case-by-case basis. Secondly, the interim measure to be imposed should be proportional to the needs of maintaining the *status quo* preceding the infringement. Lastly, the interim measure should not extend the scope of the Board’s final decision. In other words, the interim measure decision cannot assume the position of the final decision and the scope of the interim measure decision cannot include the definitive determination of the existence of a violation.

Krea Interim Measure Decision

In *Krea Interim Measure*, the Board mentioned its previous interim measure decisions as a part of its abuse of dominant position investigations about exclusive broadcasting right-holders of the football leagues. In *Digital Platform/Atlas Interim Measure* [3], which is one of the referenced decisions, the Board issued an interim measure decision in which, among other things, instructed that the highlights be delivered to all purchasing broadcasters at the same time. This interim measure was issued in the scope of an investigation to determine whether the investigated parties abused their dominant position by (i) obliging other broadcasters to purchase the highlights of all nine games of the relevant week as a package and (ii) discriminating between broadcasters by providing footages to a TV channel earlier than others. In the final decision (*Digital Platform/Atlas*) [4], the Board remarked that providing the highlights to a TV channel earlier than other channels constituted abuse of dominant position by way of discriminatory practices in accordance with Article 6 of the Law No. 4054. Similarly, in *Teleon Interim Measure*, which is one of the other referenced interim measure decisions within the *Krea Interim Measure* [5], the Board decided that the highlights be delivered at the same time to the representatives of all the broadcasters who request the said highlights.

In *Krea Interim Measure*, the Board remarked that broadcasters’ main incomes consist of advertisement revenues in open television broadcasting and advertisers’ main criterion for choosing the right television channel for their advertisement is the channels’ view ratings. The Board observed that broadcasting extended highlights of the football games attract views, which in turn attracts advertisers. In addition, the first undertaking that broadcasts the highlights gains even more views because the viewers tend to view the highlights on the first of the channels that broadcasts the highlights. Therefore, the advertisers particularly choose that first channel to run their advertisements. As such, broadcasting the highlights of the football games earlier than other broadcasters gain a competitive advantage.

The Board then went on to assess how the Law No. 4054 could be violated as a result of the aforesaid practice. The Board first established that Krea is in dominant position in the “market for the broadcasting rights of the Turkish Super League and Turkish First Division League” since it holds the exclusive broadcasting rights. Afterwards, the Board indicated that, as a dominant player in the market, in accordance with Article 6 of the Law No. 4054, Krea should not discriminate purchasers with equal status by offering different terms for the same and equal rights.

In this scope, the Board indicated that the competition in the “market for the broadcasting rights of the Turkish Super League and Turkish First Division League” could be affected negatively since the commercial activities of broadcasters that receive the highlights later could be hindered and the viewing rates and rating results of broadcasters could be impacted negatively.

Accordingly, the Board concluded that there is a possibility of the occurrence of serious and irreparable damages until the final decision is taken and thus imposed the said interim measure.

Turkish Competition Board’s Precedent Body on Interim Measures

In reviewing the Board’s precedent body regarding the interim measures, it is apparent that the Board imposed interim measures in exceptional cases that are in need of such measures owing to their particular dynamics. Additionally, even in scenarios where the Board decided to impose interim measures, the concerned decisions may also be annulled by the administrative courts during their judicial review [6]. While this is the case, the latest trend indicates that the Board imposes interim measures more frequently.

Between 2009 and 2019, in the span of ten years, the Board imposed only two known interim measures [7], whereas it has already imposed four interim measures in the last three years [8]. In this regard, it can be stated that the Board started to resort to the interim measure mechanism more frequently.

Indeed, in May 2020, the Board issued interim measures *Retailers Interim Measure* [9] where the investigated parties made obliged to submit the price increases of food and cleaning products until the investigation is finalized since the investigated parties expanded their market power by taking advantage of changes in consumer living conditions brought on by the COVID-19 outbreak and Ramadan. In January 2021, the Board imposed an interim measure in *WhatsApp Interim Measure* [10] requiring Facebook to suspend the terms regarding the sharing of its users’ data with its other services and notify all of its users regarding the said suspension. The Board concluded that sharing and accumulating users’ data on different platforms could result in serious and irreparable damages. Similarly in September 2020, through its *Trendyol Interim Measure* [11], the Board required Trendyol, among other things, to avoid certain kind of actions and practices (including interventions through algorithms and coding) through which Trendyol would otherwise obtain an advantage against its competitors in its e-marketplace.

As can be seen from the decisional trends, there is an increase in number of issued interim measures in recent years. As opposed to its reluctant approach towards imposing interim measures during the earlier years, the Board seems to expand its decisional practice with fast growing numbers of its interim measure decisions.

Conclusion

Krea Interim Measure is similar to its predecessors on broadcasting markets. However, it can be regarded as a beacon decision in the sense that it reaffirms the Board’s recent tendencies in terms of imposing interim measure decisions. The time will tell whether the Board will continue following its recent approach towards interim measures and whether the judicial reviews will allow the Board to resort to interim measure mechanism more frequently.

- [1] See Turkish Competition Authority's Announcement, available at: <https://www.rekabet.gov.tr/tr/Guncel/krea-icerik-hizmetleri-ve-produksiyon-as-cada973eea40ed11a22b0050568595ba>
- [2] Turkish Competition Board's *Krea Interim Measure* decision dated 29.09.2022 and numbered 22-44/652-281.
- [3] The Board's *Digital Platform/Atlas Interim Measure* decision dated 08.10.2001 and numbered 01-48/485-M.
- [4] The Board's *Digital Platform/Atlas* decision dated 07.09.2006 and numbered 06-61/822-237.
- [5] The Board's *Teleon Interim Measure* decision dated 21.09.1999 and numbered 99-43/450-283(a).
- [6] See e.g. High State Court 13th Chamber decision dated 06.01.2009 and numbered 2006/5600 E. 2009/568 K.; High State Court Plenary Session of the Chambers for Cases decision dated 01.07.2007 as referred in the Board's *Bursa Cement* decision dated 20.09.2007 and numbered 07-76/908-346.
- [7] The Board's *Yemeksepeti Interim Measure* decision dated 18.03.2015 and numbered 15-12/161-M; *Termopet Interim Measure* decision dated 19.12.2013 and numbered 13-71/968-M(3).
- [8] The Board's *Krea Interim Measure* decision dated 20.09.2022 and numbered 22-44/652-281; *Trendyol Interim Measure* decision dated 30.09.2021 and numbered 21-46/669-334; *WhatsApp Interim Measure* decision dated 11.01.2021 and numbered 21-02/25-10; *Retailers Interim Measure* decision dated 07.05.2020 and numbered 20-23/298-145.
- [9] The Board's *Retailers Interim Measure* decision dated 07.05.2020 and numbered 20-23/298-145.
- [10] The Board's *WhatsApp Interim Measure* decision dated 11.01.2021 and numbered 21-02/25-10.
- [11] The Board's *Trendyol Interim Measure* decision dated 30.09.2021 and numbered 21-46/669-334.