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Recap of 2022: Turkish competition law

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2022 has proven to be a significant year in terms of competition law in Turkey, with important legislative changes including the new merger control thresholds and the continuous implementation of the newly introduced commitment and settlement mechanisms in investigations. Additionally, the Turkish Competition Board (the Board) has issued numerous important decisions covering investigations, merger control and procedural aspects of the competition law. This article aims to provide a general overview of the year by addressing these key developments.

Legislative developments and new sector inquiry

New merger control regime in Turkey

The most significant legislative change in 2022 was the amendment made through Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board on 4 March 2022, which introduced new thresholds and certain exemptions in terms of the notifiability of transactions. Communiqué No. 2010/4 increased the previous thresholds as follows:

- 30 million Turkish lira (approximately €2.8 million) to 250 million Turkish lira (approximately €23.9 million);
- 100 million Turkish lira (approximately €9.5 million) to 750 million Turkish lira (approximately €71.9 million); and
- 500 million Turkish lira (approximately €47.9 million) to 3 billion Turkish lira (approximately €287.9 million).

In addition to the updated thresholds, Communiqué No. 2010/4 also introduced a threshold exemption for undertakings active in certain sectors. As a result, the 250 million Turkish lira turnover threshold is no longer sought for acquired undertakings active in or assets relating to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies, if they:

- operate in the Turkish geographical market;
- conduct research and development activities in the Turkish geographical market; or
- provide services to Turkish users.

E-marketplace platform sector inquiry final report

On 14 April 2022, the Turkish Competition Authority (the Authority) published its Final Report on the E-Marketplace Sector Inquiry. The report analysed how e-marketplace platforms affect competition and accordingly proposed a policy towards e-marketplaces. The report remarked that network externalities, multi-homing, economies of scope and scale, multi-sidedness and data-driven business models contribute to the market power of e-marketplace platforms. As a result of these market characteristics, e-marketplaces are associated with high barriers of entry and expansion and a tendency to evolve into a single platform (ie, tipping). The report concluded with two main policy proposals concerning competition law legislation in order to address these competition concerns in the market:

- ex-ante gatekeeper regulation; and
- strengthening of secondary legislation.

Expected amendment to Law No. 4054

The Authority has released a draft amendment to Law No. 4054 on the Protection of Competition to certain institutions to receive comments before its enactment.

Investigations

The Authority has been busy with investigations in 2022, particularly with respect to irrational price fluctuations that cannot be explained by market dynamics such as the covid-19 pandemic. This approach has been the status quo of the Authority for the past two years, in which inflation rates have been affected globally.

These concerns have resulted in:

- article 6 investigations where they originated from alleged unilateral practice; and
- article 4 investigations where they originated from alleged collusion between competitors.

Additionally, it has been observed that the Authority has focused on the technology sector in recent years. This sector has continued to be at the centre of its attention in 2022 as well.

Article 4 of Law No. 4054 , which is closely modelled on article 101(1) of the Treaty on the Functioning of the European Union (TFEU), prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market, or a part thereof.

The Board found a violation under article 4 of Law No. 4054 in the following investigations:

- *Healthcare Organizations* (24 February 2022; 22-10/152-62);
- *Korkmaz/Gençler/Punto* (10 November 2022; 22-51/754-313);
- *Miele* (10 November 2022; 22-51/753-312);
- *Natura Gıda* (23 November 2022; 22-52/771-317);
- *Hayırlı El Kozmetik* (21 July 2022; 22-33/523-210);
- *Dydo Drinco* (7 July 2022; 22-32/508-205);
- *Olka Marlin* (30 June 2022; 22-29/488-197);
- *Numil Gıda* (30 June 2022; 22-29/483-192);
- *Feed Manufacturers* (25 April 2022; 22-19 /310-135);
- *Duru Bulgur* (17 February 2022; 22-09/130-50); and
- *Krea* (13 January 2022; 22-03/48-19).

No administrative fine was imposed in the following investigations:

- *24 Automotive Resellers* (3 March 2022; 22-11/170-69); and
- *Audi AG/Bayerische Motoren Werke AG/Daimler AG/Porsche AG/ Volkswagen AG* (27 January 2022; 22-06/83-34).

The Board's recent *Healthcare Organizations* decision is a significant example of the Board's powers of enforcement, investigating 29 undertakings and associations of undertakings and imposing monetary fines under three different counts of violations. The Board, considering price fixing between the healthcare undertakings and freelance doctors and other services as a single violation, concluded that six undertakings[(1)] had established a pricing cartel in two different cities.

On the other hand, the Board considered that 16 undertakings' practices aimed at limiting the competition in labour market by preventing personnel transfers and wage fixing constituted another single violation of article 4 of Law 4054. Lastly, the Board imposed administrative monetary fines on:

- eight undertakings on the grounds of exchanging competitively sensitive information;
- seven undertakings for being directly active in the practice of information exchange; and
- one undertaking of association, for being a facilitator.

Unilateral conduct of a dominant undertaking in Turkey is restricted by article 6 of Law No. 4054. Although article 6 of Law No. 4054 does not define what constitutes "abuse" per se, it provides five (non-exhaustive) examples of forbidden abusive behaviour:

- preventing entry into the market or hindering competitor activity in the market;
- engaging in discriminatory behaviour;
- making the conclusion of contracts subject to acceptance by the other parties of restrictions concerning resale conditions;
- distorting competition in other markets by taking advantage of superiorities in the dominated market; and
- limiting production, markets or technical development to the prejudice of consumers.

In its *Facebook* decision, the Board claimed that the economic unity of Facebook, which is the parent company of WhatsApp LLC, is in a dominant position in the personal social network services, consumer communication services and online visual advertising markets. The investigation was initiated due to WhatsApp's amendment of its terms and conditions on 4 January 2021, which required users to accept data transfers (eg, account information, messages, and location information). It was claimed that the economic unity of Facebook had violated article 6 of Law No. 4054 by impairing its competitors' activities and creating barriers to entry in these markets.

In addition to a monetary fine, the Board required Facebook to submit to the Authority the necessary measures to end the violation and establish efficient competition in the market – Facebook would have to commit to implementing such measures within six months and report to the Authority annually for five years following their initial implementation. However, the reasoned decision is yet to be published. The *Facebook* decision is also of importance in that it is an example of the increasing number of interim measures that have been imposed by the Board: it imposed two interim measures between the years 2009 and 2019,[(2)] but four in the past two years.[(3)]

In the *Nadirkitap* decision (7 April 2022; 22-16/273-122), the Board concluded that Nadirkitap had abused its dominant position within the framework of article 6 through preventing access to and the portability of books by way of providing the datasets of its seller members who wished to market their products through rival intermediary service providers. Nadirkitap provided services to numerous undertakings that sold second-hand books in return for a membership fee and commission from their sales and was an intermediary platform active in the "platform services mediating second-hand book sales" market, as defined by the Board. In addition to a monetary fine, the Board also decided that Nadirkitap should provide the book inventory in a correct, clear, secure and complete way in a convenient form, free of charge, to the seller members if they made such a request in order to ensure the termination of the violation in question and the establishment of effective competition in the market.

In its *Yemek Sepeti* decision (18 May 2022; 22-23/366-155), the Board examined whether Yemek Sepeti had punished restaurants with its unilateral practices, such as:

- reducing their visibility on search result pages;
- lowering their scores; and
- restricting their use of advertisement spaces.

In its general overview of exclusivity practices in the digital markets of which Yemek Sepeti was a part, the Board highlighted the importance of the concepts of the "tipping" tendency of multilateral markets, as well as the limiting of "multi-homing" (ie, the motivation to switch between platforms), which it also took into account in the evaluation of Yemek Sepeti's restaurant scoring and listing applications.

In determining the accuracy of the allegations against Yemek Sepeti, the Board evaluated the broad most-favoured customer (MFC) requirements which ensured that all kinds of campaigns, promotions, prices, products and other campaign activities implemented in all channels of the provider's own workplace in the takeaway service that are implemented on the Yemek Sepeti platform are also able to be implemented on competing platforms. The Board concluded that Yemek Sepeti's applications regarding restaurant scores and comments, ads and restaurant listings did not result in MFC conditions or exclusivity and nor did they make it difficult for restaurants to work with competitors. Therefore, the Board ultimately concluded that there was no need to conduct a full-fledged investigation against Yemek Sepeti.

Individual exemption

Communiqué No. 2021/4 Amendment for the Block Exemption Communiqué on Vertical Agreements reduced the market share threshold to identify a vertical concentration to be invalid from 40% to 30%. Communiqué No.2021/4 entered into force once it was published in the *Official Gazette* on 5 November 2021.

The Turkish competition regime also allows individual exemptions for anticompetitive vertical agreements provided that the anticompetitive conditions in the agreement fulfil the conditions of the individual exemption stipulated in article 5 of Law No. 4054. For example, the Board approved individual exemption applications of *İMDER* (7 April 2022; 22-16/269-121), *Changzou BTR* (23 June 2022; 22-28/452-183) and *TFF* (4 July 2022; 22-30/494-198) in 2022.

In its *Allianz-Mapfre* decision (24 March 2022, 22-14/223-97) the Board looked into the multi-sided insurance market with regard to private hospitals, which constitutes a vertical relation characteristic, and evaluated tying allegations, considering private health insurance as the tying product and complementary health insurance as tied products. The Board concluded that Mapfre could benefit from the block exemption provided under Communique No. 2002/2 while the practices of Allianz could qualify for individual exemption, meeting the cumulative conditions for individual exemption set out under article 5 of Law No. 4054.

On the other hand, in its *Unmaş* decision (7 July 2022; 22-32/506-203), the Board decided to withdraw the block exemption of Unmaş Unlu Mamuller Gıda San ve Tic AŞ, due to the fact that Unmaş's activities which aimed de facto exclusivity would not satisfy the requirements under article 5 of Law No. 4054.

Commitment and settlement mechanisms

The changes to Law No. 4054, introducing the new commitment and settlement mechanisms, entered into force on 24 June 2020 with the Law on the Amendment of the Law No. 4054 on the Protection of Competition. Specific regulations regarding commitment and settlement mechanisms are set forth in:

- the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position (the Settlement Regulation); and
- Communiqué No. 2021/2 on the Commitments to be Offered in Preliminary Inquiries and Investigations.

The Settlement Regulation aims to achieve efficiency gains and enable competition investigations to close at an earlier phase without going through the whole process. Therefore, an increasing number of undertakings under the scrutiny of the Authority have started to apply such mechanisms.

Successful application of the commitment mechanism has been less common than successful application of the settlement mechanism in 2022. While the Board terminated cases against *Baymak* (24 March 2022; 22-14/221-95), *Mey İçki*, *Martı* and *Tadım Gıda* (the reasoned decisions of which have not been published) through successful application of the commitment mechanism, the commitments offered by *EssilorLuxotica* (24 March 2022; 22-14/219-94) and *Healthcare Organizations* were rejected.

The Board has settled numerous cases in 2022, revealing that the settlement mechanism is gradually becoming more popular in Turkish competition law practice. Settlement applications were accepted in:

- *Dydo Drinco*, *Kınık* (14 February 2022; 22-17/283-128);
- *Beypazarı (*18 May 2022; 22-23/379-158);
- *Hayırlı El Kozmetik*;
- *Korkmaz/Gençler/Punt*;
- *Miele*;
- *Natura Gıda;*
- *Olka Marlin*; and
- *Numil Gıda*.

However, the Board rejected the settlement application in *Healthcare Organizations*.

Leniency

Article 10 of the Settlement Regulation also allows undertakings to benefit from the Regulation on Active Cooperation for Detecting Cartels (the Leniency Regulation), if the leniency application was submitted to the Authority before the settlement text (ie, before the settlement negotiations are finalised and put in writing).

The recent decisions of the Board concerning Kınık and Beypazarı constitute the first combined application of the Settlement Regulation and the Leniency Regulation. In its *Kınık* decision, the Board applied a 25% reduction under the Settlement Regulation (the highest reduction possible) and a 35% reduction under the Leniency Regulation, which amounted to a 60% reduction to the administrative monetary fine. Subsequently, in its *Beypazarı* decision, where Beypazarı made a leniency application after Kınık, the Board again applied a 25% reduction under the Settlement Regulation and a 30% reduction under the Leniency Regulation, resulting in a 55% reduction to the administrative monetary fine.

In its *Biopharma/Transorient/Tunaset* decision (26 May 2022; 22-24/390-161), the Board initiated an investigation against Biopharma, Transorient and Tunaset to determine whether they had violated article 4 of Law No. 4054 by sharing customers and imposing non-compete obligations. While the Board decided to grant full immunity to the leniency applicant, Biopharma, the Board imposed administrative monetary fines against Transorient and Tunaset.

Hindering of on-site inspections

The Board has published the following reasoned decisions in 2022 for infringements regarding hindering or complicating on-site inspections:

- *LDR* (30 June 2022; 22-29/476-191);
- *AB Gıda* (9 June 2022; 22-26/426-175);
- *Hepsiburada* (13 January 2022; 22-03/35-16); and
- *Kınık* (3 March 2022; 22-11/161-65.

The Board mainly focused on deleted messages on instant messaging applications, particularly on WhatsApp.

Incorrect/misleading information

In its *Martı* decision (21 July 2022; 22-33/527-213), the Board found that the information provided to the Board by Martı regarding e-scooter operating fees was inconsistent with the other evidence included in the case file. Martı provided the consistent data after the Board pointed out the discrepancy. As a result, the Board concluded that Martı had provided incorrect and misleading information in the first place.

Merger control

2022 has been a notable year for conditional approvals of merger control filings and phase II reviews of the Board. In its *Ferro/Prince* decision (24 February 2022; 22-10/144-59) concerning the acquisition of sole control over Ferro by American Securities, the Board initiated a phase II review based on concerns that the transaction may result in the significant impediment of effective competition in the market for glass coatings for home appliances in Turkey. The Board ultimately conditionally approved the transaction subject to the commitments submitted to the European Commission, since those commitments also removed the horizontal overlaps between the parties in the horizontally affected markets in Turkey.

In terms of the violation of suspension requirements, in *Martı/Mobilite* (21 July 2022; 22-33/527-214), the Board evaluated an unnotified transaction of two undertakings, which had allegedly acted as one undertaking upon complaint and within the scope of another ongoing investigation. The Board concluded that these undertakings belonged to the same economic entity and there was no concentration between them; therefore, it imposed no monetary fine.

Another eye-catching trend of the Board in merger control assessments in 2022 was observed in non-compete or non-solicit clause assessments. In *Vinmar/Arısan* (24 February 2022; 22-10/155-63), taking into account the market structure, customer loyalty and know-how, the Board approved the transaction on the condition that the duration of non-compete and non-solicit obligations was reduced to three years. In its *Checklas Otomotiv* decision (14 April 2022; 22-17/286-130), the Board concluded that the non-compete obligation should not include the second-degree relatives of sellers, thereby approving the decision with the condition of limiting the non-compete obligation to three years. In its *Adatıp Sağlık Hizmetleri* decision (24 March 2022; 22-14/233-101), the Board concluded that the non-compete obligation for five years could be considered as an ancillary restraint, thereby unconditionally approving the transaction.

In terms of the new threshold exemption for undertakings active in certain sectors as provided under Communiqué No. 2010/4, reasoned decisions of the Board have begun to be published, slowly creating precedent on the issue. Of the 10 decisions where the relevant exemption was applied, examples include:

- *IFGL/Cinven* (18 May 2022; 22-23/372-157), which concerned an undertaking active in the digital platform markets;
- *Airties/Providence* (2 June 2022; 22-25/403-167), which concerned a programming undertaking;
- *Affidea/GBL* (16 June 2022; 22-27/431-176), which concerned a biotechnology undertaking; and
- *Clayton/TPG/Covetrus* (7 July 2022; 22-32/512-209), which concerned a pharmacology undertaking.

What is ahead in 2023?

Upcoming digital markets legislation

The Authority is in the process of considering legislative actions concerning digital markets. The intent of the Authority can also be found within the aforementioned Final Report on the E-Marketplace Sector Inquiry, which states that the Authority is working on digital market regulations and mentions the Digital Markets Act (DMA) as a basis for these regulations. It is expected that regulations focusing on gatekeepers mentioned in the online marketplaces report will be incorporated as an addition to article 6 of Law No. 4054, which regulates abuse of dominant position, or possibly as a separate article while also being reflected in secondary legislation.

The amendment is expected to constitute the most drastic change to the law on digital markets and is speculatively expected to compound the EU DMA with increasing antitrust focus on digital markets. However, the proposed text of the Act is not publicly available and its details remain unknown.

Merger control regime

As for merger control, the threshold exemption for the undertakings active in certain sectors has been applied in approximately 10 decisions of the Board as of December 2022. This number is expected to increase in 2023, which will shed light on the Board's approach to the definition of technology undertakings and the scope of the exemption.

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Endnotes

(1) In Samsun province:

- Derebahçe Özel Sağlık Hizmetleri San ve Tic AŞ;
- Hospitalpark Sağlık Hizmetleri AŞ;
- Medicana Samsun Özel Sağlık Hizmetleri AŞ; and

- Samsun Medikal Grup Özel Sağlık Hizmetleri AŞ.

In Bursa province:

- ASG Özel Sağlık Hizmetleri ve Sağlık Malz San ve Tic AŞ; and
- Hayat Sağlık Tesisleri AŞ.

(2) See:

- *Yemeksepeti* interim measure decision (18 March 2015; 15- 12/161-M); and
- *Termopet* interim measure decision (19 December 2013; 13-71/968- M).

(3) See:

- *Krea* interim measure decision (20 September 2022; 22-44/652-281);
- Trendyol interim measure decision (30 September 2021; 21-46/669-334);
- WhatsApp interim measure decision (11 January 2021; 21-02/25-10); and
- Retailers interim measure decision (07 May 2020; 20-23/298-145).