

January 18 2024

Turkish competition law in 2023: a comprehensive overview

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

- > Key developments and sector inquiries
- > Investigations
- > Board's application of interim measures
- > Individual exemption and negative clearance
- > Settlement and commitment mechanisms
- > Leniency
- > Hindering on-site inspections
- > False or misleading information
- > Merger control
- > What is ahead in 2024?

2023 proved to be a remarkable year for Turkish competition law, marked by extensive legal analyses and notable precedents by the Turkish Competition Board (Board), as well as new sector inquiries by the Turkish Competition Authority (Authority). This article aims to examine the most significant events in Turkish competition law and provide readers with a comprehensive overview and insight into the most important developments of the year.

Key developments and sector inquiries

The Authority carried out and concluded various inquiries into different sectors during 2023. As summarised below, whilst some of these inquiries included studies on the more traditional sectors such as cement and fast-moving consumer goods (FMCG), three of them focused on the digital markets.

Cement and construction chemicals

Following the earthquake that took place in Türkiye on 6 February 2023, the Board announced on 17 March 2023 that a sector inquiry had been initiated. The aim of this is to prevent corporations from engaging in anticompetitive activities in the event of sudden and high demand for certain sectors, and to foster cooperation between corporations in a competitive manner during the reconstruction of the region.

The outcome of the sector inquiry is still pending. However, according to the Board chairman Birol Küle's press release on 20 October 2023, investigations have been launched in relation to corporations operating in the cement and construction chemicals sectors in order to investigate their practices after the earthquake.

FMCG

On 30 March 2023, the Authority published its final report on the FMCG sector inquiry. The final report indicated that concentration at the retailer level increased rapidly between 2010 and 2021 and, thus, the market share of local retailers decreased. In this regard, it was remarked that the buyer power of FMCG retailers may lead to unfair commercial practices.

The final report suggested, among other things, the prohibition of certain practices based on the European Commission's Unfair Commercial Practices Directive. The final report also proposed the adoption of a dual market share threshold criterion for suppliers and retailers, in terms of the considerations related to the Block Exemption Communiqué No. 2002/2 on Vertical Agreements.

Digital markets

On 18 April 2023, the Authority made available its study entitled "Reflections of Digital Transformation on Competition Law". The study concluded that digital markets diverge from traditional markets in terms of network effects, economies of scale and data-driven business models. It also examined potential competition law violations in digital markets.

The study proposed various probable solutions to address competition law concerns in digital markets, in areas such as:

- the promotion of the interoperability between different platforms;
- data portability and data sharing;
- algorithmic transparency; and
- enhanced merger control.

Mobile ecosystems

On 12 April 2023, the Authority announced the initiation of a sector inquiry on mobile ecosystems, which aims to:

- reveal the potential competitive and anti-competitive impacts of mobile ecosystems;
- formulate effective policies; and
- establish a competitive market in the digital economy.



GÖNENÇ
GÜRKAYNAK



DİLARA
YEŞİLYAPRAK



FIRAT
EĞRİLMEZ



İZZET
ŞERBETÇİGİL

Online advertising

The Authority released a preliminary report on the online advertising sector on 7 April 2023. The preliminary report concluded, among other things, that:

- social media platforms are more advantageous than other display advertising channels and, as a result, display advertising on social media platforms differs from display advertising on other platforms;
- while targeted ads provide benefits for their customers, they raise data privacy concerns for consumers and, accordingly, an optimal balance between the benefits and harms of targeted advertising is important in terms of social welfare;
- conflicts of interest arise due to the vertical integration in ad tech supply chain in the market;
- relatedly, based on power and activity of players in the ad tech supply chain, market players with high market power may engage in tying and self-preferencing;
- certain undertakings have a much stronger position compared to their rivals in terms of access to data as they provide many complementary services;
- unequal transparency is another competitive problem in the ad technology chain and transparency needs to be enhanced across the supply chain; and
- digital platforms are indispensable commercial partners for news publishers and news publishers have to accept the terms imposed by platforms unconditionally.

Moving forward, further public opinion is sought and a workshop has been planned in order to discuss these preliminary findings.

Other matters

Besides these developments, the Authority announced on 26 October 2023 that it had signed a Cooperation and Information Exchange Protocol with the Turkish Personal Data Protection Authority. This protocol aims to foster effective competition within sectors and enhance consumers' control over their personal data by harmonising the practices of competition and data protection authorities, and address concerns arising from data-driven technologies and the increasing processing of personal data.

Investigations

In 2023, the Authority's focus revolved around numerous investigations. Certain notable abuse of dominance investigations concentrated on digital markets.

Meta

On 11 September 2023, the Board published its reasoned *Meta* decision.⁽¹⁾ In the final assessment, the Board decided that Meta Platforms, Inc abused its dominance through combining data collected from Facebook, Instagram and WhatsApp services, as it:

- hindered the activities of its competitors in the markets for personal social networking and online display advertising services; and
- created an entry barrier to these markets.

Accordingly, the Board imposed on Meta an administrative fine of more than 346 million Turkish liras (approximately £9 million) and ordered Meta to "cease the infringement" within one month as of the official service of the reasoned decision.

Sahibinden

On 23 August 2023, the Board announced that, following its fully fledged investigation initiated against Sahibinden Bilgi Teknolojileri Pazarlama ve Ticaret AŞ (Sahibinden), it was decided that Sahibinden had abused its dominance.⁽²⁾ The Board found that Sahibinden had prevented its corporate members from utilising multiple platforms by obstructing data transfers among them via certain practices (eg, imposing non-compete obligations and de facto and contractual exclusivity) thereby hindering the operations of its competitors.

Besides an administrative fine, the Board also decided to impose various obligations on Sahibinden in order to remedy the violation and ensure the establishment of effective competition in the market.

Trendyol

The Board imposed an administrative fine on Türkiye's largest e-marketplace, DSM Grup Danışmanlık İletişim ve Satış Ticaret AŞ (Trendyol) for abuse of dominance via self-preferencing practices.⁽³⁾ The Board concluded that Trendyol abused its dominant position in the market for multi-category e-marketplaces by unfairly gaining an advantage over its competitors through algorithm interventions, and using data from third-party sellers active on its e-marketplace. The Board also imposed several obligations to Trendyol for maintenance of a competitive environment.

Automated pricing mechanisms

Another highlight in digital markets concerned the Authority's investigation into automated pricing mechanisms. On 19 October 2023, the Board decided to launch an investigation into major online retail sales platforms in Türkiye, namely D-Market Elektronik Hizmetler ve Ticaret AŞ (Hepsiburada), Trendyol and Amazon Turkey Perakende Hizmetleri Limited Şirketi (Amazon).

Resale price maintenance

The Board rendered two decisions⁽⁴⁾ in which it adopted a higher standard of proof in terms of resale price maintenance (RPM) violations when compared to its past decisions.

While the Board's recent trend had been to categorise all RPM violations as "by object" violations, the Board's recent *Anavarza* and *BSH* decisions differed from this strict approach. In both cases, the Board evaluated the relevant evidence and concluded that internal communications were not sufficient to prove an RPM violation beyond reasonable doubt.

Ne bis in idem

Another eye-catching practice of the Board in 2023 was the application of general principle of law "*ne bis in idem*", which prohibits imposing duplicative penalties for the same violation.

The Board applied this principle in two cases, one of which was the *FMCG II* decision.⁽⁵⁾ In this case, the Board decided that BİM Birleşik Mağazalar AŞ, Carrefour SA, Carrefour Sabancı Ticaret Merkezi AŞ, Migros Ticaret AŞ, Şok Marketler Ticaret AŞ and Yeni Mağazacılık AŞ had been engaged in a hub-and-spoke cartel, and imposed an administrative fine on these companies. The Board determined the retailer companies' conduct to have been a violation under the decision (ie, a hub-and-spoke cartel),⁽⁶⁾ and the nature and duration of the conduct overlapped in these two cases. Additionally, the Board noted that the hub-and-spoke cartel activity had been penalised by the Board's *FMCG I* decision and the retailer companies' conduct in the *FMCG II* decision were considered to be within the scope of a general strategy, as a whole. To that end, since an administrative fine had already been imposed on the relevant companies pursuant to the Board's *FMCG I* decision, in accordance with the general legal principle of "*ne bis in idem*", the Board decided not to impose a new administrative fine within the scope of the subsequent investigation.

Human resources

The Board continued to investigate human resources practices during 2023. On 2 August 2023, the Board announced (via the Authority's website) its final decision⁽⁷⁾ in its investigation based on the allegation that certain companies had violated competition law by means of "gentlemen's agreements" to refrain from hiring each other's employees.

In its announcement the Authority noted that 16 undertakings had been handed administrative fines, whereas the investigation was terminated for 11 undertakings upon settlement.

Board's application of interim measures

In circumstances where there is an emergency due to the possibility of substantial and irreparable harm, the Board may adopt interim steps prior to the occurrence of the violation. In 2023, the Board continued to exercise this authority and adopted interim measures in three of its investigations.

Individual exemption and negative clearance

In 2023, the Board published 12 individual exemptions or negative clearance decisions. Amongst these decisions, three applications were found to have benefitted from a negative clearance, while the remaining nine applications were evaluated in terms of individual or block exemptions.

Settlement and commitment mechanisms

In 2023 the Board published five decisions relating to the commitment mechanism, as well as twenty decisions relating to the settlement mechanism. Notable examples are set out below.

Obilet

In its *Obilet* decision,⁽⁸⁾ the Board concluded the investigation against Obilet Bilişim Sistemleri AŞ via the commitments mechanism.

The investigation was launched with the allegation that the company had abused its dominance by:

- determining excessive ticket sale commission rates to bus companies in relation to ticket sales via intermediary services; and
- excluding its competitors in the markets for:
 - ticketing software services;
 - sale of bus tickets via platforms; and
 - distributing trip data to platforms.

The company was also accused of having violated Article 4 of Law No. 4054 on the Protection of Competition through its contracts for the sale of bus tickets via platforms, which entailed online advertising and communication bans.

Overall, the commitment package aimed to eliminate the concerns raised by Obilet's practices that might have led to tying the ticketing software service for bus transport with the sale of bus tickets via platforms. It also aimed to uphold the online advertisement prohibition and communication ban in the contracts made between Obilet and competing platforms.

Miele

In its *Miele* decision,⁽⁹⁾ the Board found that Miele Elektrikli Aletler Dış Ticaret ve Pazarlama Ltd Şti interfered with the resale prices of authorised dealers which had purchased products from Miele to resell in brick-and-mortar stores or online platforms. The Board also remarked that Miele monitored resale prices through internet channels, interfered with deviating prices that it detected, and imposed measures on its dealers if they failed to comply with the resale prices that it set.

While the Board remarked that these practices amounted to a violation, as per the settlement mechanism, the Board decided to apply a 25% reduction on the administrative fine imposed on Miele.

Leniency

The Board published four leniency-related reasoned decisions in 2023.

Beypazarı

The Board's *Beypazarı*⁽¹⁰⁾ and *Kınık*⁽¹¹⁾ decisions were the first instances where settlement and leniency mechanisms were applied together. In these decisions, the Board indicated that Beypazarı and Kınık exchanged competitively sensitive information relating to commercial decisions in terms of pricing and, thus, engaged in a cartel. Both Beypazarı and Kınık applied for settlement and leniency.

The Board accepted both parties' applications and reduced the administrative fines imposed on Kınık and Beypazarı by 35% and 30%, respectively, for opting into the leniency mechanism. Moreover, the Board reduced the administrative fines imposed on both parties by 25% in view of their settlement with the Authority, enabling Kınık and Beypazarı to benefit from 60% and 55% reduction in fines, respectively.

Hindering on-site inspections

In 2023, the Board published 23 reasoned decisions, where administrative fines were applied to companies due to obstruction of on-site inspections.

Most notably, the Turkish Constitutional Court issued a decision⁽¹²⁾ on 20 June 2023, which may have an impact on the Authority's on-site inspection processes. The Authority's regular procedure permits its case handlers to perform on-site inspections with a certificate of authority issued by the Board, as stipulated by Law No. 4054. However, the Constitutional Court found that the provision of law that enabled on-site inspections without a court warrant violated Article 21 of the Turkish Constitution, which protects domicile immunity. Therefore, the Authority may have to apply to the Criminal Judgeship of Peace to obtain a warrant before conducting on-site inspections, a process which was already set out under the law but only occasionally applied by the Authority when companies refused to cooperate.

False or misleading information

In 2023, the Board continued to sanction companies that provide false or misleading information.

In its *Farmasi* decision⁽¹³⁾ the Board concluded that Farmasi Enternasyonal Ticaret AŞ had submitted false or misleading documents during both the preliminary and the fully fledged investigation. Consequently, the Board decided to impose separate administrative fines on Farmasi for each instance of providing incorrect or misleading information.

Merger control

2023 was also an active year in terms of merger control matters. Some of the most prominent merger control decisions are summarised below.

Phase II investigations

In its *Migros/Ay-Mar* decision⁽¹⁴⁾ the Board analysed a transaction concerning the acquisition of the tenancy rights and fixed assets of numerous stores of Ay-Mar, by Migros. The Board first assessed the horizontal overlapping markets, compared the state of competition before and after the notified transaction was to be implemented, the position of competitors in the relevant market, the existence of a balancing buying power and market entry opportunities.

The Board found that:

- the market structure was not static;
- the companies operating in the market at the time were growing by opening new stores; and
- fluctuations and changes may have occurred in the market shares if the said growth trend continued.

Anadolu Group (which controls Migros through its subsidiaries and affiliates) operates in vertical overlapping markets as a supplier in the non-alcoholic beverages, stationery, fresh vegetables and fruits markets. These markets are the upstream markets for the FMCG organised retailing market in which Migros operates.

The Board evaluated the possibility of market closure based on the possibility of input and customer restriction. The Board found that the transaction would not result in input or customer restrictions in the markets where there was vertical overlap, and therefore, would not significantly reduce effective competition in these markets.

Merger control assessment exemption

In terms of the exemption which was recently introduced to merger control assessment, the Board clarified in its *Berkshire/Alleghany* decision⁽¹⁵⁾ that companies generating turnover outside Türkiye in the exempted sectors are deemed to be within the scope of the exemption for the purposes of the merger thresholds, if they have any activities in Türkiye. In this context, the Board concluded that the turnover threshold of 250 million Turkish liras (approximately £8.5 million) set out in Communiqué No. 2010/4 will not be sought in determining whether a merger or acquisition transaction is subject to the Board's approval in respect of companies operating in "digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies" in any geographical market in the world, if they also conduct any activities in Türkiye.

Gun-jumping

As a result of the ex-officio examination of the acquisition of the sole control of Twitter Inc by Elon R Musk, the Board concluded that the transaction was realised without the approval of the Board. Accordingly, the Board imposed an administrative fine on Musk.⁽¹⁶⁾

What is ahead in 2024?

Draft Regulation on Active Cooperation for Detecting Cartels

On 10 October 2023, the Draft Regulation on Active Cooperation for Detecting Cartels was published for public opinion. According to the Board's announcement, the aims of the raft regulation are:

- to establish a clear distinction between the active cooperation procedure and the settlement procedure by introducing the definition and requirement of a "document that holds value";
- to provide legal certainty to those in a vertical relationship with the parties to a hub-and-spoke cartel or other cartel facilitators, who are, in practice, held liable for administrative sanctions in the same way as the cartel parties, by allowing them to also benefit from active cooperation;
- to implement a reasonable deadline for active cooperation applications to prevent hindrances to investigation procedures that are bound by legal time limits;
- to specify a deadline for the submission of any potential new information and evidence for applicants;
- to clarify the consequences in cases where applicants apply for active cooperation on the grounds that they may have participated in a cartel, the Board accepts and takes a decision on the application, but concludes at the end of the investigation that there was no cartel violation;
- to change and standardise the language used in several articles.

The new legislation, which will be replacing the existing Regulation on Active Co-operation for Detecting Cartels which has been in force since 2009, is expected to enter into force in 2024.

Draft Amendment to Competition Law

The Authority is currently considering certain legislative steps related to digital markets. The amendment is expected to introduce several new definitions concerning digital markets and new obligations for companies with significant market power. Regulations focusing on gatekeepers mentioned in the Final Report on the E-Marketplace Sector Inquiry are also expected to be incorporated into Article 6 of the Law No. 4054, which regulates abuse of dominant position, or possibly added as a separate article.

The draft amendment is a result of the Authority's efforts to regulate competition issues in digital markets, which have been ongoing since at least early 2021. However, the timing for its adoption remains unclear at this stage.

For further information on this topic please contact Gnen Grkaynak, Dilara Yeilyaprak Akay, Fırat Erilmez or İzzet Őerbetigil at ELIG Grkaynak Attorneys-at-Law by telephone (+90 212 327 17 24) or email (gonenc.gurkaynak@eliglegal.com, dilara.yesilyaprak@elig.com, firat.egrilmez@elig.com or izzet.serbetcigil@elig.com). The ELIG Grkaynak Attorneys-at-Law website can be accessed at www.elig.com.

Endnotes

- (1) 22-48/706-299, 20 October 2022.
- (2) 23-39/754-263, 17 August 2023.
- (3) 23-33/633-213, 26 July 2023.
- (4) *BSH*, 22-55/864-358, 15 December 2022 and *Anavarza*, 23-13/209-67, 9 March 2023.
- (5) 22-55/863-357, 15 December 2022.
- (6) 21-53/747-360, 28 October 2021.
- (7) 23-34/649-218, 26 July 2023.
- (8) 23-27/521-177, 15 June 2023.
- (9) 22-51/753-312, 10 November 2022.
- (10) 22-23/379-158, 18 May 2022.
- (11) 22-17/283-128, 14 April 2022.
- (12) Application number 2019/40991, 23 April 2023.
- (13) 23-06/69-20, 26 October 2023.
- (14) 22-28/449-181, 23 June 2022.
- (15) 22-42/625-261, 15 September 2022.
- (16) 23-12/197-66, 02 March 2023.