TURKEY: An Introduction to Competition/Antitrust

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

Law No. 4054 was amended on 24 June 2020 ('Amendment Law'). 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). The Authority published the relevant secondary legislation governing the changes on on-site inspections, settlement procedures and commitment procedures.

Over the course of the last year, the Board rendered many decisions on hindrance of the on-site inspections (ie, 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)). A noteworthy decision in this respect is the Ankara 2nd Administrative Court's Board's Sahibinden decision where the court decided on the stay of execution (E. 2022/254, 15.04.2022) of the Board's decision (27 May 2021, 21-27/354-174) concerning the imposition of an administrative monetary fine on Sahibinden on the ground that the relevant on-site inspection was obstructed by an employee who deleted some correspondences in their WhatsApp group chats on the date of the on-site inspection subsequent to the arrival of the case handlers at the premises. In the stay of execution decision, the court noted, among others, that the deleted WhatsApp messages did not contain any business-related matters, the phone containing the message was a personal phone and the deleted messages were still accessible from the other employees' phones.

Successful application of the commitment mechanism has been less common than a successful application of the settlement mechanism in 2022. While the Board terminated cases against Baymak (24 March 2022;22-14/221-95), and Coca-Cola (2 September 2021; 21-41/610-297), Tadım Gıda (7 June 2022,22-32/505-202), Mey İçki and Martı (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 Organisations (24 February 2022; 22-10/152-62) were rejected. An important decision that was rendered by the Board on commitments is the Coca-Cola decision (02 September 2021; 21-41/610-297). The Board found that Coca-Cola abused its dominance by way of using its rebate system and refrigerator policies that restricted its competitor's activities in the relevant market. Coca-Cola proposed its commitments, including the amendment of the general agreements entered with sales points and executing separate agreements for "carbonated drinks" and "non-carbonated drinks" and termination of transitional terms and conditions across different product categories and increasing the refrigerator space accessible for the competitors by 25%. The commitments offered and subsequently agreed by Coca Cola were deemed to address the concerns raised by the Authority.

The Board has settled numerous cases in 2022, revealing that the settlement mechanism is gradually becoming more popular in Turkish competition law practice, eg, Dydo Drinco (07 July 2022; 22-32/508-205); Kınık (14 February 2022; 22-17/283-128); Beypazarı (18 May 2022; 22-23/379-158); Hayırlı El Kozmetik (21 July 2022; 22-33/523-210);

Korkmaz/Gençler/Punt (10 November 2022; 22-51/754-313); Miele (10 November.2022; 22-51/753-312); Natura Gıda (23 Natura 2022; 22-52/771-317); Olka Marlin (30 June 2022; 22-29/488-197); and Numil Gıda (30.06.2022; 22-29/483-192).

The settlement regulation allows undertakings to benefit from the Leniency Regulation under certain circumstances (ie, put in place before the settlement negotiations are finalised and put in writing). The recent decisions of the Board concerning Kınık (14 February 2022; 22-17/283-128) and Beypazarı (18 May 2022; 22-23/379-158) 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. 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.

Moving on, the Board rendered significant reasoned decisions related to Articles 4, 6 and 7 in the past year and conducted some sector inquiries, and there have been some important legislative developments.

In terms of Article 4 of Law No. 4054, with the amendment of 5 November 2021, the 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%.

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 to be met for individual exemption under Article 5 paragraph (c) of Law No. 4054, which states that competition in a significant part of the market must not be eliminated. The Board stated that when the undertaking has a significant market power and there are important barriers to entry in the market, then the block exemption may be withdrawn, and that the analysis conducted for this purpose is, in essence, an individual exemption analysis. Accordingly, in the analysis the Board noted, among others, that Unmaş had a significant market power and it applied exclusivity for a long period of time, and the efficiencies do not outweigh the negative impact of the exclusivity practice due to the fact that the vertical restrictions were applied at the retail level and there were entry barriers to the market.

In relation to assessment of vertical infringements, the Board was observed to carry out a high number of inspections on online sales (eg, Sunny Electronics, 18 May 2022, 22-23/371-156; Vestel 9 September 2021; 21-42/617-303; GİPA 9 September 2021; 21-42/617-304); Arnica (30 September 2021; 21-46/671-335), resale price maintenance (eg, Groube SEB (04 March 2021; 21-11/154-63), Hayırlı El Kozmetik (21 July 2022; 22-33/523-210); Arnica (30 September 2021; 21-46/671-335)), sales bans in non-exclusive distribution networks (eg, Betek Boya (16 December 2021; 21-61/857-421), Baymak (24 March 2022;22-14/221-95)).

A noteworthy decision of the Board on online sales is the BSH decision (16 December 2021; 21-61/859-423) in which the Board considered the restriction of sales through online marketplaces as a hardcore restriction. The Board carried out its analysis upon BSH's application to determine whether its absolute online marketplace restriction on its authorised dealers can be granted an exemption, and decided that sales restrictions through online marketplaces do not fall under the scope of the Block Exemption Communiqué on Vertical Agreements numbered 2002/2, and also do not meet any of the four criteria of individual exemption. In Arnica (30 September 2021; 21-46/671-335), the undertaking was found to have violated Article 4 of Law No. 4054 via resale price maintenance practices as it was found, among others, to set minimum resale prices for online sales, as well as in brick and mortar stores, and (ii) controlled adherence to minimum resale prices by (a) close monitoring of online or in-store sale prices, and (b)

through regular reports shared by the dealers on their sales and stock quantities, and (iii) terminated or reduced, or threatened to terminate or reduce the goods supplied to the relevant dealers, and/or discounts applied to the relevant dealers, in case of non-compliance with minimum prices. The undertaking applied for a settlement and its fine was decreased by 25%. Finally, as an example of sales bans in non-exclusive distribution networks, in its Baymak decision, the Board assessed Baymak's active sales restriction practices in absence of exclusivity conditions, and Baymak made a commitment application noting that it would stop imposing active sales restrictions and allow all its authorised service providers to offer their services freely to any region within Turkey which was accepted by the Board.

In terms of horizontal infringement assessments, the Board showed signs of increasing its supervision over the labour markets. In its Healthcare Sector decision (24.02.2022; 22-10/152-62), the Board conducted its evaluation on 29 private hospitals and assessed whether these hospitals have violated Article 4 of the Law No. 4054 by way of restricting personnel transfer amongst hospitals by gentleman's agreements as well as price fixing activities regarding the prices charged for the use of operation rooms and related services. The Board concluded that 21 of these undertakings restricted the competition in labour market through agreeing on the restriction of personnel transfer amongst hospitals, exchanging competitively sensitive information and determining the minimum/maximum salary raises collectively, and fixing the prices for the provision of certain services. Also, the Authority initiated other investigations related to gentlemen's agreements in labour markets against 32 undertakings operating in various sectors (21-18/213-M; 1 April 2021 and 21-22/270-119; 15 April 2021 and 21-22/270-M, 15 April 2021) and against seven tech companies active in the IT and communication sectors (22-18/301-M, 21 April 2022).

Technology firms and digital platforms continued to be under the Authority's investigation radar. On 14 April 2022, 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 (i) ex-ante gatekeeper regulation; and (ii) strengthening of secondary legislation. In line with this, the Authority is in the process of considering legislative actions concerning digital markets. 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 Digital Markets Act with increasing antitrust focus on digital.

Some technology firms and digital platforms were also held subject to monetary fines under Article 6 of the Law No. 4054. As a result of its investigation against Facebook/WhatsApp, the Authority decided that Facebook (Meta Platforms, Inc) violated the Article 6 of Law No. 4054 and distorted competition by hindering its competitors' activities and creating barriers of entry in the digital display advertising market through personal social networking services by means of combining the data it collects from Facebook, Instagram and WhatsApp services defined as its main services. In addition to imposing a monetary fine to the relevant undertaking, 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 (20 October 2022; 22-48/706-299).

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.

Moving on to merger control assessments, as an important 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”) entered into force on 4 May 2022. The Amendment Communiqué introduced new thresholds and certain exemptions in terms of the notifiability of transactions. Accordingly, based on the new thresholds set out with the amendment, the transaction is notifiable if:

• the aggregate Turkish turnover of the transaction parties exceeds TRY750 million, and the Turkish turnover of at least two of the transaction parties each exceeds TRY250 million; or

• either:

• the Turkish turnover of the transferred assets or businesses in the acquisition exceeds TRY250 million, and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY3 billion; or

• the Turkish turnover of any of the parties in the merger exceeds TRY250 million, and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY3 billion.

Accordingly, the Amendment Communiqué increased the previous turnover thresholds of:

• TRY30 million to TRY250 million ;

• TRY100 million to TRY750 million; and

• TRY500 million to TRY3 billion.

As for the exemptions, the Amendment Communiqué also introduced 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 in 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.

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

In terms of the above threshold exemption for certain undertakings, reasoned decisions of the Board have begun to be published, slowly creating precedent on the issue. Of the approximately ten 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; Astorg/Corden (02 June 2022; 22-25/398-164) which concerned a pharmacology undertaking; Biocon Viatris (18 May 2022; 22-23/380-159) which concerned a pharmacology/molecular medicine undertaking; Citrix/Tibco (12.05.2022; 22-21/344-149) which concerned a software undertaking; and Impala Bidco/HG Capital/ EQT Fund/ TA (12.05.2022; 22-21/354-152) which concerned technology undertakings.

With respect to the Phase-II decisions, 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.

Lastly, in addition to the E-Marketplace Sector Inquiry mentioned above, the Board launched a sector inquiry upon observing sudden price increases in the food markets, particularly in fresh fruits and vegetables market. Accordingly, the Authority published its Final Report on the Fresh Fruits and Vegetables Sector Inquiry on 11 March 2022, where it noted the structural problems in the market.

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