

NEWSLETTER

COMPETITION LAW | TÜRKİYE

NOVEMBER 2023

This Competition Law Newsletter provides information on the latest developments in relation to the Turkish competition market and the implementation of Law No 4054 on the Protection of Competition (the "**Law**") in light of recent announcements and publications by the Competition Authority (the "**Authority**") and decisions of the Competition Board (the "**Board**").

COMPETITION MARKET OVERVIEW

ANNOUNCEMENTS

A- Investigation Announcements:

The investigation against Duracell

The Board concluded its preliminary investigation into the allegation that Duracell Satış ve Dağıtım Ltd. Şti., operating as a battery supplier in the fast-moving consumer goods sector, violated Article 4 of the Law by determining the resale price of its buyers and restricting the regions and customers to which its buyers can make sales. The Board evaluated the information, documents and decisions made in the preliminary investigation at its meeting held on 7 September 2023 and, considering the findings serious and sufficient, decided to open a full investigation against Duracell Satış ve Dağıtım Limited Şirketi.



The investigation against Krea has been concluded with a commitment mechanism

Krea İçerik Hizmetleri ve Prodüksiyon A.Ş. (Digitürk) submitted a commitment package to end the Board's investigation into the allegation that Digitürk violated Article 6 of the Law by offering discriminatory sub-broadcasting rights, particularly "news footage" and "broad summary footage", to other broadcasting organisations within the scope of the broadcasting rights of Turkish Super League and First League football competitions which it exclusively owns.

As a result of the negotiations, it was concluded that Digitürk has a monopoly position in the summary footage sales of Turkish Super League Competitions and that its discriminatory summary footage sales policy can be evaluated as a breach within the scope of Article 6 of the Law in terms of competition among open TV channels. However, it has been decided to conclude the ongoing investigation by making the final commitment text binding on Digitürk, as the final commitment text is found capable of eliminating the competition problems arising from this behaviour.

The "Draft Regulation on Active Cooperation" is revealed for public opinion

The Regulation on Active Cooperation for the Purpose of Uncovering Cartels, published in the Official Gazette dated 15 February 2009 and numbered 21142, required an update in light of the implementation results recorded since it entered into force, changes to the relevant legislation,

particularly the reconciliation procedure, and the practices of peer countries. As a result of this necessity, a new draft regulation has been prepared. The draft regulation was submitted to public opinion in accordance with the Board's decision dated 28 September 2023 and numbered 23-46/884, with opinions, suggestions and evaluations regarding the draft being accepted until 9 October 2023.

The investigation against private dormitory operators in Giresun province

The information, documents and findings obtained as a result of the preliminary investigation into the allegation that Özel Piraziz Kuzey Yükseköğretim Kız Öğrenci Pansiyonu, Özel Onur Yükseköğretim Kız Öğrenci Yurdu, Özel Piraziz Beyza Yükseköğretim Kız Öğrenci Pansiyonu and Özel Sıla Yükseköğretim Kız Öğrenci Yurdu, which operate private higher education student dormitories in Giresun province, violated Article 4 of the Law by jointly determining the prices in agreement with each other, were found to constitute sufficient evidence by the Board to initiate an investigation.

The investigation into the cosmetics, personal care and food supplements sector

The Board concluded its preliminary investigation into the allegation that Amway Türkiye Ltd. İzmir Şubesi, Ersag Organizasyon Temizlik Kozmetik Ürünleri Pazarlama Sanayi ve Ticaret Limited Şirketi, Hunca Life Kozmetik Pazarlama Dağıtım Ticaret Anonim Şirketi, Oriflame Kozmetik Ürünleri Ticaret Limited Şirketi and Tiens İç ve Dış Ticaret Limited Şirketi violated Article 4 of the Law. The Board considered the information, documents and findings obtained in the preliminary investigation sufficient and decided to initiate a full investigation due to a potential breach of competition by way of resale price maintenance and/or the restriction of internet sales of resellers.

B- M&A Notifications:

During this period, a total of 11 merger and acquisition notifications were made to the Board, the sectoral distribution of these is as follows;

- *E-commerce and banking payment infrastructure:*
 - o Acquisition of control of Kartek Holding Anonim Şirketi by Param Holdings International Coöperatief U.A.
- *Sea Transportation and Shipping Brokerage:*
 - o SDB Benelux S.A. and Savino Del Bene S.p.A. to acquire 80% of the shares in Trans Okyanus Denizcilik Uluslararası Taşımacılık ve Dış Ticaret Anonim Şirketi and Boğaziçi Ekspres Denizcilik Lojistik Anonim Şirketi.
 - o Acquisition by DFDS A/S of the sole control of Samer & Co. Shipping S.p.A.'s ship agency services and transit customs services business lines providing services to DFDS Denizcilik ve Taşımacılık A.Ş. *Sports:*
 - o Acquisition of 51% of the shares in Liderform At Yarışları Enformasyon A.Ş. by Doğan Portal ve Elektronik Ticaret A.Ş.
- *Iron and Steel Industry:*
 - o Acquisition of sole control of Metser Demir Çelik Çimento Sanayi ve Ticaret A.Ş. by Speyside I GP.
- *IT Industry:*
 - o Acquisition of 48% of the shares in H3C Technologies Co., Ltd. by H3C Holdings Limited and 1% of the shares from Izar Holding Co.

- Medical:
 - o Acquisition of 10% of the share capital of Disera Tıbbi Malzeme Lojistik Sanayi ve Ticaret A.Ş. by Azimut Portföy Yönetimi AŞ LCP Birinci Girişim Sermayesi Yatırım Fonu.
 - o Establishment of a fully functional joint venture between China National Medical Device Co., Ltd. under the ultimate control of China National Pharmaceutical Group Corporation and GE Healthcare Co., Ltd. under the ultimate control of GE Healthcare Technologies Inc.
 - o The acquisition of sole control of Inofab Sağlık Teknolojileri Anonim Şirketi by Clario Holding, Inc.
- Energy Sector:
 - o Acquisition of shares in Esinti Enerji Üretim Ticaret ve Sanayi A.Ş. on the condition of (i) between 40.3282% and 39.1058% of the shares directly by Entek a Elektrik Üretimi A.Ş., (ii) 34.6624% of the shares indirectly by Entek Elektrik Üretimi A.Ş. and (iii) between 24.9969% and 24.2634% of the shares directly by Opet Petrolcülük A.Ş.
- Supply of Machinery & Services:
 - o Acquisition of sole control of Amman Makina İnşaat Emlak Mühendislik Ticaret ve Sanayi Anonim Şirketi, Teknomak İmalat Sanayi ve Ticaret Anonim Şirketi by Ammann AG.

SUMMARY OF KEY DECISIONS

A- BREACH OF LAW DECISIONS:

Private schools Decision¹

On 23 November 2022, the Board rendered its decision regarding the preliminary investigation initiated on the suspicion that private schools at primary and secondary education level in Istanbul and Ankara provinces jointly set school fees. Following the preliminary investigation focusing on 16 (sixteen) undertakings, the Board decided that there was no reason to initiate an investigation.



The Board examined whether there was an exchange of information between the undertakings. The findings of the on-site examinations conducted in Istanbul revealed that internal correspondence contained various information regarding the prices of competing schools whereas it was understood that the information was actually obtained from the public market through the branches. In other analyses conducted in Ankara, similar to the findings obtained in the Istanbul market, various findings were obtained indicating that competitor school prices were followed, though the competitor's prices were not obtained through information exchange, but were compiled from publicly available information. It is further stated that the heterogeneity in the opportunities offered by private schools to their students is too high to allow price determination among competitors.

Another issue examined within the scope of the file is the suspicion that an agreement may have been made on prices for services other than education. Some findings were obtained during the examinations conducted in Ankara. However, it is understood that the procurement of non-teaching services, i.e. books, clothes, food and services, takes place in different ways among private schools, mostly in line with agreements with third parties. In addition, it is understood that the source of the

¹ Decision of the Board dated 23 November 2022 and numbered 22-52/776-320.

increased requests in non-teaching services is not the schools, but the service providers directly, and it has been evaluated that the schools are not directly involved in the price increases in these services. Consequently, the Board decided not to open an investigation against the undertakings subject to the preliminary investigation.

Ophthalmic lenses, joint price setting by undertakings (preliminary investigation)²



On 5 January 2023, the Board issued its decision regarding the preliminary investigation initiated following a suspicion of information exchange and price fixing between undertakings operating on the ophthalmic (corrective) lens production and wholesale market. Following the preliminary investigation focusing on 10 undertakings, the Board decided that there are no grounds for an investigation.

The Board has evaluated the relevant findings in this context and concluded that the undertakings operating in the ophthalmic lens production and wholesale market generally announce product price information to the opticians through price lists, and the opticians may share price lists with other suppliers for negotiation purposes in order to obtain more competitive commercial conditions. Several documents obtained during the on-site investigation indicated that ophthalmic lens manufacturers/wholesalers tried to obtain the price lists of rival undertakings from the market (especially from opticians) and used this information in their pricing policies in order to compete and to develop a strategy against their competitors, rather than leading to a cooperative outcome.

As a result, the Board decided not to initiate an investigation against the undertakings as there was no evidence of a detailed, comprehensive, systematic and mutual exchange of competition-sensitive information between the competitors and that the undertakings operating in the ophthalmic lens production and wholesale market were not in an agreement with the purpose and/or effect of restricting competition.

Meta Platforms Decision³

On 20 October 2022, the Board concluded its investigation against Facebook and its subsidiaries to determine whether the alleged abuse of a dominant position by merging data between its group companies violated Article 6 of the Law.



The chain of events that started with the update requiring data sharing by Whatsapp necessitated a broad assessment of the abuse of a dominant position. It was stated that the data merger between the relevant undertakings and the resulting situation made it difficult for competitors to operate on the market and limited competition by restricting new entries to the market, thus reducing consumer welfare. It was assessed that, even if a structure was created to obtain user consents within the framework of free will declarations not based on coercion with the changes made in the Whatsapp update, this would not change the anti-competitive situations created by the use of WhatsApp data in other Facebook services.

The Board first concluded that Meta is in a dominant position in the relevant product markets (personalised social networking services, consumer communication services, online display advertising services). Subsequently, the Board evaluated the processing of data in digital markets within the scope of Article 6 of the Law, and in this context, the Board examined the exploitative and exclusionary abuse of data merging.

² Decision of the Board dated 5 January 2023 and numbered 23-01/6-5.

³ Decision of the Board dated 20 October 2022 and numbered 22-48/706-299.

As a result of the investigation, Facebook incurred an administrative fine of TL 346,717,193.40, compliance measures were required to end the competition violation and to ensure effective competition on the market, and these measures were to be reported periodically.

Trendyol Decision⁴



DSM Grup Danışmanlık İletişim ve Satış Ticaret A.Ş. (Trendyol), which has been operating in the e-commerce sector since 2009, switched to a marketplace model as of October 2017.

The investigation initiated against Trendyol, whose role as an intermediary has strengthened over time, into alleged abuses of its power in the multi-category marketplace by creating cross-subsidisation with the food and grocery ordering market, and entering into contracts with sellers on the online grocery ordering market that included a narrow most-favoured customer clause, was reported by the Board based on the findings and documents examined.

The Board has decided that there were no findings that would constitute an abuse of Trendyol's dominant position pursuant to Article 6 of the Competition Law, and therefore there was no need to open an investigation. Trendyol's agreements with restaurants in the online food ordering-service platform services market, which include a broad "Most Favoured Customer" clause, were also considered within the scope of the Group Exemption Communiqué No 2002/2 on Vertical Agreements.

Nestle Decision⁵

The Board's decision is based on the allegation that Nestle Türkiye Gıda Sanayi A.Ş. (Nestle), a manufacturer in the fast-moving consumer goods sector, and Nestle's distributors Duyça Gıda Dağıtım Pazarlama AŞ (Duyça Gıda) and Promas Gıda Ambalaj Pazarlama ve Ticaret Ltd. Şti (Promas) violated Article 4 of Law No 4054 on the Protection of Competition. The Board focused its decision on the allegations that Duyça Gıda and Promas, distributors of Nestle, agreed among themselves to set common prices, minimum prices and discount rates that restricted the competition, in line with the examination made in terms of supply markets, relevant product market and relevant geographical market. In this context, the Board concluded that there is no information or document that can be used as primary or secondary evidence to establish a specific infringement pattern within the scope of the existing file. Accordingly, the Board concluded that there is no need to initiate an investigation against Nestle's distributors since there is no evidence within the scope of the current file that raises suspicion that Nestle's distributors violated the Law on the Protection of Competition.



⁴ Decision of the Board dated 5 January 2023 and numbered 23-01/2-2.

⁵ Decision of the Board dated 15 December 2022 and numbered 22-55/850-350.

B- M&A DECISIONS**Health Technology Market****Acquisition of sole control of Apollo Endosurgery Inc. by Boston Scientific Corporation through Textile Merger Sub Inc.⁶**

In the notification made to the Authority, permission was requested for the acquisition of all the shares in Apollo Endosurgery by Boston Scientific Corporation through its wholly owned indirect subsidiary Merger Sub. In the decision, it is stated that the transaction subject to the notification is a takeover transaction within the framework of Article 5 of Communiqué No 2010/4 and within the scope of Article 7 of Communiqué No 2010/4, the activities of the company subject to the transfer in the medical device sector are included in the field of "health technology". Therefore, it has been assessed that the notification is subject to authorisation.

Vehicle Financing Services Market**Acquisition of all the shares in TEB Finansman AŞ by Türk Ekonomi Bankası AŞ.⁷**

The application requested authorisation for the acquisition of all the shares in TEB Finansman AŞ by Türk Ekonomi Bankası AŞ (TEB), which is jointly controlled by Çolakoğlu Group (ÇOLAKOĞLU) and BNP Paribas SA. Considering the fields of activity of the parties to the transaction, it has been concluded that, if the transaction subject to the notification goes ahead, a horizontal overlap will occur in terms of the "vehicle financing services market" within the scope of the activities of the parties in Türkiye. However, considering the low market share of the parties to the transaction in that market after the acquisition and the existence of strong entities operating on the market, the Board concluded that the acquisition is not likely to result in a significant reduction of effective competition in any goods or services market in any part of the country. Hence, the authorisation was granted.

Egg Production from Poultry Market & Manufacture of Prepared Feed for Livestock market**Acquisition of sole control of Keskinöğlu Tavukçuluk ve Damızlık İşletmeleri Sanayi Ticaret AŞ ("KESKİNOĞLU")⁸**

Upon performing the transaction subject to the notification, all the shares held by T.C. Ziraat Bankası A.Ş. in KESKİNOĞLU will be transferred to Matlı Yem Sanayii ve Ticaret AŞ. ("MATLI"). According to the information provided in the notification form, MATLI will have full control over the undertaking subject to the transfer. In line with the information provided in the application, it has been concluded that the activities of the transaction parties overlap horizontally and vertically". However, within the scope of the evaluations made by the Board, the Board has concluded that, if the transaction is authorised, it will not significantly reduce effective competition in any goods and services market in any part of the country, in particular by creating a dominant position or strengthening an existing dominant position. Therefore, the Board unanimously authorised the acquisition.

Fuel Supply Market**Joint control of Potaş Akdeniz Akaryakıt Dağıtım Anonim Şirketi by Petrol Ofisi Anonim Şirketi ("Petrol Ofisi") and TAV Antalya Akaryakıt Dağıtım Anonim Şirketi ("TAV Antalya")⁹**

⁶ Decision of the Board dated 16 February 2023 and numbered 23-09/138-40.

⁷ Decision of the Board dated 8 December 2022 and numbered 22-54/830-340.

⁸ Decision of the Board dated 16 March 2023 and numbered 23-14/239-77.

⁹ Decision of the Board dated 23 February 2023 and numbered 23-10/158-49.

The transaction is related to the establishment of Potaş, a fully functional joint venture to be jointly controlled by TAV Antalya and Petrol Ofisi. The Board concluded that the joint venture company to be established in the transaction subject to the notification will be a fully functional, independent economic entity and should be qualified as an acquisition transaction within the scope of Article 5 of Communiqué No 2010/4. On the other hand, considering the turnover information in terms of the file, it has been observed that the transaction in question is subject to authorisation since the turnover thresholds specified in Article 7 of Communiqué No 2010/4 are exceeded.

In addition, based on the information obtained within the scope of the file, it has been assessed that there may be horizontal overlap between the activities of Petrol Ofisi and Potaş in the field of fuel supply, and that there may be vertical overlap between the markets for the operation of Antalya Airport and fuel supply. However, since the transaction subject to the notification will not significantly reduce effective competition on any market in any part of the country, in particular by creating a dominant position or strengthening an existing dominant position, the transaction has been authorised.

Elon Musk Twitter Decision¹⁰



The decision dated 2 March 2023 concerns the examination of the transaction for the acquisition of the sole control of Twitter Inc. by Elon R. MUSK pursuant to Article 11 of the Law. As a result of the failure to notify this transaction, which is subject to authorisation pursuant to Article 7 of Communiqué No 2010/4, the relevant transaction was examined ex officio by the Board. In the decision, the Board stated that the turnover thresholds will not be sought for the undertaking subject to the transfer in transactions regarding the acquisition of technology undertakings, and it is understood that the Twitter digital platform is subject to authorisation since it is considered as a technology undertaking in this context. Although it was decided to authorise the transaction, since there is no significant lessening of effective competition, because the relevant transaction was carried out without the authorisation of the Board, an administrative fine was imposed on Elon R. MUSK.

Establishment of joint control over The Rimrock Resort Hotel¹¹

The decision dated 13 April 2023 concerns the examination of whether the establishment of a joint venture by Parks Bottom, Omers Realty and Accor Management on The Rimrock Resort Hotel in Canada will significantly reduce effective competition, since the transaction is subject to authorisation pursuant to Article 7 of the Law and Communiqué No 2010/4. The Board concluded that there is no horizontal or vertical overlap between the activities of the parties in Türkiye, and that there will be no significant lessening of effective competition in any market as a result of the transaction subject to the notification. Therefore, the Board authorised the relevant transaction.

Acquisition of the Land Transport Systems business line of Thales SA by Hitachi Ltd. through Hitachi Rail¹²

The decision, dated 30 March 2023, concerns the examination of the transaction regarding the acquisition of the Land Transport Systems line of business of Thales SA by Hitachi Ltd. through Hitachi Rail, in accordance with Article 7 of the Law and Communiqué No 2010/4.

¹⁰ Decision of the Board dated 2 March 2023 and numbered 23-12/197-66.

¹¹ Decision of the Board dated 13 April 2023 and numbered 23-18/351-119.

¹² Decision of the Board dated 30 March 2023 and numbered 23-16/289-101.

In the decision, it is stated that the undertakings are not in a dominant position on the relevant product markets and that the relevant transaction will not create a dominant position. It was further stated that the high market shares of the undertakings are temporary and do not provide any information regarding the intensity of competition on the market, there are many undertakings on the relevant market, new entries and smaller players are likely to grow in the coming years as the market is an attractive market, and that the buyer power is high as the relevant market is a regulated tender market. Therefore, the Board decided to authorise the transaction since there is no significant lessening of effective competition as a result of the transaction.

***Dalsan and Saint-Gobain JV establishment transaction (final review)*¹³**

The decision dated 8 December 2022 concerns the examination of the transaction subject to authorisation for the establishment of a 50-50 joint venture between Dalsan and Saint Gobain on Rigips, which is wholly owned by Saint Gobain, in accordance with Article 7 of the Law and Communiqué No 2010/4.

In the decision, as a result of the determinations reached in terms of the relevant product market, it was concluded that there will be no significant reduction of effective competition due to the transaction subject to notification in the powder gypsum and gypsum board markets, where there is horizontal overlap between the activities of the transaction parties. The Board decided to authorise the transaction since there is no significant lessening of effective competition as a result of the transaction.

C- OTHER DECISIONS

***Empa Order to prevent an on-site inspection*¹⁴**

In its decision dated 16 March 2023, the Board decided that Empa had hindered and prevented the on-site inspection of Empa on 9 March 2023, and therefore, an administrative fine of 105.688,00 TL was imposed on the Empa representative pursuant to Article 16 of Law No 4054.

***Fair Organisation , Abuse of Dominant Position Preliminary Investigation*¹⁵**

On 16 March 2023, the Board ruled that 29 undertakings operating as fairground operators and fair organisers subject to a complaint were in a dominant position for each specialised fair they organised. On the other hand, the fair organisers gave the transportation of the products to be exhibited in the fair from the entrance of the fairground to the stands to which they are related to only one transportation company, another company was prevented from providing this service and the participants were not given the right to choose. The five undertakings subject to the complaint performing in-fair transport services are in a monopoly position and the complainant Ertem Nakliyat was prevented by these undertakings with the aim of excluding it from the market.

In its decision, the Board firstly assessed that none of the undertakings operating on the markets of fairground management, fair organisation services and fair transport services are in a dominant position. The Board also evaluated the complaint in terms of the refusal to contract and discrimination despite the lack of a dominant position and consequently decided not to open an investigation pursuant to Article 41 of the Law.

¹³ Decision of the Board dated 8 December 2022 and numbered 22-54/829-339.

¹⁴ Decision of the Board dated 16 March 2023 and numbered 23-14/244-80.

¹⁵ Decision of the Board dated 16 March 2023 and numbered 23-14/229-73.

Mackolik Decision¹⁶

In its decision dated 7 September 2023, the Board decided to take an interim measure against Mackolik İnternet Hizmetleri A.Ş. (MAÇKOLİK) in order to prevent serious and irrecoverable damages until the completion of the investigation opened against MAÇKOLİK due to actual exclusivity, which requires an investigation regarding an alleged violation of Articles 4 and 6 of the Law.



The chain of events that started with the investigation opened on 7 July 2022 to examine whether NESİNE and MAÇKOLİK had violated the Law, by way of concluding a contract with an exclusivity provision. Thereafter the contract between NESİNE and MAÇKOLİK was amended so as to remove the exclusivity provisions in accordance with the Board's interim measure decision. However, the Board stated that the amendment report did not bring about much change and that MAÇKOLİK still did not enter into advertising co-operation with other betting companies in a way that would eliminate the suspicion of exclusivity. In this context, the Board initiated an investigation against MACKOLİK on 10 August 2023. In its decision, the Board decided to take further interim measures against MACKOLİK in accordance with Article 9 of the Law while the relevant investigation continues.

Derebağçe Özel Sağlık Hizmetleri San. ve Tic. A.Ş. (ATASAM) Decision¹⁷

In order to evaluate the application submitted as part of the Administrative Judicial Procedure Act, the Board made evaluations regarding the evidence that constituted the basis for an administrative fine imposed on ATASAM in the Board's decision dated 24 February 2022 and numbered 22-10/152-62. An administrative fine was imposed on ATASAM due to the existence of a large number of documents revealing its involvement in breaches of competition.



In compliance with Turkish bar regulations, opinions relating to Turkish law matters that are included in this client alert have been issued by Özdirekcan Dündar Şenocak Ak Avukatlık Ortaklığı, a Turkish law firm acting as correspondent firm of Gide Loyrette Nouel in Türkiye.

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¹⁶ Decision of the Board dated 7 September 2023 and numbered 23-41/797-281.

¹⁷ Decision of the Board dated 15 December 2022 and numbered 22-55/851-351.