

## NEWSLETTER

COMPETITION LAW NEWSLETTER

SEPTEMBER 2022

This Competition Law Newsletter provides information on the latest developments in relation to the Turkish competition market and the implementation of the 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

The Board rendered 157 decisions between 25 May and 25 August 2022. The distribution of these decisions was as follows:

- 90 decisions regarding merger and acquisition notifications;
- 29 decisions regarding breaches of competition law;
- 10 decisions regarding negative clearance and exemption applications; and
- 28 decisions regarding other issues.

All of the breaches of competition law were investigation decisions. The companies involved in these were mainly active in agriculture, online car sales and the textile sector. As a result of the Board's decisions, administrative fines corresponding to a total of TRY 13,576,154 (approximately EUR 744,420,96) were imposed on the companies that were found to be in breach of the Law.

### LEGISLATION AND ANNOUNCEMENTS

#### Legislation

#### ***Increase in the turnover thresholds regarding the pre-notification requirement for acquisitions by way of privatisations***

According to the latest amendment,<sup>1</sup> the existing turnover threshold for an undertaking subject to privatisation was increased from TRY 30 million (approximately EUR 1.6 million) to TRY 250 million (approximately EUR 13.7 million).

Accordingly, in an acquisition via a privatisation within the scope of Communiqué No 2013/1, if the turnover of the undertaking or unit intended for the production of goods or services to be privatised exceeds 250 million Turkish liras, then a pre-notification must be filed with the Authority before the public announcement of tender specifications. Such a pre-notification is requested in order to reveal the opinion of the Board on the effects of the relevant privatisation on the market from a competition law perspective, as well as the Board's consideration of any potential problems that may arise within the framework of

<sup>1</sup> Published on the Official Gazette dated 18 June 2022 and numbered 31870.

Article 7 of Law No 4054. The opinion of the Board will serve as the basis for preparing the tender specifications.

This amendment was a follow-up to the change in the turnover threshold for mergers and acquisitions subject to the approval of the Board (see our previous [Client Alert](#)). However, it is unclear whether the same amendment was necessary for privatisations. In 11 out of the 38 privatisation decisions since 2015, the Board decided that the transactions were not subject to pre-notification because the TRY 30 million threshold was not exceeded. With numbers like these, the new amendment will likely lead to an increase in the number of such out-of-scope decisions, as opposed to M&A transactions.

#### ***Expansion on the scope of "turnover" definition***

Before the recent amendment, annual gross income (turnover) was defined as the income corresponding to net sales within a company's uniform chart of accounts. If it is not possible to calculate that amount, the income that is nearest to the net sales in that year should be determined by the Board. Following the amendment,<sup>2</sup> the definition of annual gross income has been expanded to include other accounting items, e.g. ordinary revenues and profit from the other activities item, in addition to the net sales item. Accordingly, if it is detected that an undertaking has recognised any income from its main activities under an accounting item such as ordinary revenues and profit from other activities that is not taken into account whilst calculating the net sales, then the amounts in question will also be included in the calculation of the company's gross income.

#### ***Announcements***

The Board has continued its series of investigations in various sectors as follows:

- ***Technology markets/shops:*** Media Markt Turkey Ticaret Limited Şirketi, Teknosa İç ve Dış Tic. A.Ş., Vatan Bilgisayar San. ve Tic. A.Ş. and Sunny Elektronik San. ve Tic. A.Ş. on 18 May 2022.<sup>3</sup> The companies will be subject to an investigation in relation to an alleged exchange of competition sensitive information, banning internet sales of the sellers and/or deciding the resale price, acting as intermediary for the indirect exchange of information. This investigation is expected to shed light on the recent discussions on vertical restrictions applied to online sellers. Due to accelerated developments on the online sales market (e.g. the expansion of Getir, Trendyol's listing on Nasdaq etc.), further investigations by the Board in this regard are expected to be launched in the near future.
- ***IT systems:*** as a result of the investigation launched on 16 June 2022 against Obilet Bilişim Sistemleri A.Ş., it was found that the company was restricting competition by determining excessive ticket sale commission rates and excluding its competitors from the market.
- ***Food:*** Tadım Gıda Maddeleri San. Ve Tic. A.Ş was the subject of an investigation launched on 12 August 2021 in relation to its alleged abuse of a dominant position on the relevant market, with exclusionary practices and interfering with the prices of dealers. During the investigation process, Tadım Gıda Maddeleri San. ve Tic. Inc. filed an application to initiate the commitment process to address the competitive concerns and a comprehensive commitment package was presented. The Board decided to conclude the investigation by making the relevant commitment package binding, considering that the commitments in question are proportionate to the competition problems, suitable for eliminating these problems, can be fulfilled in a short time and can be implemented effectively.

<sup>2</sup> Published in the Official Gazette dated 15 June 2022 and numbered 31867.

<sup>3</sup> The Board's decisions numbered 22-23/370-M and 22-23/371-M.

- Domestic appliances: Electrolux Dayanıklı Tüketim Mamülleri Sanayi ve Ticaret A.Ş., Çetinler Dayanıklı Tüketim Malları, Uğur Soğutma Makinaları Sanayi ve Ticaret A.Ş., Miele Elektrikli Aletler Dış Ticaret ve Pazarlama Ltd. Şti. were subject to investigations launched on 30 June 2022.
- E-platforms: (i) Also on 30 June 2022, another investigation was launched against Sahibinden Bilgi Teknolojileri Paz. Ve Tic. AŞ, a company active in the sales/leasing of real estate and vehicles. The company is being investigated in relation to its alleged abuse of a dominant position by over-pricing, (ii) D Elektronik Şans Oyunları ve Yayıncılık A.Ş. (Nesine.com) was subject to an investigation launched on 7 July 2022 in relation to alleged vertical agreements that include exclusivity and (iii) an investigation was launched against car sales companies Arabam Com İnternet ve Bilgi Hizmetleri A.Ş., Vava Cars Turkey Otomotiv A.Ş., Araba Sepeti Otomotiv Bilişim Danışmanlık Hizmetleri Sanayi ve Ticaret A.Ş. and Letgo Mobil İnternet Servisleri ve Ticaret A.Ş. on 21 July 2022
- Mobility App/Scooter: On 10 August 2022, an investigation was launched against the technology company Martı İleri Anonim Şirketi due to the abuse of its dominant position on the relevant market. The investigation was concluded on 8 September 2022 without any penalty being imposed, thanks to commitments filed by the company.

## SUMMARY OF KEY DECISIONS

### MERGERS AND ACQUISITIONS

#### Automotive

- RMA Holdings Limited, a Welsh automotive solutions company, has obtained approval from the Board to acquire sole control of Altınay Modifikasyon Merkezi Tic. A.Ş., a Turkish vehicle modification company. The Board concluded in its decision that the acquisition relates to the provision of superstructure services for the light vehicles market and that, since the market shares of the companies are low and the relevant market is a competitive market with multiple players, the transactions does not entail any anti-competitive concerns.



- Kavak Holdings Limited, a Mexican online car sales platform, has obtained approval from the Board to acquire sole control of Araba Sepeti Otomotiv Danışmanlık Hizmetleri San. ve Tic. A.Ş., a Turkish online car sales platform. The Board concluded in its decision that the acquisition relates to the second-hand automobile sales market and the transaction does not create a dominant position or enhance an existing dominant position, and so does not raise any anti-competitive concerns.



- Volkswagen AG – a German automotive company, Trinity Investments DAC – an Irish investment company and Pon Holdings B.V. – a Dutch automotive company have obtained approval from the Board to acquire joint control of Europcar Mobility Group S.A. – a French car rental company.
- The Board has authorised ADT LLC and Ford Next LLC to acquire the joint control of SNTNL LLC . Ford Next LLC is the Ford Group's self-driving vehicles business. The American company ADT is a security, automation and smart home solutions provider that operates as a do-it-yourself model and offers solutions with mobile and digital-based services as well as 24/7 professional monitoring services. SNTNL will operate in the field of integrated intelligent vehicle safety systems, which will be developed, produced and sold from scratch on the market in the last quarter of 2022.



### Information Technologies

- HgCapital LLP have obtained approval from the Board to acquire sole control of D.T.P Bilgi İşlem İletişim ve Tic. A.Ş., – an e-transformation service provider – from Sovos Compliance, LLC. Even though the Board did not define the relevant product market, it indicated that the e-transformation industry is a fast-growing market, with many players, and that it has not reached a high level of concentration.





- The Board authorised EdgeConneX Hold Co I (Cayman Islands), a pioneer in global hyperlocal to hyperscale data centre solutions, to acquire joint control over Chayora Holdings Limited – a digital infrastructure developer and data centre provider in China which was previously wholly owned by ACTIS. The Board stated that data storage and data centre services have a local character and therefore considered that a possible vertical overlap will not cause a competitive concern at the global level.

- A joint venture between the Suez Group and Schneider Electric was approved by the Board, creating a company that will offer water management software for water and wastewater treatment facilities. This joint venture will support municipal water operators as well as industrial players, helping with the acceleration of their digital transformation by providing them with an industry-focused range of software solutions for planning, operation, maintenance, and optimization of water treatment infrastructure.

#### Insurance

- Chubb Limited's aim to acquire sole control over Cigna Corporation's South Korea, Taiwan, New Zealand, personal accident, supportive health and insurance business and to create a joint venture in Turkey with Cigna Sağlık Hayat ve Emeklilik A.Ş. was cleared by the Board. Cigna Turkey mainly focuses on life insurance, private pensions, personal accident and health insurance. Chubb engages in global insurance business and offers corporate and individual property and accident insurance, personal accident and supportive health insurance; it also carries out reinsurance activities.

#### E-commerce

- Shares in Doğu Planet Elektronik Ticaret ve Bilişim Hizmetleri AŞ (N11) were acquired by Getir Perakende Lojistik AŞ via a capital increase from Doğu Holding AŞ and SK Planet Co and was approved by the Board. N11 is a retail company operating an online business with a multi-category marketplace model. GETIR works in online sales and the fast delivery of FMCG goods.



### Retail Sector

- Further to a conditional permission decision of the Board dated 1 October 2018 for the merger of Luxottica Group S.p.A and Essilor International S.A., the Board decided to extend the duration of the behavioral commitments for another three years, because there is a horizontal overlap in the sunglasses and frame markets of the parties' activities.

### Gaming

- The Board authorised the acquisition of sole control of Zynga Inc. Software, Inc., an American developer running social video game services, by Take-Two Interactive Software, Inc. an American video game developer. Although the merger of the target company with an affiliate of the acquiring company, in such a way that the parent company will control the target company, is defined as a merger in the literature, in this decision the Board declared that this structure, which is called a "reverse triple merger", will actually constitute an acquisition.

## INVESTIGATIONS

### Sahibinden.com Decision



The Board decided to launch an investigation (the "**First Investigation**") against Sahibinden Bilgi Teknolojileri Paz. ve Tic. A.Ş. ("**Sahibinden.com**") on 12 January 2017, further to numerous complaints filed to the Authority alleging an abuse of a dominant position by its price gouging practice. At the end of the First Investigation, the Board concluded that Sahibinden.com had abused its dominant position on the relevant market by increasing the membership prices excessively and had breached Article 6 of the Competition Law No 4054.

However, the Board's decision was reversed by the administrative court on 18 December 2019, following an appeal by Sahibinden.com. After the reversal decision by the administrative court, the Board commenced a subsequent investigation on 27 February 2020 (the "**Second Investigation**"). In the relevant investigation report, the Board stated that Sahibinden.com holds a dominant position in the "*provision of online platform services for facilitating advertisement places in relation to real estate sale/rent transactions of the corporate members*" and the "*provision of online platform services for facilitating advertisement places in relation to car sales transactions of the corporate members*" markets.

Through the Second Investigation, the Board found that, Sahibinden.com had increased its membership prices in the real estate category relatively but not significantly higher than its competitors. However, the increase in the vehicles category was higher than the average on the market. That said, with a *rule of reason* analysis, the Board resolved that the relevant price changes did not have any effects on the profits of auto sellers and real estate agents, and that there was no evidence to suggest that the increase in the membership prices have adversely affected end customers. In this respect, the Board stated that, in order to rule for a breach on the ground of price gouging, it should be proven that the relevant price changes have a direct and negative impact on the customers, while no such impact was observed in this case. As

a result of the Second Investigation, on 8 July 2021, the Board decided that Sahibinden.com had not abused its dominant position on the above mentioned markets, and therefore had not breached Article 6 of Competition Law No 4054.

- This decision is critical in the sense that it has set out the principle for approaching claims regarding an abuse of dominant positions via price gouging, which should be an effect analysis in respect of the end customers. In other words, the actions of price gouging does not *per se* render a breach of law.
- On a related note, in another competition investigation on Sahibinden.com for preventing and hindering the on-site inspection, the Board decided to set an administrative fine of TRY 4.8 million (approximately EUR 0.27 million). However, the administrative court recently rendered a suspension of execution decision<sup>4</sup> because it found out that there was no evidence proving a breach of Competition Law No 4054.
- There were two further complaints made to the Board against Sahibinden.com and, although no fines were imposed, the Board indicated in its decisions that Sahibinden.com is in a dominant position on the online platform service market for vehicle sales and real estate sales/rental activities. In this respect, the excessive pricing allegations in Turkey's digital industry is being kept under close scrutiny via investigations against Sahibinden.com.

### Arnica Decision



On 4 March 2021, the Board initiated an investigation against Arnica Pazarlama A.Ş. ("**Arnica**"), a home appliances company, in response to allegations from a sales representative regarding its practice of determining the resale price. Following the investigation, Arnica asked the Board to consider its commitment and reconciliation mechanisms. The Board rejected Arnica's request concerning the commitment mechanism, as the allegations of a breach against Arnica qualified as an obvious and severe breach of competition law, but accepted its request for reconciliation.

- In its decision, the Board found that Arnica has determined the minimum sale price for the undertakings purchasing products with the intention of reselling them and tried to impose sanctions on them, such as cancelling orders, ceasing deliveries and not providing products. Further, the Board found that Arnica imposed an internet sale restriction on certain distributors and tried to prevent wholesalers from selling its products to certain retailers and to distributors from outside a set region of activity. The Board and Arnica conducted a reconciliation mechanism.
- The Board imposed an administrative fine on Arnica Pazarlama A.Ş. in the amount of TRY 2.47 million (approximately EUR 0.14 million) for determining the resale prices of products, with a 25 per cent reduction due to the reconciliation mechanism. The investigation ended via the reconciliation procedure.
- This decision is of importance as it addresses the issue of limiting sales through online platforms.

### Nadirkıtap Decision

<sup>4</sup> The Decision of Ankara 2nd Administrative Court numbered 2022/254 and dated 15 April 2022.



The Board launched an investigation against Nadirkitap Bilişim ve Reklamcılık Anonim Şirketi ("**Nadirkitap**"), an online second-hand book sales platform. The Board imposed an administrative fine of TRY 0.35 million (approximately EUR 0.02 million) based on the grounds that Nadirkitap abused its dominant position.

- The Board determined the relevant market was platform services for second-hand book sales in Turkey, on the grounds that new book sales are not substitutable with second-hand book sales; second-hand book sales through traditional channels are not substitutable with online sales; book sales via marketplace platforms are not substitutable with sales conducted by undertakings acting on their behalf; and other marketplace platforms that sell books and other products are not substitutable with marketplace platforms that sell only books.
- As a result of the investigation, the Board concluded that Nadirkitap prevented booksellers who want to sell their products via other intermediary service providers from accessing book data uploaded to Nadirkitap's website, which complicates the activities of competitor intermediary service providers. The Board also decided that Nadirkitap must provide the relevant bookseller with the book inventory data at the request of the bookseller.
- This decision provides guidance as regards the relevant markets for marketplace platforms and the Board's precedents on data portability.

#### **Decision of the Board on First-hand and Second-hand Car Sale Market**

- On 24 July 2020, the Board launched an investigation into distributors and car rental companies. The investigation was a very large one covering many companies, though none of the companies were found to be in breach of the Law.
- With the latest amendments in Turkish law, cars purchased for commercial purposes cannot be sold until at least six months have passed and they have driven at least 6000 kilometres. This decision will be instrumental for the upcoming regulations of the government to ensure prevention of any anti-competitive practices in the first-hand and second-hand car sale markets.

#### **OTHER DECISIONS**

##### **Allianz Sigorta and Mapfre Sigorta Decision**



On 14 July 2021, the Board commenced a preliminary investigation against Allianz Sigorta A.Ş. ("**Allianz Sigorta**") and Mapfre Sigorta A.Ş. ("**Mapfre Sigorta**") in response to complaints that Allianz Sigorta and Mapfre Sigorta breached Article 4 of the Law by tying the complimentary health insurance and private health insurance products.

- According to the Board, in order to render a tying practice in breach of Law, both of the below criteria should be met:
  - i. The tied and tying products should be two different products; and
  - ii. The tying practice should be likely to result in anti-competitive closure of the market.
- The Board concluded that complimentary health insurance and private health insurance are two different products as they are already offered separately on the market and as healthcare entities demand these insurance separately as a matter of practice.



- As regards the issue of anti-competitive closure of the market, the Board looked at the claims on the basis of the vertical relationships of Allianz Sigorta and Mapfre Sigorta with their respective private hospital customers. In respect of Mapfre Sigorta, the Board found out that Mapfre Sigorta has a tying practice that results in the breach of Article 4 of the Law. However, since Mapfre Sigorta's market share is not over 30 per cent and other conditions stipulated under the Block Exemption Communiqué No 2002/2 for Vertical Agreements are satisfied, this tying activity benefitted from the block exemption. In respect of Allianz Sigorta, although its practice does not benefit from the block exemption, the practice benefitted from the individual exemption set out under Article 5 of the Law. Therefore, the Board did not feel the need to start an investigation on the parties.

### Anadolu Cam Decision

The Board launched an investigation against Türkiye Şişe ve Cam Fabrikaları A.Ş. ("**Anadolu Cam**") and decided to impose an administrative fine of TRY 2.5 million (approximately EUR 0.14 million). However, the decision of the Board was rejected and returned by the Council of State on the ground that the relevant oral hearing procedures were not properly followed.



Upon the Council of State's decision, the Board rendered another decision to impose the same administrative fine against Anadolu Cam. However, Anadolu Cam appealed this decision as well and Council of State's Plenary Session of Administrative Law Divisions also rejected and returned the decision on the basis that the fine amount was not properly calculated in line with the relevant penalty regulation.

- In this regard, the Board drafted an Information Note on 31 January 2022 and finalised its decision in this respect. In the Board's view, Anadolu Cam's price policy at the Tekel tender on 9 June 2003 constituted an abuse of a dominant position by complicating the activities of Marmara Cam Sanayi ve Ticaret Ltd. Şti. Therefore, the Board decided on an administrative fine of TRY 2.5 million (approximately EUR 0.14 million).
- This decision is significant as it reflect the importance of following procedural rules in competition investigations. Indeed, an obvious breach by Anadolu Cam was not punished for almost 19 years due to not following procedural rules.

### **EXEMPTIONS**

#### Otomotiv Sanayii Derneği Decision

On 21 October 2021, the Board concluded on the negative clearance/exemption request for the purpose of expanding the scope of publicly available information on automobile industry offered by an association

of undertakings active in this sector. The Board evaluated that the request consisted of information exchange between competitors, but it is not sensitive in terms of competition law. In this regard, the Board granted a negative clearance by establishing each kind of information (such as car body, car segment, fuel type, export country, CO2 emission) to be published by the association that can benefit from this clearance.

#### **Cigna Sağlık Decision**

On 30 September 2021, the Board concluded on an exemption request for a bancassurance agreement between two insurance companies (Cigna Sağlık Hayat ve Emeklilik A.Ş. and QNB Finansbank A.Ş.). The Board stated that the agreement, which fell within Article 4 of the Law, does not meet the criteria of the block exemption for vertical agreements. Furthermore, the Board assessed the agreement within the scope of individual exemption criteria and concluded that the validity of the non-compete clause should be limited to the term of the contract and an indefinite obligation of non-inducement for the post-termination term should be amended to be five years. On that account, The Board granted a conditional individual exemption on the basis of Article 5.

#### **Ege Asansör Decision**

Ege Asansör ve Yürüyen Merdiven Sanayiciler Derneği, an association of the elevators and escalators (E&E) sector requested the regulation of the sector through the determination of a base price for the periodic maintenance services of E&E. However, the Board rejected the negative clearance request of the association, which means the exclusion of the sector from the free market economy. Accordingly, the Board did not grant an individual exemption since such clearance would mean price fixing was determined among competitors. The Board underlined that the market should be regulated through structural measures that need to be implemented by the relevant public authorities, with less restrictive interventions from competition law standpoint.



*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 Turkey.*

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