

NEWSLETTER

COMPETITION LAW | TURKEY |

NOVEMBER 2022

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

The Board rendered 56 decisions in October 2022. The distribution of these decisions was as follows:

- 35 decisions regarding merger and acquisition notifications;
- 6 decisions regarding breaches of competition law;
- 6 decisions regarding negative clearance and exemption applications; and
- 9 decisions regarding other issues.

Two of the breaches of competition law were investigation decisions and four were preliminary investigation decisions. The companies involved in these were mainly active in the container interior storage, food, technology and the textile sectors. As a result of the Board's decisions, administrative fines corresponding to a total of TRY 3,502,401.19 (approximately EUR 188,221.19) were imposed on the companies that were found to be in breach of the Law.

ANNOUNCEMENTS

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

- **Food:** On 25 October 2022, an investigation was launched against the fast-moving consumer goods supplier Panek Ziraat Aletleri Dayanıklı Tüketim Malzemeleri Otomotiv Yakıt Petrol Ürünleri Tarım Ticaret A.Ş. concerning an alleged restriction of competition by deciding the resale price.
- **Beverages:** Mey İçki Sanayi ve Ticaret A.Ş. was the subject of an investigation launched on 21 October 2021 in relation to its alleged abuse of a dominant position on the relevant market by causing difficulties to the activities of its competitors through its investments in final sales points and its financial benefits. During the investigation process, Mey İçki Sanayi ve Ticaret A.Ş. filed an application to initiate the commitment process to address the competitive concerns and a comprehensive commitment package was presented. On 6 October 2022, 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, are suitable for eliminating these problems, can be fulfilled in a short time and can be implemented effectively.

- ***E-platforms:*** On 26 October 2022, the Board unanimously concluded that Meta Platforms Inc, Meta Platforms Ireland Limited, WhatsApp LLC and Madoka Turkey Information Services were abusing their dominant position by combining the data collected from their basic services (Facebook, Instagram, and WhatsApp) and restricting competitors from operating on the relevant markets. The Board imposed behavioural remedies as well as an administrative fine of TRY 346,717,193.40 (approximately EUR 18.6 million). In addition to paying the fine, Meta must apply the remedies, and present and submit periodic reports over the next five years.

The Board has authorised merger & acquisition transactions in various sectors as follows:

- ***Technology:*** Mikro Yazılımevi Yazılım Hizmetleri Bilgisayar San. ve Tic. AŞ has obtained approval from the Board to acquire sole control of Emükellef Teknoloji AŞ. Re-Pie Portföy Yönetimi AŞ Turkcell New Technologies Venture Capital Investment Fund has obtained approval from the Board to acquire joint control of Barikat İnternet Güvenliği Bilişim Ticaret AŞ.
- ***Pharmaceuticals:*** EİS Eczacıbaşı İlaç Sınai ve Finansal Yatırımlar Sanayi ve Ticaret AŞ has obtained approval from the Board to acquire sole control of Gensenta İlaç Sanayi ve Ticaret AŞ.
- ***Logistics:*** Transpet Petrolcülük ve Enerji AŞ has obtained approval from the Board to acquire joint control of Global Terminal Hizmetleri AŞ.
- ***Construction Chemicals Market:*** Mustafa Hakan SAFİ, Said SAFİ and Faruk SAFİ have obtained approval from the Board to acquire sole control of Sançim Bilecik Çimento Madencilik Beton Sanayi ve Ticaret A.Ş.
- ***Energy:*** the Board authorised a joint venture, jointly controlled by ENI S.p.A. and SNAM S.p.A., to take control of ENI S.p.A.'s activities related to the management of onshore and offshore pipelines allowing the import of Algerian natural gas from the Tunisian border to Mazara del Vallo in Sicily, Italy.

SUMMARY OF KEY DECISIONS

MERGERS AND ACQUISITIONS

Information Technologies

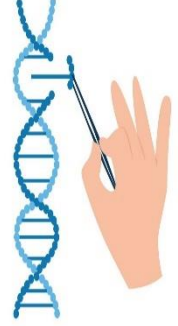
- The Board has authorised Providence Managing Member LLC to acquire sole control of Airties Kablosuz İletişim San. ve Dış Tic. A.Ş., a software services company that provides residential Wifi solutions and networks for broadband operators.¹ The Board evaluated that the software services provided by AIRTIES is a technology undertaking within the scope of Communiqué No 2010/4 and applied the sectoral threshold exemption for the acquired undertaking according to paragraph 2 of Article 7 of that communiqué. The Board stated that Providence's global turnover exceeds the thresholds provided in that article, and that, as the sectoral threshold exemption



¹ Decision of the Board dated 02.06.2022 and numbered 22-25/403-167.

states no turnover is required and the technology sector is directly subjected to approval without any turnover examination, the Board approved the transaction.

- Groupe Bruxelles Lambert SA has obtained approval from the Board to acquire sole control of Affidea Group B.V. and its affiliates.² In its decision, the Board recalled the sectoral threshold exemption in its newly amended Article 7 of Communiqué 2010/4 as *"the TL 250 million Turkish turnover thresholds are not sought for the acquired undertakings active in or assets related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals, and health technologies if they (i) operate in the Turkish geographical market or (ii) conduct R&D activities in the Turkish geographical market or (iii) provide services to the users in the Turkish geographical market."* The Board concluded that Affidea is a diagnostic imaging company in the biotechnology sector and the exemption introduced under Communiqué No. 2010/4 will apply, and exceeding the Turkish turnover thresholds will not be required for the transaction to be subject to approval. The Board directly passed its evaluation without even examining the acquiring parties' turnover thresholds.



Pharmacology

- The Board has authorised Astorg VIII SCSp's acquisition of sole control over Corden Pharma Holding S.E., which sells generic APIs to generic medical drug manufacturers, and Corden Pharma US Holdings Inc., which has no operations on the Turkish market.³ After recalling the sectoral exemption rule introduced under paragraph 2 of Article 7 of the Communiqué 2010/4, the Board concluded that, even though the turnovers of the parties stated in the application do not exceed the prescribed thresholds, it is assessed that the undertakings subject to the acquisition fall within the scope of the sectoral threshold exemption and therefore, the transaction is subject to authorisation.
- The Board has authorised the acquisition of joint control of Covetrus Inc by Clayton Dubilier & Rice Fund XI L.P. and TPG Inc.⁴ In its decision, the Board concluded that the specified turnover thresholds have not been exceeded, but that, since the Target Company operates in the pharmaceutical and software sector for animals, the acquisition falls within the scope of the sectoral threshold exemption.



INVESTIGATIONS

Port Decision⁵

The Board decided to impose an administrative fine of TRY 3,502,401.19 on Ortadoğu Antalya Liman İşletmeleri A.Ş. ("**PORT AKDENİZ**") for abusing its dominant position in the container interior storage services market and complicating the activities of its competitors on this market.

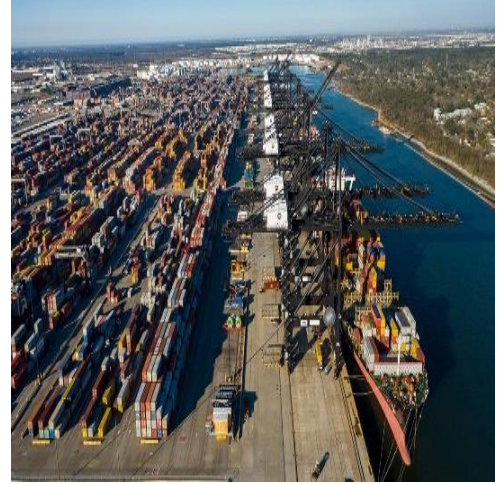
² Decision of the Board dated 16.06.2022 and numbered 22-27/431-176.

³ Decision of the Board dated 02.06.2022 and numbered 22-25/398-164.

⁴ Decision of the Board dated 07.07.2022 and numbered 22-32/512-209.

⁵ Decision of the Board dated 03.03.2022 and numbered 22-11/169-68

During the investigation, the complaining parties alleged that PORT AKDENİZ was colluding with container line agencies in the area of Antalya to push its competitors out of the market. It is noted in the allegations that the number of firms around Antalya Port providing storage and container storage services has recently fallen from seven firms to three, and that this decrease was associated with collusion between PORT AKDENİZ and two container line agencies – Medlog Lojistik Gemicilik Turizm A.Ş. and MSC Gemi Acenteliği A.Ş. Of these agencies, Medlog Lojistik Gemicilik Turizm A.Ş. is ultimately controlled by MSC Gemi Acenteliği A.Ş., which acts as an exclusive agency of MSC Mediterranean Shipping Company, an international container shipping company, though the Board did not find sufficient evidence to demonstrate a collusion between these parties with a view to pushing the competitors out of the market and did not render a breach on the basis of Article 4 of the Law.



According to the Board, the discounting practice used by PORT AKDENİZ was a *de facto* exclusivity application in the container interior storage market, which constituted an abuse of a dominant position. On this basis, the Board did not hesitate to impose a fine on PORT AKDENİZ.

Red Meat Decision⁶

The Board has launched an investigation against undertakings active on the red meat market based on claims that the red meat supply is controlled by undertakings through posts on social media and the communications within the WhatsApp groups, including livestock enterprises, leading to artificial price increases on the relevant market.

At the end of the investigation, it was decided that 1) the communications through WhatsApp groups were generally regarding wishes in relation to the policies to be generated in the livestock sector, despite the presence of certain complaints on the costs and prices escalated in the market, so they could not be considered as an agreement in the sense of Article 4 of the Law, and 2) the posts on the social media were only speculation. Therefore, no breach in respect of Article 4 of the Law were found.

Baymak Decision⁷

The Board has launched a preliminary investigation against Baymak Makine San. ve Tic. A.Ş. ("**Baymak**") on the basis of its actions to prevent the authorised services from working with competing entities. Following its preliminary analysis, the Board established that Baymak's practice of regional restrictions in respect of its authorised services does not benefit from the group exemption set out under Communiqué No 2022/2 on Group Exemptions Regarding Vertical Agreements or the individual exemption foreseen under Article 5 of the Law. In this respect, Baymak submitted its commitments aimed at fixing its non-conforming practices. The Board accepted such commitments as they were found to be

⁶ Decision of the Board dated 23.06.2022 and numbered 22-28/443-180

⁷ Decision of the Board dated 24.03.2022 and numbered 22-14/221-95

effective enough to overcome the competition law issues, rendered them binding on Baymak and completed the investigation.

Sunny Elektronik Decision⁸

In addition to a preliminary investigation launched against Sunny Elektronik Sanayi ve Ticaret A.Ş. ("**Sunny Elektronik**") in relation to its anti-competitive actions of imposing an internet sale ban on resellers and/or fixing resale prices, and also by mediating the indirect exchange of information between resellers, the Board is also conducting a preliminary investigation against Sunny Elektronik's authorised distributors: CarrefourSA Carrefour Sabancı Ticaret Merkezi A.Ş., Migros Ticaret A.Ş. and Yeni Mağazacılık A.Ş. in connection with the Sunny Elektronik investigation.



In its preliminary decision, the Board has addressed the issue of sharing sensitive information among competitors. In this respect, based on the evidence obtained from site visits, the Board decided that there was insufficient evidence to demonstrate any horizontal cooperation between these undertakings, and decided not to initiate a full investigation.

Adidas Decision⁹



The Board has launched a preliminary investigation into Adidas Spor Malzemeleri Satış ve Pazarlama A.Ş. ("**ADIDAS**") due to its purported practice of influencing the retail sale price of the products in the stores operating as its authorised sellers by disrupting product shipments, setting high sales targets etc. When the documents obtained during the on-site inspection were examined, no information or document was found to substantiate ADIDAS's alleged interventions regarding the retail sales price of its dealers.

It was only found that ADIDAS gave recommended prices to its authorised sellers, but without any pressure to apply such prices strictly. There was no evidence that the authorised sellers were interfered with in order to comply with these lists – the dealers were not contacted to ensure compliance with the recommended pricelist, no sanctions were imposed on dealers who did not comply with the list, and no extra privileges were granted to dealers that did. In this regard, the Board decided to reject the complaints and stated that there is no need to initiate an investigation against ADIDAS.

Yemek Sepeti Decision¹⁰

Yemek Sepeti Elektronik İletişim Perakende Gıda Lojistik A.Ş. ("**Yemek Sepeti**") has been subject to a preliminary investigation by the Board due to breaching Article 6 of the Law with its pushing-out-of-market practices in the online food order-service platform services market. The complaint was filed by Getir Perakende Lojistik A.Ş. ("**Getir**"), a leading competitor.



⁸ Decision of the Board dated 18.05.2022 and numbered 22-23/371-156

⁹ Decision of the Board dated 21.04.2022 and numbered 22-18/300-133

¹⁰ Decision of the Board dated 18.05.2022 and numbered 22-23/366-155

A part of Getir's allegations regarded Yemek Sepeti's discounting and raffle campaigns, which allegedly led to decreases in Getir's activities on the market. However, the Board found that Getir's restaurant network, meal order numbers, meal order values and active member numbers all increased during the relevant campaigns. There was also no additional evidence to support Getir's claims against Yemek Sepeti. The Board decided that there was no need to initiate an investigation against Yemek Sepeti and dismissed Getir's claims.

OTHER DECISIONS

Krea Decision¹¹

After a preliminary investigation against Krea İçerik Hizmetleri ve Prodüksiyon A.Ş. in response to complaints that Krea breached Article 6 of the Law by distributing news footage and highlights of the Turkish Super League and Turkish 1st League football competitions to other broadcasters in a discriminatory manner within the scope of the exclusive broadcasting rights, the Board examined whether an *ex officio* interim measure was required or not. The Board concluded that the information and documents obtained during the preliminary investigation are considered serious findings indicating a breach of the Law, and therefore an *ex officio* interim measure is necessary, as there is a possibility of "serious and irreparable damage" before the final decision, due to the possible negative impact to the competition on the "broadcasting rights of TFF Super League and TFF 1st League competitions". The Board issued an *ex officio* interim measure stating that, in respect of the ongoing 2022-2023 football season, no broadcasts will be possible for any of the broadcasters before the deadline set out in the specifications.



HepsiBurada Decision No 1¹²



In the Hepsiburada decision dated 13 January 2022, the Board imposed an administrative fine for obstructing an on-site inspection, because it was detected that, after the start of the on-site investigation, WhatsApp correspondence and group chats were deleted by employees, and that the HR department of the undertaking sent several messages such as "I will delete them all soon," "you should delete messages", "delete conversations yes, but don't leave groups".

Hepsiburada Decision No 2¹³

In the Hepsiburada decision dated 7 October 2022, even though it was determined that some WhatsApp correspondence had been deleted by employees after the start of the on-site inspection, the Board concluded by a majority of the votes that the on-site inspection had not been hindered. In the dissenting

¹¹ Decision of the Board dated 29.09.2022 and numbered 22-44/652-281.

¹² Decision of the Board dated 13.01.2022 and numbered 22-03/35-16.

¹³ Decision of the Board dated 07.10.2021 and numbered 21-48/678-338.

opinion, it was mentioned that the decision was not justified as there was evidence to show that deletions had occurred.

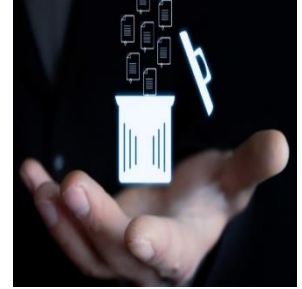
LDR Turizm Decision¹⁴



The Board imposed an administrative fine on LDR Turizm A.Ş. for obstructing and hindering the on-site inspection on the grounds that sales specialists deleted WhatsApp correspondences after the start of the inspection. It is important to note that, as indicated in the previous Board decisions, it is irrelevant whether or not the erased correspondences entailed a breach of the competition law.

A.B. Gıda Decision¹⁵

The Board imposed an administrative fine on A.B.Gıda San. ve Tic. A.Ş. for obstructing and hindering an on-site inspection on the grounds of delaying the on-site investigation and preventing experts from accessing potential evidence. The competition experts became aware that the email correspondences had been deleted and that there were only a few emails left in the mail boxes of the employees. In response to that, employees claimed that their email correspondence was deleted regularly at the end of the each day and IT infrastructure is provided by external support. Log records on the regular deletion of e mail messages could not be examined and confirmed, thus the Board did not accept this claim.



EXEMPTIONS

Unmaş Decision¹⁶

After a preliminary investigation found that Unmaş, a packaged bread manufacturer, was involved in actions aimed at exclusivity in retail outlets, the Board, *ex officio*, decided to initiate an investigation to re-evaluate whether Unmaş should benefit from the block exemption. In its decision dated 7 July 2022, the Board concluded that the block exemption for vertical agreements granted to Unmaş should be removed on the grounds that, even though Unmaş's market share of the "packaged bread market" was less than 40%, the exclusivity agreements it made Unmaş were incompatible with the conditions set out for the block exemption. Accordingly, it was concluded that the negative effects arising from exclusivity cannot be offset against the efficiency gains, due to the fact that the vertical restraints are applied at the retail level and that the distribution requirements in the market and the idle capacity of undertakings constitute an entry barrier.

¹⁴ Decision of the Board dated 30.06.2022 and numbered 22-29/476-191.

¹⁵ Decision of the Board dated 09.09.2022 and numbered 22-26/426-175.

¹⁶ Decision of the Board dated 07.07.2022 and numbered 22-32/506-203

Johnson & Johnson Decision¹⁷

In a decision dated 3 September 2020, the Board refused Johnson & Johnson's exemption/negative clearance request for a vertical agreement regarding the establishment of a selective distribution system between itself and nine pharmaceutical warehouses on the grounds that the distribution of the medical products mentioned in the agreement cannot be the subject of a selective distribution system. Johnson & Johnson filed a petition to the Administrative Court to annul that decision. On 27 April 2022, the Court annulled the Board's decision and concluded that, since the market shares of the products do not exceed the legal threshold of 30%, that Johnson & Johnson applies objective criteria to the warehouses, and that the agreement does not affect access to the relevant products, the decision must be re-examined. Following the court's decision, on 30 June 2022, the Board made a further examination and aligned with the court's argumentation by granting the block exemption to the vertical agreement.

Krea Decision¹⁸

On 4 July 2022, the Board concluded on an exemption request for a supplementary agreement regarding the time extension for a period of two years covering the 2022-2023 and 2023-2024 football seasons in the "Super League and 1st League Football Season Broadcasting Rights Agreement" between the Turkish Football Federation and the production company Krea A.Ş. By comparing the various sale processes across other countries (such as France, the UK and Spain) including the EU Commission's decisions, the Board determined the relevant product markets to be i) the sales of television broadcasting rights of Turkish Super League and 1st League football competitions ii) television broadcasting services of these football competition services iii) paid TV broadcasting services iv) digital platform broadcasting services v) the broadcasting rights of Super League football competitions through alternative technologies. In addition, the Board decided that the proposed agreement, which fell within Article 4 of the Law, meets the cumulative criteria and so granted an individual exemption to the proposed agreement on the basis of Article 5 of the Law.

RECENT DEVELOPMENTS IN EUROPEAN COMPETITION LAW***Court of Appeal of Paris slashes Apple antitrust fine in blow to European regulators¹⁹***

The French Competition Authority's decision dated 16 March 2020 imposed a landmark fine of 1.1 billion euros on Apple and its wholesalers, considering that they had colluded to impose abusive terms and fix prices of some Apple electronic devices set by their resellers in France by abusing the economic dependence of its outside resellers. Subsequently, on 6 October 2022, in the appeal decision against this decision, the Court of Appeal of Paris lowered the antitrust fine to 371.6 million euros, roughly a third of the value of the original penalty, and reduced the duration of the certain practices sanctioned.

The publication of Digital Markets Acts and its echoes in Turkey

On 12 October 2022, the Digital Markets Act ("DMA") was published in the Official Journal of the European Union. This is the final step in the nearly two-year journey that began with the publication of the Commission's initial proposal in December 2020. The DMA will enter into force 20 days after its publication, on 1 November 2022. Despite the early entry into force, the majority of the DMA will not

¹⁷ Decision of the Board dated 30.06.2022 and numbered 22-29/484-193

¹⁸ Decision of the Board dated 04.07.2022 and numbered 22-30/494-198

¹⁹ Decision of Court of Appeal of Paris dated 6 October. 2022 and numbered 20/08582

become applicable for another six months. In parallel with the publication of the DMA, the Board recently shared a Draft Amendment Bill on the Law that aims to regulate digital markets in Turkey and preserve their competitive environment.

OECD Competition Policy Roundtable Background Note on "Competition and Inflation"

The OECD recently published a Competition Policy Roundtable Background Note on "Competition and Inflation".²⁰ The note essentially focuses on the debate over how much competition affects inflation and how competition issues have contributed to current inflation levels. According to the OECD, competition is an important contributor to a long-term low inflationary environment, both in terms of mitigating the exacerbating effects of market power on rising costs and overall better market functioning. Competition policy, on the other hand, should not be viewed as a prominent short-term anti-inflation tool. Competition interventions take time to assess and implement, and rushing them risks creating procedural injustice and undermining the rule of law. To summarise, competition is essential for maintaining low inflation, and competition enforcement should be prioritised, but not at the expense of fiscal or monetary policy.

Collaboration between Spanish and Portuguese competition authorities

The Spanish and Portuguese authorities cooperated and conducted simultaneous on-site inspections at the premises of several woodchip suppliers in order to investigate possible anti-competitive practices affecting the supply of wood chips in Spain and Portugal, specifically, the possible exchange of commercially sensitive information and geographic market sharing between competing companies.



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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²⁰ OECD (2022), Competition and Inflation, OECD Competition Policy Roundtable Background