

# NEWSLETTER

COMPETITION LAW | TURKEY

APRIL 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:

#### Elon Musk's Acquisition of Twitter Inc. has been Approved by the Board with the Imposition of an Administrative Fine



On 2 March 2023, the Board concluded its ex officio investigation pursuant to Article 11 of the Law regarding the transaction aimed at the acquisition of sole control of Twitter Inc. by Elon R. MUSK. It has been concluded that the transaction is subject to approval within the scope of Communiqué No 2010/4. Given that the transaction does not significantly reduce effective competition, it has been decided to grant approval for the transaction. However, since the transaction was carried out without the prior approval of the Authority, pursuant to Article 16 of the Law, an administrative fine will be imposed on Elon R. MUSK, the acquiring party, equivalent to one-thousandth of his gross income earned in Turkey in 2022.

#### The Board Launches a Sectoral Inquiry Following the February 2023 Earthquake to Ensure a Competitive Market Environment

On 17 March 2023, the Authority announced that the Board had initiated a sectoral inquiry into the potential effects and outcomes of the earthquake in February 2023. The inquiry is set to cover a total of eleven cities that were impacted by the earthquake. The Board intends to establish a reliable and prompt communication channel with the institutions in those cities, primarily with the governmental institutions that fall within the purview of the sectoral inquiry. Within the framework of the inquiry, the Board's primary objectives are to resolve any potential concerns related to competition law that may arise as a result of coordinated actions of other governmental institutions; to offer guidance with respect to cooperation between undertakings involved in the reconstruction of the affected areas; and to prevent any action that may distort or limit the competitive environment of the relevant sectors due to the sudden and high demand in these sectors, thereby ensuring the preservation of a competitive market environment.

### **The Board Takes Action Against Cement and Concrete Companies**

An announcement was published by the Authority on 17 March 2023 providing information on the Board's recent short-form decisions concerning undertakings operating in the cement and ready-mix concrete sectors. As a result of hindrances during on-site inspections, the Board has imposed administrative fines on four of the relevant undertakings, namely: Oyak Çimento Fabrikaları A.Ş., Çimsa Çimento Sanayi ve Ticaret A.Ş., Ceyhan Hazır Beton İnşaat Nakliye Madencilik Petrol Ürünleri Pazarlama San. ve Tic. Ltd. Şti. and Güven Grup Hazır Beton Harf. İnş. Maden Petrol Nak. Tic. Ltd. Şti. Furthermore, the Board has initiated two distinct investigations encompassing a total of 22 undertakings. This announcement is significant in the sense that the cement and concrete markets in Turkey are closely scrutinised by the Authority to prevent any anti-competitive practices that may adversely affect the supply of cement and concrete, factoring in the fact that the real estate and construction sector is experiencing a remarkable increase in product prices.

### **Fast-Moving Consumer Goods Industry: Authority's Sector Inquiry Report Recommends Bans on Unfair Practices and 'Diameter' Limits for Market Chains**

On 30 March 2023, the Authority released its final sectoral inquiry report into the fast-moving consumer goods ("FMCG") industry. The report covers a wide range of topics, including the general structure and operation of the industry, the potential effects of retail market undertakings, and its digitalisation. The report contains several recommendations and evaluations such as bans on unfair payment terms and cost structuring, unilateral contract revisions, and misuse of trade secrets, especially regarding perishable items. Additionally, it has been stated that penalties for unfair commercial practices should be based on the turnovers of relevant undertakings.



The Authority also suggests that a "perimeter" limit could be imposed on the establishment of a market chain in a certain area, prohibiting the opening or acquisition of more than one supermarket chain within a particular perimeter. Regarding the block exemption of vertical agreements, the Authority suggests that a threshold based on the bargaining power of buyers may be included in the legislation, given the bargaining power of retailers.

### **B- M&A Notifications:**

In March 2023, a total of seven merger and acquisition notifications were made to the Board, the sectoral distribution of these is as follows;

- Construction:
  - o The acquisition of shares corresponding to 17.5% of the total capital of Çiftay İnşaat Taahhüt ve Ticaret A.Ş. by one individual shareholder – Sabit Aydın – from another individual shareholder – Serkan Aydın.
- Cleaning Products:

- The acquisition of sole control of Diversey Holdings, Ltd by Platinum Equity Group.
- Technology:
  - The acquisition of sole control of Stalex Bilişim Teknoloji A.Ş., an undertaking that operates within the realm of the information technology sector, by Ak Yatırım Menkul Değerler A.Ş.
  - The acquisition of sole control of Sartonet Seperasyon Teknolojileri A.Ş., an undertaking operating in the field of separation technology, by Sartorius Stedim Biotech GmbH.
  - The acquisition of sole control of M.B.İ.S Bilgisayar Otomasyon Danışmanlık ve Eğitim Hizmetleri Sanayi ve Ticaret A.Ş. by Nagarro SE.
- Gaming:
  - The acquisition of joint control of VSPN Group Limited by Saudi Electronic Gaming Holding Company.
- Poultry Breeding:
  - The acquisition of 99.4% of the shares in Keskinöğlü Tavukçuluk ve Damızlık İşletmeleri A.Ş. by Matlı Yem Sanayii ve Ticaret A.Ş.

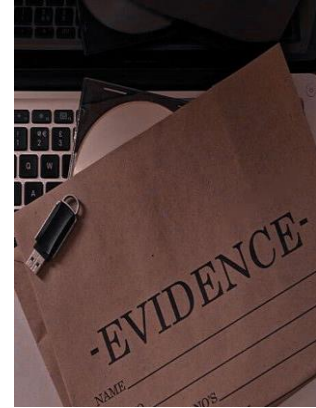
## SUMMARY OF KEY DECISIONS

### ***Constitutional Court Renders a Decision on the Annulment of Specific Provisions in Law***

The Constitutional Court's decision<sup>1</sup> regarding claims that Article 15 of the Law (regulating on-site inspections) and Article 9 of the Law (regulating structural remedies) breach the Constitution of the Republic of Turkey, was published in the Official Gazette on 30 March 2023. The decision ultimately states that these articles do not violate the Constitution.

The Constitutional Court stated that the provision regarding on-site inspections clearly and specifically defines the scope, limitations and situations in which the Authority can exercise its right, and is therefore specific, accessible and predictable, fulfilling the requirement of legality. Additionally, the Constitutional Court emphasised that in many cases, finding evidence of breaches of competition requires access to books, physical and electronic records, as well as all types of data and documents on computer systems, as other credible evidence may not be available.

Although the Authority is subject to the obligations under the Personal Data Protection Law No 6698, the Constitutional Court evaluated that the provision requiring the copies and physical samples of books, documents, records, and data, which are used as evidence in detecting anti-competitive behaviour or transactions, does not include the recording or use of personal data of a special nature. Furthermore, the Constitutional Court concluded that the provision met the necessary safeguards for the protection of personal data, such as the right to information, access to data, and the right to know whether data is being used for its intended purposes, and therefore did not impose an undue restriction on these rights or violate the Constitution.



<sup>1</sup> Decision of the Constitutional Court dated 9 November 2022 and numbered 2022/139.

Regarding the provisions on structural remedies, the Constitutional Court stated that they restrict the right to property and freedom of enterprise, but they clearly and specifically regulate which structural measures can be taken in a manner that leaves no room for doubt. The provisions also include information on when these measures can be decided and for how long they can be applied. Therefore, the Constitutional Court concluded that the provisions were specific, accessible and predictable in nature. Furthermore, the Constitutional Court emphasised that the aim of these measures was to protect the free market economy, the competitive environment from the behaviours of economic actors that threaten it, and that such measures had a legitimate constitutional purpose. Finally, the Constitutional Court noted that structural remedies are not in the nature of seizures or compulsory executions, and are implemented by the relevant undertakings rather than the Board. These measures can only be resorted to when behavioural remedies previously imposed have not yielded results, and therefore do not constitute an excessive or disproportionate intervention, nor do they impose an undue restriction, and are not contrary to the Constitution.

## RECENT DEVELOPMENTS IN EUROPEAN COMPETITION LAW

### *Conditional approval of the acquisition of Le Chamois (owner of Bricolex stores) by the Gifi Group*

The Autorité de la Concurrence (the "French Competition Authority") has granted conditional approval for the acquisition of Le Chamois, the parent company of Bricolex stores specialising in the sale of DIY products, by Gifi Group, a distributor of bargain and decoration products. As a result of the acquisition, Bricolex stores will be rebranded under the "Gifi" title and will offer bargain and decoration products. The French Competition Authority has identified that the transaction was likely to harm competition in certain areas of Paris, given the very high market shares of the new entity and the absence of a sufficient alternative offer after the transaction. To address these concerns, the Gifi Group has committed to divest five Bricolex stores located in the affected areas, thereby eliminating any overlap between the parties.



### *The European Commission Clears Orange's Acquisition of VOO and Brutélé Subject to Conditions to Ensure Competition in the Belgian Telecom Market*



The European Commission has granted conditional approval for the proposed acquisition of VOO and Brutélé by Orange under the EU Merger Regulation. This decision is subject to full compliance with the commitments package offered by Orange. The Commission had concerns that the proposed acquisition, as initially notified, would reduce the number of operators from three to two in areas covered by VOO and Brutélé's own fixed networks, which could eliminate Orange as an innovative and significant competitive constraint. Additionally, the proposed acquisition could significantly reduce competition in the markets where Orange, VOO and Brutélé are close competitors, and increase the likelihood of coordination between remaining operators in areas covered by VOO and Brutélé's own fixed networks. To address these concerns, Orange offered commitments to provide Telenet access to the existing fixed network infrastructure it is acquiring from VOO and Brutélé in the Walloon region and parts of Brussels, as well as Orange's future fibre-to-Premises network. Telenet will be the new access seeker on those networks, effectively replacing Orange as an access seeker. These commitments fully address the competition concerns identified by the Commission. The decision is

conditional upon full compliance with the commitments and a trustee appointed by Orange will monitor the implementation of its commitments and report periodically to the Commission.

### ***UK Competition Authority Updates Evaluation on Microsoft-Activision Blizzard Merger Amid Ongoing Global Reviews***

On 24 March 2023, the Competition and Markets Authority ("**CMA**") of the United Kingdom publicly released its revised assessments concerning the acquisition of Activision Blizzard by Microsoft. On the basis of newly acquired evidence, the CMA reduced its concerns about the supply of gaming consoles in the United Kingdom. Nevertheless, the CMA maintains its initial position that the transaction would augment Microsoft's already robust standing in the cloud gaming market in the UK, resulting in a restriction of competition. While the ongoing evaluations of the CMA and other relevant authorities regarding this acquisition persist, the Fair Trade Commission of Japan declared its approval of the transaction on 28 March.

### ***Swiss Government Uses Emergency Powers to Approve UBS's Acquisition of Credit Suisse Despite National Merger Control Rules***



The approval of UBS's acquisition of Credit Suisse by the Swiss government was granted through emergency powers that circumvented national merger control rules. The exercise of emergency powers was required due to the significant outflow of funds from Credit Suisse that posed a threat to its financial stability. The Swiss Financial Market Supervisory Authority ("**FINMA**") is authorised to approve mergers in the interest of lenders, as established by the Cartel Act of Switzerland. Regulatory law grants FINMA the power to override the competitive situation in the interest of financial stability.

Emergency powers are exercised only in specific circumstances, and the suspension of competition law is temporary, with the Competition Commission's role being reinstated once the situation stabilises. The Competition Commission also has the authority to retrospectively scrutinise the merger within two years of its completion.



*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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