

NEWSLETTER

COMPETITION LAW | TURKEY

MAY 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- Inquiry Announcements:

The Authority Launched Sector Inquiry into Mobile Ecosystems to Promote Competition in the Digital Economy



On 12 April 2023, the Authority initiated a sector inquiry in order to examine the potential competitive and anti-competitive impacts of mobile ecosystems on competition and to devise effective policies that foster a competitive market in the digital economy.

The Authority acknowledges the significance of mobile ecosystems in the digital economy and emphasises that the smooth operation of these ecosystems has a direct impact on consumer welfare. The Authority also highlights that every aspect of the mobile ecosystem, such as operating systems, applications and app stores, is interlinked and can raise competition concerns. Moreover, the Authority expressed concern that market power held by undertakings, due to their big data advantages and network effects operating across multiple sub-markets of the mobile ecosystem, may exacerbate competition issues.

The Authority has warned that this process may lead to the exclusion of competing products/services, limiting consumer choices, and stifling innovation. The Authority gathered input not only from service providers but also from application developers, end-users, and device manufacturers to ensure a comprehensive and inclusive assessment of the mobile ecosystem.



The Authority released its Preliminary Report on Online Advertising Sector Inquiry, Highlighting Concentrated Market Structures and Competitive Concerns in Turkey's Online Advertising Market"

On 7 April 2023, the Authority released its Preliminary Report as part of the "Online Advertising Sector Inquiry" started on 21 January 2021. The Report highlights the significance of online advertising as the foremost platform for advertising expenditure in Turkey, surpassing traditional advertising channels. The Authority conducted an analysis of the competitive status of various types of online advertising in Turkey, exploring the substitution relationships between these types. The report identifies concerns regarding concentration in the display advertising market, which is dominated by Meta, and the search-based advertising market, which is dominated by Google. The Authority stresses that this domination may lead to an increase in market concentration and may limit the operating areas of small businesses, thus hindering the competitive structure of the market. The report also identifies concerns relating to Google's practices, such as conflicts of interest, tying, self-preferencing practices, access to data, transparency, and privacy issues. The Authority will collect feedback on the Preliminary Report until 7 July 2023.

**Insights into Turkey's Digital Markets Revealed: the Authority Releases Study**

On 18 April 2023, the Authority published the final version of its Digital Markets Study, which was conducted to assess competitive interventions necessary for the structure and functioning of digital markets. The study examined potential changes to competition law and policy, as well as policy changes required in digital markets. The research identified several challenges, including first-mover advantage, high entry and investment costs, economies of scale and scope, network effects, and data ownership characteristics, that traditional competition law approaches may face in digital markets.



The study also analysed four key areas that could be affected by these challenges, namely defining the relevant market, identifying the market power of undertakings, identifying anti-competitive conduct, and finding a remedy for the infringement. The study highlighted that foreign competition authorities share similar concerns regarding digital markets. It mentioned significant regulations that have been legislated or implemented, including the Digital Markets Act, the Digital Services Act, the draft legislation published by the European Commission and the advisory report published by the British Competition Authority in

December 2020.

Moreover, the study identified several possible infringements observed in digital markets, such as excessive data collection, prevention of data portability and interoperability, favouring and/or

promoting a product or service. It emphasised that data portability and interoperability could promote competition, as they enable users to control their data, reduce costs for consumers, and encourage innovation.

B- M&A Notifications:

In April 2023, a total of 10 merger and acquisition notifications were made to the Board, the sectoral distribution of these is as follows;

- Energy:
 - o Limak Yatırım Enerji Üretim İşletme Hizmetleri ve İnşaat AŞ acquires shares corresponding to 25% of the total capital of Limak Doğalgaz Elektrik Üretim AŞ, the sole shareholder of Hamitabat Elektrik Üretim ve Ticaret AŞ, from InfraKan Holding S.a.r.l.
- Poultry Breeding:
 - o ŞENPİLİÇ Gıda Sanayi AŞ acquired sole control of YEMSEL Tavukçuluk Hayvancılık Yem Hammaddeleri San. ve Tic. AŞ.
- Technology:
 - o Marketspringpad Holdings Limited and Uni Finansal Teknoloji Hizmetleri Anonim Şirketi established a fully functional joint venture.
 - o Blackstone acquired sole control of Cvent Holding Corp., an undertaking operating in the field of hospitality management technology.
 - o An investment vehicle belonging to funds managed or controlled by Meridiam Eastern Europe IV A SAS or Meridiam SAS acquired 100% of the shares in KI One S.A., and consequently indirect acquired certain equity instruments and debt instruments of KI One S.A.
- Chemistry:
 - o Abu Dhabi Investment Authority acquired joint control of Univar Solutions Inc.
- Online Banking:
 - o Pay Fix Elektronik Para ve Ödeme Hizmetleri AŞ acquired sole control of BankPozitif Kredi ve Kalkınma Bankası AŞ and C Bilişim Teknolojileri ve Telekomünikasyon Hizmetleri AŞ.
 - o TURK Elektronik Para Anonim Şirketi acquired sole control of Univera Bilgisayar Sistemleri Sanayi ve Ticaret Anonim Şirketi, and indirectly acquired sole control of Univis Bilişim Destek Hizmetleri Sanayi ve Ticaret Anonim Şirketi
- Agriculture:
 - o Ros Agro China Limited (together with RUSAGRO and its subsidiaries, jointly RUSAGRO GROUP) acquired 50% of the shares in Sethal Holdings Limited, and indirectly the shares held by SETHAL in its subsidiaries
- Mining:
 - o Mitsui & Co., Ltd. acquired 60% of the shares in Joy Global (Peru) S.A.C.

SUMMARY OF KEY DECISIONS

The Board rendered 58 decisions between March and April 2023:

- 9 decisions regarding breaches of competition law
- 26 decisions regarding merger and acquisition notifications
- 4 decisions regarding negative clearance and exemptions
- 19 decisions regarding other matters



COMPETITION LAW BREACH DECISIONS

Arçelik Decision¹

On 9 September 2021, the Board initiated an investigation against six undertakings operating in the household appliances market, including Arçelik Pazarlama A.Ş. ("**Arçelik**"), regarding allegations of a violation of Article 4 of the Law. The allegations against Arçelik included the restriction of online sales and the determination of resale prices of its authorised resellers.

Arçelik submitted an application before the Authority to initiate the commitment process regarding its practices of restricting online sales. However, the Board rejected the first set of commitments submitted by Arçelik on the grounds that they were insufficient to eliminate the competitive concerns.

Arçelik submitted a revised commitment package, which the Board accepted as being sufficient to address the competitive concerns related to the restriction of online sales of its authorized sellers. Consequently, the investigation against Arçelik was terminated with respect to the practices regarding the restriction of online sales.

The revised commitments package included a controversial condition that set a 15% threshold for sales conducted via online marketplaces. Arçelik proposed a clause stipulating that physical sales must comprise 85% of the authorised sellers' turnover. The Board assessed this condition in detail and concluded that the proposed 85% ratio would not hinder online sales in the short term and is suitable for a short-term solution. Arçelik will provide data and information on its authorised sellers and the channels they use, the sales numbers, value-based ratios and information on authorised sellers who terminated their sales and their reasons to the Authority. The Board deemed the commitment package proportionate, suitable, and effectively applicable and remedied competition law concerns, thereby ending the investigation against Arçelik with respect to the online sales restrictions.



¹ Decision of the Board dated 8 September 2022 and numbered 22-41/580-240.

Furthermore, the Board acknowledged that if the Authority identifies that the 15% threshold is met through sales made via non-physical channels, then the 85% ratio can be re-evaluated and reduced. Arçelik has undertaken to provide the Authority with comprehensive data and information about its authorised sellers, including the distribution channels, sales figures, value-based ratios, and details regarding authorised sellers who have discontinued their sales and the reasons behind their termination, twelve months after the Board's reasoned decision is officially served. This approach will enable the Board to scrutinise whether Arçelik's terms comply with the preferences of its authorised sellers and the prevailing market dynamics.

It is important to highlight that three members of the Board dissented and opposed the acceptance of the commitments proposed by Arçelik. The dissenting members argued, among other things, that the 15% threshold could have a discouraging effect on online sales, and that Arçelik had failed to provide sufficient explanation on how this threshold would contribute to the effectiveness of physical stores. Therefore, in the dissenting opinion, this specific commitment was not acceptable, while the other commitments included in the proposal were deemed acceptable.

MERGERS AND ACQUISITIONS

QNB Finansbank Decision²

On 20 April 2023, the Board released its reasoned decision regarding the acquisition of sole control over Cigna Sağlık Hayat ve Emeklilik A.Ş., which is ultimately controlled by Cigna Corporation and Qatar National Bank Q.P.S.C. through QNB Finansbank A.Ş. Initially, the Board evaluated the parties' activities both in Turkey and globally in order to determine the relevant product markets for the transaction. While Cigna Sağlık exclusively operates on the Turkish market and offers life insurance, non-life insurance (personal accident and health insurance) and private pension services, QNB Finansbank operates in banking, financial leasing, factoring, investment and brokerage, portfolio management, e-commerce and electronic communication, banking communication and information technologies, ATM maintenance and repair services, money and valuable goods handling, processing and custody services, and reinsurance through its subsidiaries.



The Board concluded that there is no horizontal overlap between the activities of the parties in terms of health insurance, life insurance, individual pension, and auto-enrolment insurance since QNB Finansbank is not a provider, unlike CIGNA SAĞLIK, in terms of these markets. However, the Board noted that a vertical overlap exists between the parties as QNB Finansbank operates in the marketing, sale and distribution of insurance products supplied by Cigna Sağlık through bancassurance.

Despite the vertical overlap, the Board assessed that there will be no concern of market blockage resulting from the transaction subject to the notification since QNB Finansbank and Cigna Sağlık both

² Decision of the Board dated 1 December 2022 and numbered 22-53/812-334.

have low market shares, and competing undertakings with significant market shares operate in the relevant markets. Thus, the Board found that there is no significant antitrust issue arising from the transaction and authorised the relevant transaction.

AmerisourceBergen Corporation Decision³

The Board has authorised AmerisourceBergen Corporation to acquire sole control of Pharmalex Holding GmbH, a company that globally provides technology-enabled, functional services for customers in the highly regulated pharmaceutical, biotechnology and medical device industries.

In its decision, the Board applied the new merger control regime for technology and pharmacology undertakings.⁴ As a reminder the turnover threshold requirement set out in Communiqué No. 2010/4 is not sought in determining whether a transaction is subject to the authorisation of the Board in respect of undertakings operating in "*digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies*" sectors.



The Board evaluated that the services provided by Pharmalex classifies it as a technology undertaking operating in the field of pharmacology within the scope of Communiqué No. 2010/4 and applied the sectoral threshold exemption for the target company according to the Article 7(2) of Communiqué No. 2010/4.

Hızlıpara Decision⁵

The Board authorised the acquisition of shares in Hızlıpara Ödeme Hizmetleri ve Elektronik Para A.Ş. by venture capital investment funds established and managed by Re-Pie Portföy Yönetimi A.Ş. through the capital increase process. In the Board's decision, the undertaking, which is a payment and electronic money institution established to intermediate all kinds of money transfer and payment transactions, was accepted as a technology undertaking since it was understood that it operates in the field of financial technologies.

It must be noted that the Board has expanded its case law on "technology undertaking". A total of seven merger and acquisition decisions published in April 2023 the Board applied the definition of technology undertaking.⁶

³ Decision of the Board dated 23 November 2022 and numbered 22-52/775-319.

⁴ Please see our previous client alert titled "New turnover thresholds and rules for M&A notifications in Turkey" and dated 23 March 2022. <https://www.gide.com/en/actualites/new-turnover-thresholds-and-rules-for-ma-notifications-in-turkey>

⁵ Decision of the Board dated 8 December 2022 and numbered 22-54/842-347

⁶ Decision of the Board dated 3 November 2022 and numbered 22-50/733-305, Decision of the Board dated 8 November 2022 and numbered 22-54/823-336, Decision of the Board dated 10 November 2022 and numbered 22-51/745-309, Decision of the Board dated 10 November 2022 dated and numbered 22-51/744-308 and Decision of the Board dated 1 December 2022 and numbered 22-53/816-335).

EXEMPTIONS

FTR Decision⁷

On 26 April 2023, the Board released a reasoned decision concerning the request for negative clearance/exemption for a joint venture proposed by multiple undertakings operating in the furniture manufacturing and sales market, namely Adore Mobilya San. ve Dış Tic. A.Ş., Çilek Holding A.Ş., Doğtaş Kelebek Mobilya San. ve Tic. A.Ş., Gündoğdu Mobilya San. Tic. Ltd. Şti., İşbir Sünger San. A.Ş., Kilim Mobilya A.Ş., and Numan Nurettin Usta Mobilya İmalat San. A.Ş.



Upon receiving feedback from third parties regarding the notified transaction, the Board concluded that, while the new joint venture's operations are oriented towards the export market, the joint venture and shareholders' agreement between the competing undertakings may have an anti-competitive impact on the domestic furniture manufacturing and sales market under Article 4 of the Law. Therefore, it is not possible to grant a negative clearance under Article 8 of the Law.



Despite finding that the joint venture and shareholders' agreements between competing undertakings in the furniture manufacturing and sales market may have anti-competitive effects on the domestic market, the Board has evaluated the request for an individual exemption for the related joint venture and shareholders' agreements under the conditions stated in the Article 5 of the Law. The Board stipulated that certain amendments must be made to the agreements in order to meet the requirements for individual exemption. As such, the Board has determined that a conditional individual exemption will be granted to the relevant agreements for a duration of 10 years under the second paragraph of Article 5 of Law, subject to the inclusion and removal of specific provisions in the Shareholders' Agreement. Specifically, it was stated that the Shareholders' Agreement must include provisions that prohibit the collection and/or sharing of competition-sensitive information (such as price, stock, cost information, etc.) beyond what is necessary for export-oriented activities, and particularly, such information may not be collected

and/or shared for the domestic market. Furthermore, a clause the Shareholders' Agreement must be removed from the text of the Agreement.

⁷ Decision of the Board dated 23 November 2022 and numbered 22-52/779-321.

OTHER DECISIONS

VavaCar & Arabam Decisions⁸



On 21 July 2022, the Board launched an investigation into four undertakings operating in the online sale and purchase of second-hand passenger cars sector including Arabam.com and Vava Cars, in order to investigate whether these undertakings violated Article 4 of the Law by engaging in anti-competitive practices. Despite Arabam.com and Vava Cars' requests to initiate the commitment mechanism under Article 43(3) of the Law and Communiqué No. 2021/2 on Commitments for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions, and Abuse of Dominant Position, the Board declined, as the undertakings were accused of committing a "naked and hard-core infringement."

Instead, both undertakings requested a re-evaluation of their requests to offer commitments, as per Article 11 of the Administrative Procedure Law, before proceeding to challenge the Board's decisions before the administrative court.

Recently, the Board published two reasoned decisions in response to the applications submitted by Arabam.com and Vava Cars, requesting a re-evaluation of their requests to offer commitments. Evidence in the case file showed correspondence between Arabam.com and Vava Cars with their competitors, where they notified each other about their online advertising activities. The undertakings argued that their investigated practices did not violate the Law since the practices were aimed at the use of the trademark right and preventing any infringement of the trademark right by competitors under the Intellectual Property Law. Furthermore, they claimed that this was the only method in order to protect their trademark rights on Google Ads and that the relevant negative matching practices did not restrict competition by object or effect.



However, the Board rejected their requests to initiate commitment negotiations for the second time, stating that negative matching agreements restrict the ability of consumers to compare prices between competitors and artificially direct them to certain undertakings. The Board considered such agreements as a reduction of the possibility of competing undertakings appearing in the text advertisements at the top of the search engine results page, hindering digital comparison, and providing consumers with fewer options by referring to its evaluation within the Modanisa Decision, claiming that "negative matching agreements have similar effects to customer/market sharing agreements between competitors in the

⁸ Decision of the Board dated 27 October 2022 and numbered 22-49/725-304 and; Decision of the Board dated 8 December 2022 and numbered 22-54/836-346.

relevant markets." And therefore considered as naked and hard-core infringements to which the commitment procedure can not apply.

Private Schools Decisions⁹



The Board conducted a preliminary investigation into allegations of primary and secondary level private schools in Ankara and İstanbul Provinces violating Article 4 of the Law. The Board then published its reasoned decisions regarding the obstruction and hindrance of on-site inspections of two undertakings, Eyüpoğlu Eğitim Kurulları A.Ş. ("**Eyüpoğlu**") and Açı Eğitim Öğretim Hizmetleri A.Ş. ("**Açı**"). This decision is only decision published in April 2023 that does not impose a penalty.

During the on-site inspection conducted at the headquarters of Eyüpoğlu, the Guidelines on the Examination of Digital Data in On-Site Investigations were followed. It was found that one of the executives did not have WhatsApp or any other communication application on his mobile device. The executive later claimed that his mobile device had been hacked a week prior, and that he did not install the application in question after the hacking, but rather carried out WhatsApp correspondence from his desktop computer at Eyüpoğlu. Throughout the process, the executive in question acted in full cooperation with the members of the institution, informing Authority representatives that he was using WhatsApp and facilitating the investigation by downloading the application to his mobile phone in order to provide the QR code required to log in to the WhatsApp application on his desktop computer.

After exchanging information with the Information and Communication Technologies Authority, the Board concluded that the allegation that the WhatsApp application was deleted for the purpose of obstructing/ hindering the on-site inspection could not be proven. This was due to the fact that no log record regarding the suspicion of deletion was obtained, and the executive's statement that he had not installed the WhatsApp application on his phone after it was hacked a week before the on-site inspection. Therefore, the Board determined that the absence of the WhatsApp application on the executive's mobile device cannot be considered as an obstruction and hindrance of the on-site examination, and thus no administrative fine was imposed.



However, the on-site inspection that was carried out at Açı encountered difficulties. The Board's assessments, made during the on-site inspection, revealed that the experts visited the headquarters of Açı appearing on the undertaking's website. However, it was found that the headquarters address provided in the trade registry records differed from the address submitted by Açı's representatives. This discrepancy suggests a contradiction between Açı's statements and the trade registry records.

Moreover, Açı's representatives alleged that the senior manager's personal computer contained personal data and trade secret information that did not belong to Açı. Consequently, the representatives claimed

⁹ Decision of the Board dated 10 November 2022 and numbered 22-51/756-314 and; Decision of the Board dated 27 October 2022 and numbered 22-49/723-303.

that the inspection request was unlawful. The Board deemed this approach incompatible with the purpose and scope of on-site inspections, which is to gather evidence of any violations of the Law. The Board explicitly stated that "failure to accept this would render on-site examinations ineffective."

Additionally, during the on-site inspection, verbal and physical confrontations arose, preventing the examiners from keeping the minutes at the scene of the attempt. Considering these factors, the Board concluded that Açı did not provide the necessary information and documents requested by the experts and actively obstructed/hindered the on-site inspection from taking place. Therefore, an administrative fine was imposed.

RECENT DEVELOPMENTS IN EUROPEAN COMPETITION LAW

Italian Competition Authority Launches an Anonymous Whistleblowing Platform to Strengthen the Fight Against Cartels.

The Italian Competition Authority (the "ICA") introduced a new whistleblowing platform that enables anonymous reporting of anticompetitive behaviour. The platform's innovative feature is an encrypted system that allows whistle-blowers to communicate directly with the ICA without revealing their identities. The ICA aims to encourage individuals with access to confidential information to report antitrust violations, including abusive behaviour and secret anti-competitive agreements. The new platform should help the ICA strengthen its fight against cartels, which are the most difficult anticompetitive behaviour to uncover. Whistle-blowers can report anticompetitive behaviour on the third-party platform provider's website, and the right to anonymity is ensured. The initiative aims to improve the quality of antitrust enforcement and align the ICA's enforcement powers with those of the European Commission.

The European Commission Launches In-Depth Investigation into Orange-MasMovil Joint Venture for Potential Breach of EU Merger Regulations and Reduction of Competition in Spanish Telecoms Market.

The European Commission (the "Commission") has launched an in-depth investigation, in accordance with the EU Merger Regulation, into the creation of a joint venture by Orange and MasMovil, two of the largest telecommunications companies in Spain. The Commission's concerns centre on the possibility that the proposed transaction may decrease competition in the retail supply of mobile and fixed broadband services and multiple-play bundles in Spain, and may ultimately result in higher prices and lower quality services for end customers. The Commission found that the transaction would lessen the number of network operators in Spain, thus eliminating a significant rival, and could limit virtual operators' ability to compete. The Commission will continue to investigate and determine whether these preliminary competition concerns are confirmed. The investigation will be completed within 90 working days from the notification of the proposed transaction. This joint venture between Orange and MasMovil was notified to the Commission on 13 February 2023. In addition to this transaction, there are eight ongoing Phase II merger investigations within the scope of the Commission's jurisdiction.

The Commission Launches Unannounced Inspections on Fashion Industry Companies Over Suspected Antitrust Violations.

On 18 April 2023, the Commission initiated surprise inspections at the premises of fashion industry companies located in various Member States, while concurrently delivering formal information requests to companies engaged in the same sector. The Commission harbours concerns that these undertakings may have transgressed EU antitrust rules, which prohibit cartel and restrictive business practices, including particular horizontal and vertical restrictions as laid out in Article 101 of the Treaty on the Functioning of the EU and Article 53 of the European Economic Area Agreement. The Commission

officials were joined by their counterparts from the relevant national competition authorities of the Member States where the inspections were conducted. It is important to note that the inspections executed on this day are separate and unrelated to those carried out in May 2022 and in June 2021.

The Commission Refers Sportsdirect.com's Acquisition of GO Sport's Asset to the French Competition Authority

On 5 April 2023, the Commission referred the acquisition of GO Sport assets by Sportsdirect.com, a subsidiary of the British group Frasers, exclusively to the French Competition Authority. GO Sport is engaged in the distribution of sports and leisure goods, while Sportsdirect.com is primarily active in the sports retail market in France through its Sports Direct brand, which operates seven stores across the country.



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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