

NEWSLETTER

COMPETITION LAW | TURKEY

OCTOBER 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 25 decisions between 25 August and 30 September 2022. The distribution of these decisions was as follows:

- 18 decisions regarding merger and acquisition notifications;
- 4 decisions regarding breaches of competition law;
- 1 decision regarding negative clearance and exemption applications; and
- 2 decisions regarding other issues.

Two of the breaches of competition law were investigation decisions and two were preliminary investigation decisions. The companies involved in these were mainly active in the automobile, house appliances, banking and telecommunication sectors. As a result of the Board's decisions, no administrative fines were imposed on the companies, as none of them were found to be in breach of the Law.

ANNOUNCEMENTS

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

- **Television Broadcasts:** on 8 September 2022, Krea İçerik Hizmetleri ve Prodüksiyon A.Ş. was subject to a preliminary investigation in relation to an alleged abuse of its dominant position in the relevant market.
- **Construction Chemicals Market:** The Board announced the opening of an in-depth investigation into the proposed acquisition of joint control by Dalsan Alçı Sanayi (controlled by Dalsan Yatırım ve Enerji A.Ş.) and Saint-Gobain Rigips Alçı Sanayi (controlled by Saint-Gobain Weber Yapı Kimyasalları Sanayi), through mutual share purchases.
- **Pharmaceuticals:** After the Ankara 10th Administrative Court annulled the Board's decision No 13-01/3-3 dated 3 January 2013, the Board concluded its investigation against Allergan İlaçları Ticaret A.Ş. on 19 September 2022, without imposing any fine.
- **E-platforms:** As part of the investigation into its alleged abuse of a dominant position on the relevant market, the oral hearing of Meta Platforms Inc, Meta Platforms Ireland Limited, WhatsApp LLC and Madoka Turkey Information Services was held on 11 October 2022.

SUMMARY OF KEY DECISIONS

MERGERS AND ACQUISITIONS

Automotive

- The Board authorised the establishment of a joint venture by Daimler Truck AG, Traton SE (through its subsidiary Traton International S.A.) and Aktiebolaget Volvo (through its subsidiary Volvo Energy AB) to develop a high-performance charging network for electric battery-powered heavy-duty trucks and buses.¹ Charging stations for passenger cars have become widespread in recent years, but the development and establishment of charging stations for electric battery-powered heavy-duty trucks and buses is a very recent initiative. The Board concluded that, although the transaction parties are big players in the production and sale of passenger cars, light commercial vehicles, trucks and buses market, there is no overlap at the horizontal or vertical level in Turkey between the newly established joint venture and the activities of the transaction parties. In addition, the joint venture is not expected to operate in Turkey in the near future, and the transaction parties have no production and sale activity of electric battery-powered heavy-duty trucks and bus in Turkey at present. The Board also underlined the fact that a competition law compliance management system will be implemented in order to prevent the share of competitively sensitive information between the transaction parties through the joint venture.
- The Board gave conditional approval to the partial acquisition of Checklas Otomotiv A.Ş. by LG Lastik Girişim A.Ş., provided that the term of the non-compete obligation is changed to be three years and second-degree relatives of the sellers are excluded from the scope of the non-compete obligation.²



Information Technologies

- The Board has authorised the creation of a joint venture by Lufthansa Industry Solutions AS GmbH (an IT service provider and a subsidiary of the Lufthansa Group) and A4nXT GmbH (an indirect subsidiary of the Volkswagen Group, which is under the sole control of Porsche Automobil Holding SE Stuttgart).³ The joint venture will operate in the field of information technology consultancy and information technology ancillary services in the European Economic Area. The Board concluded that the proposed acquisition would raise no competition concerns given the joint venture's limited foreseen activity and the limited overlaps between the companies' activities.

Agriculture

- The Board has authorised the acquisition of the grain and ingredients business of Gavilon Agriculture Investment, Inc. by Viterra Limited for \$1.125 billion, plus working capital.⁴ Gavilon is based in the

¹ Decision of the Board dated 28.04.2022 and numbered 22-20/320-142.

² Decision of the Board dated 14.04.2022 and numbered 22-17/286-130.

³ Decision of the Board dated 10.03.2022 and numbered 22-12/177-72.

⁴ Decision of the Board dated 28.04.2022 and numbered 22-20/311-136.

USA and originates, stores and distributes grains, oilseeds, as well as feed and food ingredients, to food manufacturers, livestock producers, poultry processors, soybean processors and ethanol producers worldwide. Viterra distributes agriculture products such as grains, oilseeds, pulses, rice, sugar, and cotton.

Health

- The Board gave its conditional approval to the acquisition of sole control of Adatıp Sağlık Hizmetleri Ticaret A.Ş. by Lokman Hekim Engürüsağ Sağlık Turizm Eğitim Hizmetleri ve İnşaat Taahhüt A.Ş.⁵ The relevant product market was defined as the "private hospital management market" and the relevant geographical market was defined as the Anatolian Side of Istanbul. The Board concluded that the term of the non-compete obligation is unreasonable and only a five-year non-compete obligation can be considered as an ancillary restraint. Therefore, the Board granted the authorisation to the transaction provided that the term of the non-compete obligation is changed to be five years.



Beverages

- The Board has authorised the acquisition of Damla, a brand owned by Coca-Cola İçecek A.Ş. by Coca-Cola Meşrubat Pazarlama Danışmanlık Sanayi Ticaret A.Ş.⁶ The Board concluded that, pursuant to subparagraph (b) of the first paragraph of Article 5 of Communiqué No 2010/4, the transaction that achieves a permanent change of control over a brand to which turnover can be attributable can be defined as an acquisition within the scope of Article 7 of the Law.

International container shipping

- The Board has authorised the establishment of an indirect joint venture by PSA International Pte. Ltd. and Terminal Investment Limited Sarl on Pusan Newport International Terminal Co. Ltd.⁷ The Board reached the conclusion that, although there is a horizontal and vertical overlap between the undertakings in Turkey, it is considered that there will be no increase in the risk of coordination between undertakings in terms of Turkey's geographical area, considering that a terminal operation located in Busan New Port in South Korea is the subject of the transfer.



INVESTIGATIONS

OTV Decision⁸

Back in 2009, the Board dismissed complaints in respect of 12 automobile companies regarding an alleged collusion between new automobile producers and distributors to increase prices and to restrict the

⁵ Decision of the Board dated 24.03.2022 and numbered 22-14/233-101.

⁶ Decision of the Board dated 17.02.2022 and numbered 22-08/115-45.

⁷ Decision of the Board dated 10.02.2022 and numbered 22-09/122-47.

⁸ Decision of the Board dated 26.08.2021 and numbered 21-40/595-290.

supply of automobiles on the grounds that there was not sufficient evidence to initiate an investigation. However, the Board's dismissal decision was reversed by the Plenary Session of the Administrative Law Chamber of the Council of State (*İDDK*) and so the Board launched an investigation on 26 March 2020 for activities performed during 2009 against those 12 automobile companies. The Board examined the case both on the end of the statute of limitations and the *ne bis in idem principle* (avoiding double prosecutions/punishments against the same facts with same persons) in accordance with the defences of the relevant undertakings. In the decision, the Board decided that no fines should be applied in respect of any of the parties on the ground that the conditions for *ne bis in idem principle* was met with respect to 11 companies subject to the investigation, and that the collected evidence did not indicate or prove a breach of the Law in respect of the remaining company.

Banks Decision⁹



The Board launched a preliminary investigation on 17 January 2020 to consider the alleged anti-competitive activities of 27 financial entities (including banks and portfolio management companies) in relation to deposits, loans, foreign exchange, government bonds, commercial bonds, and intermediation services. The Board did not find sufficient evidence to continue the investigation into the relevant allegations, whereas the preliminary investigation took two years and involved an extensive request for information from all the parties subject to the investigation. This decision marks the increasing attention of the Board on the banking market at times of significant currency fluctuations (relevant product markets being defined as corporate banking services market, derivatives market, fund (management) market, bond/securities market and foreign exchange market).

Vestel Decision¹⁰

The Board launched a preliminary investigation into complaints about an infringement of competition law against certain home appliance companies, backed up by claims that such home appliance companies and their distributors restricted internet sales and fixed resale prices. Following its evaluations, the Board decided that no investigation is required in respect of Vestel Elektronik Sanayi ve Ticaret A.Ş. ("**Vestel**"), but that the remaining companies would be investigated. That said, in its objection annotation, one of the Board members dissented against the dismissal decision because he considered that actions such as restricting internet sales and fixing resale prices are common anti-competitive activities observed in the market, and factoring in the fact that in the oligopolistic structures such as in the house appliances market where the firms' decisions are influenced by the decisions of other firms, an economic analysis should have covered all companies, including Vestel.

⁹ Decision of the Board dated 26.08.2021 and numbered 21-40/576-279.

¹⁰ Decision of the Board dated 09.09.2021 and numbered 21-42/617-303.

Türk Telekom Decision¹¹

Türk Telekomünikasyon A.Ş. ("**Türk Telekom**") was subject to an investigation where competing undertakings claimed that Türk Telekom was in a dominant position on the wholesale fixed broadband internet services market and was unjustly preventing its competitors on the retail fixed broadband services market from gaining customers and providing services. Although the Board found that Türk Telekom was in a dominant position on the wholesale fixed broadband internet services market, the actions of Türk Telekom did not constitute a breach of the Law by being an abuse of its dominant position on this market. That said, one of the Board members dissented to the decision and stated that Türk Telekom actually complicated the operations of its competitors and caused the closure of the relevant market.

OTHER DECISIONS

Kınık Decision¹²

On 3 March 2022, the Board issued a decision regarding the actions that resulted in a hindrance/obstruction of the inspection at an on-site inspection carried out Kınık Maden Suları AŞ (Kınık), as part of the investigation initiated against suppliers on the natural mineral water market. The Board concluded unanimously that the deletion of both Whatsapp data and email correspondences during the on-site inspection was considered an obstruction of access to potential evidence and findings and a hindrance of the on-site inspection, therefore imposed an administrative fine on Kınık by referring to the previous decisional practice of the Board (Eti Decision, Pasifik Decision, Medicana Samsun Decision, İstanbul Gübre Decision, etc.) as well as the administrative court decisions on this subject.



A101 Decision¹³

On 23 June 2022, the Board issued a decision regarding the hindrance/obstruction of an on-site inspection by Yeni Mağazacılık A.Ş. (A101) as part of an investigation initiated against retailers in the FMCG market. The Board concluded with a majority vote that there was no concrete evidence that the deletion of Whatsapp data occurred after the inspection commenced, therefore the Board did not impose an administrative fine against the undertaking. However, a dissenting opinion was issued with the aim of expanding the scope of the examination of digital data before the on-site inspection by referring to the previous decisional practice of the Board (Medicana Samsun Decision,¹⁴ İstanbul Gübre Decision,¹⁵ etc.) on the grounds that:

- the absence/non-availability of the log record cannot be claimed as evidence that the digital data was not wiped.
- the deletion of data by any means whatsoever should be considered as concrete evidence of the hindrance/obstruction of the on-site inspection.

¹¹ Decision of the Board dated 30.09.2021 and numbered 21-46/667-332.

¹² Decision of the Board dated 03.03.2022 and numbered 22-11/161-65

¹³ Decision of the Board dated 23.06.2022 and numbered 22-28/464-187

¹⁴ Decision of the Board dated 17.06.2021 and numbered 21-31/400-202

¹⁵ Decision of the Board dated 12.08.2021 and numbered 21-38/544-265

With this decision, the Board stated explicitly that reasonable doubt of any kind of digital data deletion before an on-site inspection cannot be considered as concrete evidence. The decision is important since it differs from Board's previous decisions regarding hindering/obstructing on-site inspections, as it sets a high standard of proof in favour of undertakings. It must be underlined that the Board's decision resembles a recent judgment by the Ankara 2nd Administrative Court in terms of the emphasis on the Board's obligation to rely on concrete evidence.

EXEMPTIONS

Dogus Otomotiv Decision

On 21 July 2021, the Board concluded on the negative clearance/exemption request of Dogus Otomotiv for its consultancy agreement concluded with ADP Oto Sanayi ve Ticaret Ltd. Şti. for the purpose of market research regarding spare parts and repair and maintenance services. The Board evaluated that the facts that (i) the requested data consist of publicly available and current prices information and (ii) the supplier of data is a market research company, the information exchange cannot be considered as sensitive in terms of competition law. In this regard, the Board granted a negative clearance since no competition concerns will arise as a result of this agreement on relevant markets.



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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