IN-DEPTH

Public Competition Enforcement

TÜRKIYE

LEXOLOGY

Public Competition Enforcement

EDITION 16

Contributing Editor

Aidan Synnott

Paul, Weiss, Rifkind, Wharton & Garrison LLP

In-Depth: Public Competition Enforcement (formerly The Public Competition Enforcement Review) is an annual survey of the most important and relevant developments in public competition law enforcement in the most significant jurisdictions worldwide. Among other things, it examines the practical implications of recent enforcement activity regarding cartels, restrictive agreements, abuse of dominance, state aid and merger control.

Generated: June 13, 2024

Türkiye

Bahadır Balkı, Caner K Çeşit, Alper Karafil, Burce Eylul Gocer and Mehmet Müezzinoğlu

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Summary

Introduction

Law No. 4054 on the Protection of Competition (the Competition Law) has been in force since 1994 and the Turkish Competition Authority (TCA) was established in 1997.

The Turkish Competition Board (TCB) is the decision-making body of the TCA. The TCB is vested with special powers to enforce the competition rules regarding restrictive practices, abuse of dominance and mergers, as well as to draft and enact secondary legislation (i.e., regulations and communiques) for the implementation of the Competition Law. It also provides opinions on amendments to be made to competition legislation and monitors legislation, practices, policies and measures of other countries concerning agreements and decisions limiting competition. The TCA watches closely global developments in competition law enforcement, especially those made by the European Commission and national competition authorities.

Year in review

The TCA publishes 'Decision Statistics for the First Six Months' for the relevant year in the middle of each year, and updates the relevant report as 'Decision Statistics' covering the whole year after the year is completed. At the time of writing, the Decision Statistics for 2023 have been published by the TCA. In the first six months of 2023, the TCB rendered a total of 195 decisions including 56 competition law infringement claim decisions, 96 merger and acquisitions decisions, two privatisation decisions, two negative clearance and exemption decisions and 30 other decisions. Of the 56 competition law infringement claim decisions, 45 concerned infringements of Article 4 of the Competition Law (on agreements, decisions and practices preventing, distorting or restricting competition in relevant markets), eight concerned Article 6 violations (abuse of dominant position) and three concerned both these Articles. Fines in the first half of 2023 totalled 439,716,106.46 Turkish lira. The cases concerned a range of industries, including information technology (IT) and platform services, media, advertising and broadcasting, agriculture and agricultural products, the food industry (packaged product production, wholesale and retail, alcoholic and non-alcoholic beverages, food and beverage services), logistics, warehousing and mail (port and port services, land, air and sea transport, customs services), the appliances industry (white goods, small home appliances, electrical products, electronic products, office machines and computers), the textile and ready-made clothing industry (production, marketing, wholesale and retail sales) and health services (drugs, hospitals, health equipment and supplies).

In a decision published in the Official Gazette dated 20 June 2023, the Turkish Constitutional Court ruled that on-site inspections carried out by the TCA without a judge's decision violates the right to inviolability of residence guaranteed by Article 21/1 of the Turkish Constitution. In the decision, it was stated that the on-site inspections were carried out at companies' workplaces that are not open to the public, and that the concept of 'residence' includes workplaces that are not open to the public. Following this finding, the Constitutional Court ruled that the authority granted to the TCA by Article 15 of the Competition Law to conduct on-site inspections authorises the TCA's professional staff to

enter areas deemed as dwellings; therefore, the on-site inspections that were conducted without a judge's decision violated the right to inviolability of residence and sent the case to the Turkish National Assembly. It remains to be seen how on-site inspections, which are critical to the outcome of the TCA's investigations, will proceed after this process.

In addition, the reasoned decision regarding the investigation against undertakings in the fast-moving consumer goods (FMCG) sector, which has been a hot topic in Türkiye, was published. The TCA found that the undertakings:

1. coordinated prices or price increases through indirect communications via their common suppliers and shared competition-sensitive information such as future prices, price increase dates, periodic activities and campaigns through common suppliers;
2. intervened through suppliers regarding the prices of retailers that had reduced their prices or had not yet increased their prices during the period when prices increased across the market, thereby raising these prices to the detriment of consumers; and
3. continuously monitored compliance with the collusion between undertakings through various sanctions such as product-specific price reductions (disruption) in cases where competitor prices did not increase.

For the aforementioned reasons, the TCA imposed a total administrative fine of 2.7 billion lira on the relevant undertakings due to a hub-and-spoke cartel.

Furthermore, with the rule introduced to examine killer acquisitions, the revenue thresholds for transactions involving technology undertakings with local nexus, the uncertainties regarding who will be considered a technology undertaking in practice and how local nexus will be identified have begun to decrease. In its latest Berkshire Hathaway decision, the TCA resolved that the exception brought by the recent amendment for technology undertakings regarding merger control thresholds shall be applicable, even if the activities of the target undertaking, which can be classified to fall under the definition of technology undertaking, are carried out in geographical markets other than Türkiye. The interpretation in the Berkshire Hathaway decision would mean that in an M&A transaction, as long as the target has some activities in areas of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals and health technologies anywhere on the globe and is also active in Türkiye through any market or means (i.e., even if the activities in Türkiye would not constitute a technology undertaking as a stand-alone business), the undertaking would be considered as a technology undertaking operating in Türkiye and the thresholds should be assessed in line with the exception.

Cartels

i Definition of a cartel

Agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings that have as their object or effect or likely effect the

prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services, are illegal and prohibited in accordance with Article 4 of the Competition Law. Therefore, cartel activities in the markets are covered by Article 4 of the Competition Law.

However, the Competition Law does not provide a definition of practices deemed to be a cartel. Instead, the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition and Abuse of Dominant Position (the Regulation on Fines), which further stipulates the procedures and principles relating to the fines to be imposed for a violation of the Competition Law, defines cartels as follows:

1. agreements restricting competition or concerted practices between competitors for fixing prices;
2. allocation of customers, providers, territories or trade channels;
3. restricting the amount of supply or imposing quotas; and
4. bid rigging.

Moreover, according to Article 3(c) of the Regulation on Active Cooperation for Discovery of Cartels, the term cartel refers to competition-limiting agreements or concerted practices concluded between competitors concerning price-fixing, allocation of customers, suppliers, regions or commercial channels, supply amount restrictions or quotas, and collusive bidding in tenders.

Finally, Paragraphs 44 and 57 of the Guidelines on Horizontal Cooperation Agreements stipulate that exchange of competition-sensitive information among rivals (e.g., future prices, outputs or sales amounts) is deemed to be cartel conduct if it is in the nature of an agreement with the object of fixing prices or quantities.

ii Fines for cartel behaviour

Pursuant to Article 16(3) of the Competition Law, those who commit behaviour prohibited in Article 4 of the Competition Law shall be subject to an administrative fine of up to 10 per cent of the annual gross revenue of the relevant undertakings, associations of undertakings or members of such associations generated by the end of the financial year preceding the decision or, if it is not possible to calculate this, the financial year closest to the date of the decision as determined by the TCB.

Paragraph 3 of Article 16(4) of the Competition Law provides that managers or employees of undertakings or associations of undertakings who are found to have had a decisive influence on the violation may be given fines of up to 5 per cent of the fine given to the undertakings or associations of undertakings.

In determining the percentage of the fine to be imposed, the TCB takes the characteristics of the violation into account, and thus the consequences of an infringement vary depending on the facts of the specific behaviour. However, the Regulation on Fines states that the TCB is entitled to impose a base fine of:

1. between 2 and 4 per cent for cartels; and
2. between 5 per mille and 3 per cent for other violations of the undertaking's turnover.

Reviewing the mitigating[2] and aggravating[3] factors, the TCB is entitled to increase the fine percentage up to 10 per cent of the company's turnover achieved within the previous year.

That said, there are no criminal sanctions in the cartel enforcement of the TCA, except for bid rigging in public procurement, in which case it would be possible for the TCA to report this cartel activity to the prosecutor's office.

iii Leniency programme

The Regulation on Active Cooperation for Discovery of Cartels (Old Leniency Regulation)-[4] was in force for approximately 15 years as the main legislation regulating the requirements and procedures that shall be satisfied to apply for a leniency in Türkiye. However, the new Leniency Regulation, also called the Regulation on Active Cooperation for Discovery of Cartels (New Leniency Regulation), came into effect as of 16 December 2023 and introduced new definitions such as 'cartel facilitator', 'party to the cartel' and 'documents with added value'. Accordingly:

1. cartel facilitator refers to undertakings and associations of undertakings that mediate for organising or maintaining a cartel, and facilitate the organising or maintaining of a cartel with their activities, without carrying out activities at the same level of the production or distribution chain as the parties to the cartel;
2. party to the cartel refers to undertakings operating in the same level of the market and being a party to the agreements or concerted practices concerted practices defined as cartels; and
3. documents with added value refers to information and documents that will reinforce the TCB's ability to prove the cartel, taking into account the evidence held by the TCB. The New Leniency Regulation requires the submission of documents with added value within three months following the notice of investigation, whereas there was only a requirement to submit before the notification of an investigation report in the former regulation.

The Old Leniency Regulation provided immunity or the possibility of a reduced fine for infringements that could qualify as cartels. Under Turkish competition law, the leniency procedure was only applicable to cartels; however, one exception to this was the Corporate Banking decision. Although there was no finding of cartel conduct, Bank of Tokyo-Mitsubishi UFJ Türkiye was not subject to the imposition of a fine by the TCB because it cooperated with the authority. Pursuant to the amendments, it has been made clear that non-cartel horizontal violations will also be able to benefit from leniency.

The first undertaking to submit the information and evidence and meet the requirements laid down in Article 6 of the New Leniency Regulation independently of its competitors, before the preliminary inquiry decision or as of the decision by the TCB to carry out a preliminary inquiry until the notification of the investigation report, shall be granted immunity from fines on condition that the TCA does not have, at the time of the submission, sufficient evidence to find the violation of Article 4 of the Competition Law. Managers and employees

of the undertaking shall also be granted immunity from fines. Further reductions in fines are provided in detail in the New Leniency Regulation.

According to Article 6 of the New Leniency Regulation, to benefit from the active cooperation or leniency application, an undertaking must:

1. submit information and evidence in respect of the alleged cartel, including the products affected, the duration of the cartel, the geographical scope of the cartel, the names of the undertakings party to the cartel, specific dates, locations and cartel meeting participants;
2. not conceal or destroy information or evidence related to the alleged cartel;
3. end its involvement in the alleged cartel unless requested otherwise by the assigned unit on the grounds that detecting the cartel would be complicated;
4. keep the application confidential until the end of the investigation, unless otherwise requested by the assigned unit; and
5. maintain active cooperation until the TCB takes the final decision after the investigation is completed.

The New Leniency Regulation slightly decreases the discount rates for the administrative fines. Furthermore, a guarantee that the information and documents submitted are not going to be included in the investigation file is provided for the undertakings whose leniency application is not accepted by the TCA.

In addition, according to Articles 5 and 8 of the New Leniency Regulation, undertakings that fulfil the requirements of Article 6 but cannot benefit from not being fined and managers and employees who provide the relevant documents to the TCB but cannot benefit from not being fined within three months following the notification of the investigation, provided that it is before the notification of the investigation report, as of the TCB's decision to conduct a preliminary investigation, may benefit from the discount. These three-month periods shall not apply to investigations initiated before the entry into force of the New Leniency Regulation.

Any leniency application must be submitted before the settlement application. If both the leniency application and the settlement application are accepted, the parties may benefit from both discounts. With the New Leniency Regulation, which harmonises Turkish competition law with the EU law, coming into effect, the Old Leniency Regulation has been completely annulled.

iv Settlement mechanism

The settlement mechanism was introduced with the amendments made to the Competition Law in 2020. After initiating an investigation, the TCB may, on the request of the parties concerned or on its own initiative, start the settlement procedure, considering the procedural benefits that may arise from a rapid resolution of the investigation process and the differences in opinion concerning the existence and scope of the infringement. Before the notification of the investigation report, the TCB may come to a settlement with the undertakings and associations of undertakings under investigation that acknowledge the existence and scope of the infringement. As a result of the settlement procedure, a

discount of up to 25 per cent may be applied to the administrative fine. If the process is concluded with a settlement, the parties to the settlement may not take the administrative fine and the provisions of the settlement text to court. In contrast to the leniency procedure, the settlement mechanism can be applied to violations other than cartels. The settlement mechanism is highly encouraged by the TCA due to its contribution to procedural economy. As a matter of fact, in October 2023 alone, a total of nine decisions, five of which were reasoned decisions, were published. The secondary legislation regarding the settlement mechanism was adopted in July 2021.

v Significant cases

The TCB has continued its previous approach, and, after fining Türkiye's five biggest supermarket chains and a supplier a record total of 2.7 billion lira in 2021, another investigation was initiated against the supermarkets, as well as other producers, suppliers and retailers operating in the FMCG sector, resulting in a total fine of 878.6 million lira. While 13 undertakings were subject to the fine for either partaking in a hub-and-spoke cartel or resale price maintenance, or both, although the previous five supermarket chains were also determined to have violated the Competition Law, they were not subject to the fine under the ne bis in idem principle.

In addition, the investigation against Eczac1ba_1 has been concluded through a settlement. The respective investigation was initiated based on allegations of participating in a cartel by coordinating price increases among downstream retailers and determining the resale price of retailers. The TCA found that Eczac1ba_1 acted anticompetitively as a participant in a cartel that engages in the practice of top-down distribution.

Moreover, in recent years, there has been an increasing view that the market power of employers in labour markets suppresses wages or causes them to decrease, and maintains working conditions below competitive levels. In particular, employers prevent the transfer of employees between undertakings through direct or indirect agreements, which may deprive employees of job opportunities that offer higher wages and better conditions. Thus, the competitive structure in the labour market may be damaged by the decrease in mobility of labour among enterprises or may artificially limit workers' ability to obtain wages of the correct value for the labour actually undertaken. In 2022, an investigation was initiated against 48 enterprises arising from a 'gentleman's agreement' in the labour market, and another labour-related investigation was launched into seven IT companies to reveal whether any gentleman's agreement had been concluded between the parties. Adopting the same approach as in 2022, the TCA imposed a total fine of 151 million lira on 16 undertakings on the grounds that they engaged in no-poaching agreements in 2023. Although the reasoned decision has not yet been published, the TCA announced in its short decision that an examination has been made regarding whether the relevant undertakings attempted to enter into no-poach agreements that aim to prevent the employment of each other's employees and restrict employee mobility.

vi Trends, developments and strategies

In terms of competition probes, cases seen during the year in review covered:

1. IT and platform services;

2. media, advertising and publishing;
3. agriculture and agricultural products;
4. the food industry;
5. healthcare services;
6. chemistry and mining;
7. banking, capital markets, finance and insurance services;
8. the machinery industry;
9. logistics, warehousing and mail services;
10. culture, art, entertainment, leisure, sports, games of chance and education;
11. textiles and ready-to-wear garments; and
12. the automotive industry and vehicles. Other cases include telecommunications; infrastructure services; leather and leather products, rubber and plastic; vocational, scientific and technical operations; real estate services; construction; industry sector; forestry and wood-based industries; jewellery; and accommodation, travel and tour operators.

The trend that saw price increases in various sectors that were looked into following the fluctuation of the Turkish lira and high inflation rates continued throughout 2023. The TCA monitored undertakings' behaviour to determine whether any price increases stemmed from incremental costs or anticompetitive activities. In addition, e-platforms and labour markets are also prominent within the TCA's agenda.

vii Outlook

The TCA will closely watch critical markets such as healthcare, transport, consumer goods, automotive, financial services, travel and tour operators, digital platforms and consumer electronics, and use its powers proactively.

In fact, the TCA is conducting investigations into almost all the above-mentioned markets. While supermarkets and their suppliers are a clear priority, digital platforms and tourism markets are also under scrutiny. Moreover, the TCA is investigating an alleged gentleman's agreement between undertakings in the labour market.

Antitrust: restrictive agreements and dominance

Article 4 of the Competition Law sets out the main rules governing horizontal and vertical relations between undertakings and prohibits any agreement, decision and practice preventing, distorting or restricting competition in the relevant markets.

Restrictive agreements may be exempted from the application of Article 4 of the Competition Law. The TCB has issued block exemption communiques covering vertical restraints, research and development agreements, specialisation agreements and technology transfer agreements. Moreover, the motor vehicle and insurance industries

have sector-specific block exemption communiques. Restrictive agreements that do not benefit from block exemption communiques may be exempt from the application of Article 4 of the Competition Law provided that they:

1. ensure new developments or economic or technical improvements in the production or distribution of goods and in the provision of services;
2. benefit the consumer;
3. do not eliminate competition in a significant part of the relevant market; and
4. do not restrict competition more than necessary to achieve the goals set out in points (a) and (b).

A dominant position means that one or more undertakings in a particular market has the power to determine economic parameters such as price, supply and the amount of production and distribution by acting independently of their competitors and customers. It is not in itself an infringement for an undertaking to hold a dominant position, and undertakings are allowed to become more prominent competitively as a result of their internal efficiencies. However, Article 6 of the Competition Law prohibits any practice that may harm consumer welfare by dominant undertakings exploiting the advantages provided by their market power. In this respect, dominant undertakings are considered to have a 'special responsibility' not to allow their conduct to restrict competition.

Article 6 of the Competition Law states that the abuse, by one or more undertakings, of a dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices is illegal and prohibited. Abuse of dominance is also considered a violation in terms of fining methodology. Although it is not indicated under Article 6 of the Competition Law, excessive pricing is a theory of harm in the TCA's practice akin to Article 102(a) of the TFEU.

It should be reiterated that the legislation regarding restrictive agreements and abuse of dominance complies with EU competition legislation.

i Significant cases

In terms of vertical restrictions, the TCA issued a decision on October 2023 regarding Mavili, a company in the fire and gas detection industry. This decision concluded part of its investigation specifically regarding restrictions on active and passive sales, but its investigation into possible violations of resale price maintenance is still ongoing. The investigation is examining if restrictions imposed by Mavili on customers or territories, within a context where the company operates both as a supplier and competitor, should be considered as agreements among competitors (horizontal). The TCA noted Mavili's involvement in the repair and maintenance sector through a subsidiary and initially suspected a possible illegal agreement (cartel) with its authorised service providers. However, after unannounced inspections (dawn raids) failed to uncover evidence of such collusion, the TCA determined that no such competitor agreement (horizontal agreement) existed. Consequently, the restrictions Mavili placed on customers and territories are being viewed as supplier-imposed restrictions (vertical restraints) rather than agreements between competitors.

In terms of abuse of dominance, the TCA concluded the preliminary investigation of the allegation that Google violated Article 6 of the Competition Law by engaging in tying and favouritism with respect to online display advertising and advertising technology services activities. The TCA found the findings serious and sufficient, and decided to open an investigation against Google to determine whether it violated Article 6 of the Competition Law. Furthermore, the TCA decided to impose an administrative fine of 492,191,132 lira on EssilorLuxottica SA for breaching the commitments made binding by the TCB's decision dated 1 October 2018. The TCB also decided that EssilorLuxottica SA's ophthalmic lens and ophthalmic machine bundled contracts and other actions in the market constituted de facto exclusivity and excluded competitors, and that these actions violate Article 6 of the Competition Law, concluding that there is no room for imposing a new administrative fine within the framework of the general principle of law ne bis in idem.

Likewise, the TCB fined Meta Platforms 346 million lira for violating competition rules by abusing its dominant position in personal social networking services and online video advertising to obstruct competitors through data collected from its core services, Facebook, Instagram and WhatsApp in 2022.

ii Trends, developments and strategies

The TCA's enforcement in relation to restrictive agreements covers a variety of services, with no obvious specific priority for the Authority. However, the TCA seems to have adopted a stricter approach to vertical restrictions, especially resale price maintenance and sales restrictions.

The TCA's investigations have shown that digital markets are its priority in terms of abusive practices, and it was much faster to investigate alleged abusive practices of digital platforms than the European Commission. This indicates that the TCA wants to be seen as a reputable competition authority in the area of enforcement in digital markets.

In this respect, the TCA has focused on digital markets while monitoring traditional markets constantly. Having published its sector inquiry report concerning e-marketplace platforms in 2022, and as new markets give rise to new competition concerns arising from technological changes, the TCA concluded its full investigation initiated into newly established Mart1, a leading e-scooter rental firm, with a commitment package presented by the undertaking.

iii Outlook

The TCA continues to impose administrative fines on undertakings for obstructing or hindering on-site examinations within the scope of on-site examinations carried out at undertakings during the preliminary investigation process. In the Empa Gayrimenkul Pazarlama decision, during an on-site inspection of the undertaking operating in the real estate sector, an employee of the undertaking stated that the inspection of his personal phone by TCA officials was contrary to the legislation on personal data and that such an inspection could only be possible with a court decision. However, the TCA did not accept the defences of the employee of the undertaking, which were in fact related to the Constitutional Court decision, and imposed an administrative fine on the undertaking on the grounds that the on-site inspection was hindered.

Furthermore, the TCB's decision about NadirKitap reveals that it is prioritising data-related practices. In April 2022, the TCA concluded its investigation into NadirKitap, a popular platform service for the sale of second-hand books, on the grounds that the company abused its dominant position by not providing data about member sellers, and therefore was found to be responsible. The TCA initiated a similar probe into Sahibinden, an online advertising platform, for renting and selling vehicles and real estate and imposed an administrative fine for the same reason.

Sectoral competition: market investigations and regulated industries

The TCA has the power to conduct market studies. For instance, in its Final Report on E-Marketplace Platforms, the TCA evaluated the need for further work on the legal framework and secondary legislation for powerful digital platforms, their merchant fulfilled networks (MFNs) and exclusivity practices, as well as excessive data collection and privacy concerns. Moreover, the Report states that e-marketplaces represent only one side of the targeted digital actors; in this respect, legislative work aimed at identifying digital platforms with significant market power and determining the obligations of and behaviour to be avoided by the platforms as a precursor is currently underway within the TCA and is excepted to be concluded soon. The Report also emphasises that it would be appropriate to review the relevant secondary legislation to clarify the framework for MFNs and exclusivity practices of digital platforms. It also concludes that an area in which the secondary legislation needs to be strengthened is the exploitative practices of the platforms. Regarding excessive data collection and privacy concerns, the Report indicates that actions have been taken for data merging and processing within the scope of the current legislative work. In addition, in terms of the concern about information asymmetry and manipulation, the Report considers that the obligation to ensure platform transparency brought about by the legislation study largely will constitute a solution. In addition to these issues, the Report signals that an additional secondary legislation study could be conducted within the TCA to clarify the determination of undertakings with significant market power and the obligations expected to be brought to these undertakings and the application conditions of the upcoming legislation.

The TCA published two market investigation reports in 2023: the Preliminary Report on Online Advertising Sector Review and the Final Report on Turkish Fast Moving Consumer Goods Retailing Sector Review. Online advertising has surpassed all traditional advertising channels with the growth rate it has achieved in recent years. In fact, as of 2021, online advertising had overtaken television advertising as the medium with the largest share of advertising expenditures. The shift of advertising services to online channels has led to changes in the functioning of the supply chain and competitive parameters. As a result of all these developments, the TCA decided to analyse the dynamics in the sector to identify behavioural or structural competition problems in the sector and to develop solutions for these problems in order to apply competition law effectively and correctly in these markets. The Report analysed the state of competition in Türkiye in terms of online advertising types and examined the substitution relationship between these types. Following that, the online advertising technology services used in the buying and selling of display adverts,

which enable the use of complex algorithms and systems to exchange digital adverts within milliseconds, thereby enabling the sale of digital advertising space to a large number of advertisers across a large number of publishers' websites and apps, were analysed. Finally, the competition problems arising from the practices of the undertakings that are considered to have market power in the sector and the proposed solutions to these problems have been investigated. In the Final Report on Turkish Fast Moving Consumer Goods Retailing Sector Review, after presenting the general structure and functioning of the sector, the ways in which the increase in concentration in the sector has been realised and whether there is a need for separate merger and acquisition notification thresholds for the retail sector are analysed. The Report particularly focuses on the effects of abuse of buyer power on competition and proposes solutions to eliminate the possibility of abuse of buyer power.

State aid

Even though the primary legislation of the Turkish competition law regime regarding state aid is mainly harmonised with that of the EU, secondary legislation for the implementation of this regime has not yet been adopted. Therefore, there are no state aid decisions within the scope of Turkish competition law.

Merger review

The main legislation on merger review is Article 7 of the Competition Law and Communique No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board. Following the amendment made in Article 7 of the Competition Law, to harmonise with EU legislation, the significant impediment to effective competition (SIEC) test was adopted by the Turkish competition law system, replacing the dominant position test for mergers or acquisitions.

Significant changes were introduced in Communique No. 2010/4 in March 2022. Pursuant to new revisions, a concentration shall be deemed notifiable in Türkiye if:

1. the aggregate Turkish turnover of the transacting parties exceeds 750 million lira and the Turkish turnover of at least two of the transacting parties each exceeds 250 million lira; or
2. the asset or business subject to acquisition in acquisition transactions, and at least one of the parties to the transaction in merger transactions, has a turnover in Türkiye exceeding 250 million lira and the other party to the transaction has a global turnover exceeding 3 billion lira.

With the amendments introduced in 2022, transactions regarding the acquisition of technology undertakings operating in the Turkish geographical market or having R&D activities or providing services to users in Türkiye shall be subject to notification to the TCA regardless of the above-mentioned 250 million lira turnover thresholds. In this regard, technology entities are defined as undertakings or related assets operating in the fields

of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals and health technology under the relevant communique.

Further, the provision in Article 13(2) of Communique No. 2010/4 that states 'mergers and acquisitions that lead to a significant impediment of competition by creating or strengthening a dominant position shall be prohibited' has been amended to 'mergers and acquisitions that lead to a significant decrease in competition particularly by creating or strengthening a dominant position shall be prohibited'. The purpose of the added word 'particularly' is to emphasise that a concentration will not be permitted if it significantly restricts competition, even if it does not create a dominant position. This is in line with the relevant amendment to the Turkish Competition Law in 2020 when the SIEC test was introduced officially into Turkish merger control. This newly introduced amendment merely harmonises the secondary legislation with the Competition Law.

i Significant cases

The acquisition of Twitter by Elon Musk resulted with a gun-jumping fine for failure to notify and obtain clearance from the TCA. Since Twitter is recognised as a technology undertaking, the only threshold to be met was on the buyer side, which consists of the companies controlled by Elon Musk. The companies were considered as a single economic unit; therefore, the threshold was met. This case emphasises that the notification requirement applies to foreign-to-foreign transactions as well. Upon a similar reasoning, the Berkshire Hathaway case indicated that the exception of a technology undertaking is applicable even though the target's activities in other jurisdictions were considered in line with the definition of technology undertaking, but yet not in Türkiye.

The TCA has published its first decisions on acquisitions targeting technology undertakings. The decisions came amid some uncertainties regarding the newly added definition in the merger notification rules of technology undertakings, which are defined as undertakings active in the areas of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals and health technologies.

Following the recent amendments that set lower notification thresholds for technology undertakings that are active or have R&D activities in the Turkish geographic market or that provide services to customers in Türkiye, the TCA concluded that several transactions were subject to authorisation under the new rules and cleared these transactions on the basis that they did not lead to a significant reduction to effective competition. For example, in the acquisition of Airties through P8 Holding, the TCB concluded that due to the software services that Airties provides, it is considered a technology undertaking.

ii Trends, developments and strategies

In the first six months of 2023, 98 mergers and acquisitions (M&A) and privatisation transactions were examined by the TCA. Although M&A statistics for the second half of 2023 have not been released yet, it is estimated that the respective numbers are at least to be doubled.

iii Outlook

Through recent legislative amendments, the TCA aims to protect innovation-based competition by introducing the definition of technology undertakings in terms of M&A control. Indeed, the TCA, with the amended lower thresholds, embraces a broader approach to bring acquisitions of technology undertakings under a greater degree of control and to ensure acquisitions of such undertakings are not prevented. In particular, the tendency for large-scale incumbent undertakings to take over nascent competitors is to be controlled to avoid restricting effective competition.

Outlook and conclusions

The TCA maintained its approach in 2021 and 2022, and actively initiated investigations into the digital and FMCG markets in 2023. It is known that the TCA is working on alignment with the European Commission on the Digital Markets Act and is preparing to introduce regulations regarding gatekeepers. In addition, it is expected that the number of investigations initiated and the administrative fines imposed in 2023 and 2024 will be seen to be higher compared to those seen in previous years. When all of these developments are considered together, it can be observed that the TCA has become an institution that both follows global trends and establishes its own path.

Endnotes

1 Bahad1r Balk1 is a managing partner, Caner K Çe_it is a counsel, Alper Karafil is a senior associate and Burçe Eylül Göçer and Mehmet F1rat Müezzino lu are junior associates at ACTECON. Back to section

2 Such as provision of assistance to the investigation beyond fulfilment of the legal obligations, the existence of encouragement by public authorities or coercion by other undertakings in the violation, voluntary payment of damages to those harmed, termination of other violations, and attribution of a very small share of annual gross revenue to the practices subject to the violation. Back to section

3 Such as recidivism in respect of the violation, maintaining the cartel after notification of the investigation decision, failure to meet the commitments made for the elimination of the competition problems within the scope of Articles 4 or 6 of the Competition Law, providing no assistance to the investigation, and coercing other undertakings to engage in the violation. Back to section

4 Published in the Official Gazette dated 15 February 2009, No. 27142. Back to section

Bahadır Balkı bahadir.balki@actecon.com
Caner K Çeşit caner.cesit@actecon.com
Alper Karafil
Burce Eylul Gocer burce.gocer@actecon.com
Mehmet Müezzinoğlu mehmet.muezzinoglu@actecon.com

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