The Output®

QUARTERLY BULLETIN

2nd Quarter 2024

A Thin Line between Legal and Illegal Info Exchanges in Commercial Vehicles Sector in Türkiye

Arçelik Penalized for Enforcing Resale Price Maintenance

Pharma Companies Fined for Labour Market Antitrust Violations

Servier Lost its Court Battle Over Pay-for-Delay Agreements

EC Must Pay Interest on Fines It Has Unduly Imposed: CJEU Confirms in Deutsche Telekom

Key Points of the Report on the SPS Agreement Implementation

EDPB Critiques "Consent or Pay" Models on Large Online Platforms

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Dear reader,

The second quarter of 2024 has been marked by significant developments and landmark decisions that underscore the quickly evolving landscape of competition and regulatory enforcement in Türkiye and other jurisdictions.

This quarter has seen notable actions within Türkiye, including the termination of Google's daily fine, the repercussions of Trendyol's self-preferencing practices, and release of the reasoned decision in relation to penalties imposed on Arçelik for resale price maintenance. Additionally, the TCA's rigorous approach to antitrust violations in the labor market and aggressive behavior during inspections highlights the increased scrutiny and enforcement in various sectors.

Beyond Türkiye, we have witnessed important rulings, such as the Court of Justice of the European Union's ("CJEU") landmark decision in Servier v Commission, which reaffirms the European Union's ("EU") stance on pay-for-delay agreements in the pharmaceutical sector. The unprecedented fine for deleting WhatsApp messages during the European Union's ("EU") inspection further emphasizes the tightening grip of regulatory authorities on antitrust compliance. The EC's obligation to pay interest on unduly imposed fines confirmed by the CJEU reminds of the importance of principles of fairness and the right to effective remedy under the EU (competition) law.

The realm of international trade remains busy, highlighted by notable actions such as the hike in tariffs on Chinese electric vehicles, the prolongation of anti-dumping duties on stainless steel imports, and the imposition of final anti-dumping duties on PET products from China. These measures signify the global effort to promote fair trade practices and safeguard domestic industries.

In the regulatory domain, advancements in data protection are highlighted by the National Commission on Informatics and Liberty's ("CNIL") first General Data Protection Regulation ("GDPR") compliance recommendations for Articial Intelligence ("AI") systems and the European Data Protection Board ("EDPR") critiques of "consent or pay" models on large online platforms. The introduction of the Data Act and its practical implementation guide by the EC sets the stage for a more competitive and innovative data economy within the EU.

As we delve into the In the Focus, we hope it will help you to navigate the complexities of the information exchanges assessments under the Turkish competition rules.

Finally, let's celebrate reaching new heights together: Tunç Fındık's Everest triumph and our commitment to sustainability!

Sincerely,
ACTECON Team

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Google Complied with its Obligations - Daily Fine Terminated

On 10 June 2024, the Turkish Competition Authority ("TCA") terminated the daily administrative fine imposed on Google for failing to fulfil the implementation of the proposed measures with respect to hotel inquiries. The fine imposed for the period Google did not fulfil the measures amounted to TRY 482 million (approx. EUR 13,716,562.32).

A TCA decision in 2021 determined that Google had violated Article 6 of Law No. 4054 on the Protection of Competition ("Competition Law") by abusing its dominant position in the general search services market. Google violated regulations by granting its local search (Local Unit) and accommodation price comparison (Google Hotel Ads) preferential positioning and display on the general results page, while also blocking competing local search sites from accessing Local Unit. This advantage hindered competitors from operating and distorted competition in the local search services and accommodation price comparison services markets. As a result of the violation, Google received an administrative fine of TRY 296,084,899.49 (approx. EUR 8,425,865.09). The decision also obliged Google to ensure that the competing "local search services" and the competing "accommodation price comparison services" were not disadvantaged compared to its own services on the general search results page. In this context, Google submitted proposed measures, which included new designs for local search services. On 21 March 2024, the TCA decided to implement these measures presented and monitor them for a period of three months.

On 9 May 2024, the TCA found that Google had failed to implement the new designs for "local search services" concerning hotel inquiries, thus not meeting its obligations. Consequently, the TCA decided to impose daily administrative fines on Google at 0.05% of its annual gross revenues in 2023, until the new designs were implemented concerning the local search service related to hotel inquiries.

The TCA determined that Google has complied with the obligations as described above. Therefore, the TCA decided to terminate the daily administrative fine as of 21 May 2024 and imposed a total fine of approximately TRY 482 million (approx. EUR 13,716,562.32) on Google as a sanction for non-compliance with those obligations.

Consequences of Trendyol's Self-Preferencing Practices at a Glance

On 24 May 2024, the TCA published its reasoned decision regarding its investigation initiated against DSM Grup Danışmanlık İletişim ve Satış Ticaret AŞ ("Trendyol") to determine whether it had violated the Competition Law by self-referencing its own retail business and discriminating against sellers using the platform. As a result, the TCA imposed an administrative fine of TRY 61,342,847.73 (approx. EUR 1,745,670.11) and certain obligations on Trendyol.

It was alleged that Trendyol, holding a dominant position in the multi-category e-marketplaces market, intervened in the algorithm and used the data of third-party sellers on the marketplace to gain an unfair advantage to benefit its own retail operations. These actions were seen as restrictive to the activities of its competitors, potentially violating Competition Law.

After a comprehensive evaluation of the documents and opinions regarding algorithm and ranking interventions, the TCA concluded that since 2017, Trendyol had aimed to prioritize its own brands in the product rankings that included all sellers and/or brands in the marketplace. It was concluded that Trendyol had intervened in the algorithm in a way that favoured its brands—TrendyolMilla, TrendyolMan, and TrendyolKids—over their competitors in the fashion category. This practice made it challenging for other sellers to operate on the Trendyol marketplace to compete and potentially led to their exclusion, thereby harming intra-platform competition.

Furthermore, the TCA also found that as an intermediary, Trendyol's possession of information, that has high commercial value—which sellers cannot access to the same extent—enabled Trendyol to protect itself from competitive pressure and solidify its current market position.

As a result of the investigation, the TCA decided to impose an administrative fine of TRY 61,342,847.73 (approx. EUR 1,745,670.11). Additionally, it imposed the following obligations on Trendyol:

• Avoiding all interventions made through algorithms and coding that will provide an advantage to its private label ("PL") products over competitors regarding its retail activity carried out through its marketplace (www.trendyol.com) and implementing necessary measures.

• Avoiding the use of all kinds of data obtained or produced/generated from the marketplace activity for PL products related to the retail activity and implementing all necessary technical, administrative, and organizational measures for this purpose.

• Maintaining records for three years of (i) parametric and structural changes made on algorithm models used for product sorting and brand filtering purposes; (ii) all codes belonging to the algorithms and those affecting the algorithms used for product sorting and brand filtering purposes; and (iii) user access and authorization records and administrator audit records for all software used for the execution of business processes in a versioned and non-repudiable manner, within the scope of marketplace activity.

However, two Competition Board members held a different view regarding the fine amount. They argued that the base fine rate should be set close to the upper limit due to the gravity of the actual and potential damages caused by Trendyol's infringing behaviour. Additionally, they proposed that the infringement period should start from January 2020, when Trendyol became dominant, arguing that the infringing behaviours continued from 2017 until September 2021. Given that the duration of the infringement was longer than one year (from January 2020 to September 2021), they suggested the base fine rate should be increased by half. Consequently, they advocated for an administrative fine nine times higher, i.e., TRY 552,085,629.57 (approx. EUR 15,711,031).

[1] TCA Decision No. 21-20/248-105, 08 April 2021.

French Private Schools Sanctioned for Coordinating Fees and Salaries

The TCA's investigation into French private schools in Istanbul was concluded on 9 May 2024 with five schools[1] fined for two separate infringements.

On 10 November 2022, the TCA launched an investigation into several French high schools operating in Istanbul regarding allegations of price fixing. The TCA concluded the investigation and imposed an administrative fine of TRY 32,326,438.91 (approx. EUR 925,638.87) in total on five different schools based on two separate infringements.

With its decision, the TCA decided that the respective schools had violated the Competition Law by means of fixing both school registration fees (together with the elements that constitute the fee) and the salaries of Turkish teachers.

[1] 1 Private Saint-Joseph French High School, Private Saint Benoit French High School, Private Notre-Dame de Sion French High School, Private Saint Michel French High School, and Private Sainte Pulchérie French High School.

Arçelik Penalized for Enforcing Resale Price Maintenance

On 17 April 2024, the TCA published its reasoned decision regarding its investigation initiated against Arçelik Pazarlama A.Ş. ("Arçelik"), a Türkiye-based global white goods manufacturer, to determine whether it had infringed Article 4 of Competition Law, which prohibits agreements that restrict competition, by engaging in resale price maintenance ("RPM"). The TCA imposed an administrative fine of TRY 365,379,161.06 (approx. EUR 10,462,307.82) on Arçelik due to RPM violation.

The TCA's evaluations in the reasoned decision clarify the justifications for its decision that Arçelik had violated the Competition Law by RPM. Three of the findings obtained by the TCA constituted the basis for the infringement. Of particular significance, as understood from the reasoned decision, is that one of these findings was obtained coincidentally from the mobile phone of a former employee of Arçelik during the inspection of that former employee's new firm by the TCA.

Arçelik contended that, based on its case law, the TCA did not levy fines on undertakings for RPM considering in the absence of evidence of communication between the undertakings and the resellers, nor evidence of pressure or coercion to influence the reseller's prices. The undertaking also argued that the three findings did not constitute sufficient evidence for the determination of the infringement and that the statements regarding the intervention were not deemed sufficient for the intervention in the resale price to occur.

In response to these arguments, the TCA stated that the quality rather than the quantity of the findings regarding the resale price determination was important and concluded that the findings were sufficient to prove the infringement. As a result, it was decided that Arçelik had intervened in the resale price of its resellers and accordingly, an administrative fine was imposed.

Pharma Companies Fined for Labour Market Antitrust Violations

The investigation into pharmaceutical companies Abdi İbrahim İlaç Sanayi ve Ticaret Anonim Şirketi ("Abdi İbrahim") and GlaxoSmithKline İlaçları Sanayi and Ticaret AŞ ("GSK") for anti-competitive practices in the labour market underscores the TCA's focus on labour market violations. On 16 April 2024, this investigation led to fines exceeding TRY 217 million (approximately EUR 6.3 million) to the involved companies.

Within the scope of the investigation initiated against Abdi İbrahim and GSK, the parties presented their settlement texts to the TCA. As a result, the TCA terminated the investigation and imposed fines of TRY 33.3 million (approximately EUR 960 thousand) on GSK and TRY 184.3 million (approximately EUR 5.3 million) on Abdi İbrahim. These fines were imposed because the undertakings had acknowledged the presence and the scope of the violations. The violations included engaging in agreements/concerted practices by concluding gentleman's agreements with their competitors not to hire each other's employees and exchanging competitively sensitive information between competitors in the labour market.

With this decision, the TCA has consolidated the impression, built upon signs from its previous investigations, that the labour markets will remain a hot topic for some time.

Aggressive Behavior During Inspection Leads to Fine for Dried Nuts and Fruits Manufacturer

On 15 April 2024, the TCA imposed an administrative fine on a manufacturer of dried nuts and fruits in Türkiye[1] for hindering/delaying the on-site inspection through aggressive behaviours against the TCA experts responsible for conducting the on-site inspection.

The TCA previously had decided to conduct a preliminary investigation into whether certain undertakings operating in the purchase and sale of pistachios had violated the Competition Law. Pursuant to the respective preliminary investigation, the TCA staff went to the mentioned undertaking for an on-site inspection.

As mentioned within the TCA's reasoned decision, during the on-site inspection, the chairman and members of the board of directors of the respective undertaking had displayed aggressive behaviours that could be considered as hindering/delaying the on-site inspection. The officials of the undertaking had shouted at, approached, and threatened the TCA experts during the inspection. Additionally, an official of the undertaking had discarded empty tea and coffee cups from a table outside of an open office window.

Furthermore, the officials had refused the request of the TCA experts to print out the on-site inspection report. Due to the systematic accusations against the experts, the report for hindering the on-site inspection could not be drafted on the premises of the undertaking. Instead, it had to be prepared outside by the experts after leaving the undertaking premises.

As a result, an administrative fine was imposed on the relevant undertaking for hindering/delaying the on-site inspection.

[1] Sabri Bakısgan ve Oğulları Gıda San. Tic. Ltd. Şti

TCA Flags 14 New Tech Undertakings in Merger Control Spotlight

The TCA has issued 14 decisions between March and April 2024, identifying the acquired parties as technology undertakings operating in various fields. Analyzing these decisions can provide valuable insights into the TCA's practical application of the "technology undertaking" exception within merger control regulations.

The TCA has published new decisions in which it identified several technology undertakings that are being acquired. These are categorized by the fields of activity as follows:

• Software: software services for warehouse operations; software solutions for the travel industry; software services, particularly security services and products; software solutions for advanced scheduling, capacity planning, supply chain planning, optimization solutions and workforce planning; acquisition, development, maintenance, and leasing of data center facilities; and the provision of Enterprise Architecture Management ("EAM") software.
• In the gaming software sector: mobile gaming.
• Financial technologies: providing primarily banking, crypto, and financial investment services and insurance services as an interface provider, i.e. the designer and developer of the application, within the scope of the contracts to be concluded by an undertaking with banks, electronic money and payment services companies, organizations providing retail investment services.
• Digital platforms: computing, cloud programming, industrial internet networking, 5G broadband, digital platform development, information systems operation and maintenance, data storage, artificial intelligence solutions and information security solutions; a digital platform service that allows health professionals such as doctors, veterinarians, dentists, physiotherapists, psychologists, and dieticians to meet online with users anywhere in the world; providing services with real-time streaming data and membership-based on-demand watching model.
• Healthcare technologies: respiratory care services for personal and professional use, and services related to endoluminal or endoscopic vacuum therapy.
Hence, companies that are active in these sectors should be more careful in their merger assessments when and once they are contemplating a concentration to ensure compliance with the merger control regime in Türkiye.

Servier Lost its Court Battle Over Pay-for-Delay Agreements

On 27 June 2024, the CJEU delivered its judgement in Servier v Commission case addressing significant issues regarding antitrust and the pharmaceutical sector. Here are the key points from the judgement.

Background and legal issues. The case revolved around Servier, a pharmaceutical company, which had been fined by the European Commission for engaging in anticompetitive practices. The EC had accused Servier of entering into patent settlement agreements with generic drug manufacturers, which delayed the entry of cheaper generic versions of the cardiovascular drug, perindopril, into the market. The primary legal issues concerned whether the patent settlements constituted a restriction of competition by object and whether Servier had abused its dominant position in the market.

CJEU's Findings:

• Restriction of Competition by Object: The CJEU upheld the General Court's finding that the agreements between Servier and the generic manufacturers constituted a restriction of competition by object. The Court reasoned that such agreements, which include a transfer of value from the originator to the generic company in exchange for the latter's commitment not to enter the market, inherently has the potential to restrict competition.

• Abuse of Dominant Position: On the issue of abuse of dominance, the CJEU confirmed that Servier had abused its dominant position. The Court highlighted that by entering into these settlement agreements, Servier effectively excluded competitors and maintained higher prices for perindopril, which harmed consumers.

• Fines: The CJEU also addressed the fines imposed by the Commission. The Court confirmed that the fines were appropriate given the nature and gravity of the infringement. It emphasized that the fines serve as a deterrent against anticompetitive practices in the pharmaceutical industry.

Implications: The judgment reinforces the EC's stance on pay-for-delay agreements and underscores the importance of maintaining competitive markets in the pharmaceutical sector. It sends a clear message to pharmaceutical companies about the severe consequences of engaging in anticompetitive practices.

Overall, the Servier v Commission judgment is a landmark ruling that reaffirms the EU's commitment to preventing anticompetitive practices and ensuring that consumers benefit from competitive prices and innovation in the pharmaceutical industry.

Microsoft's Tying Troubles: EU Targets Teams and Office Practices

On 25 June 2024, the European Commission sent a Statement of objection to Microsoft concerning its tying practices involving Teams and Office. This case bears similarities to Microsoft's past issues with tying practices, most notably with Windows Media Player. The outcome of the investigation could have significant implications for Microsoft. It is also expected to clarify the EC's approach to anticompetitive tying.

On July 27, 2023, the EC launched an ongoing investigation into Microsoft's practices following complaints from Slack Technologies, Inc., and Alfaview GmbH. In response, Microsoft made changes to how it distributes Teams, offering some suites without it. However, the Commission deemed these changes insufficient to address its concerns.

The Commission determined that Microsoft holds a dominant position globally in the market for software as a service (SaaS) and productivity applications for professional use. Since at least April 2019, Microsoft has been tying Teams with its core SaaS productivity applications, Office 365 and Microsoft 365.
The Commission expressed concerns that this tying practice might restrict competition in the market for communication and collaboration products while reinforcing Microsoft's market position in productivity software and its suite-centric model, potentially disadvantaging competing suppliers of individual software.

The Commission's announcement highlighted that Teams enjoyed a distribution advantage because Microsoft did not offer customers the option to exclude Teams when subscribing to Office 365 and Microsoft 365. This advantage might have been further amplified by interoperability limitations between Teams' competitors and Microsoft's offerings.

Historical Context: Windows Media Player Case
This case bears similarities to Microsoft's past issues with tying practices, most notably with Windows Media Player. In 2004, the European Commission fined Microsoft for tying Windows Media Player with its Windows operating system. The Commission found that by bundling Windows Media Player with Windows, Microsoft had hindered competition in the media player market. As a result, Microsoft was required to offer a version of Windows without Windows Media Player, a remedy aimed at restoring competitive conditions. The

parallels between these cases underscore the Commission's ongoing vigilance regarding Microsoft's market behavior and its potential to limit competition through tying practices.

Why Tying Is a Concern in Microsoft's Case
Although tying is not always problematic from a competition law perspective, and in fact it is often considered acceptable and even beneficial when it leads to efficiencies that outweigh any anti-competitive effects, tying is considered an issue in Microsoft's case because of its potential to harm competition and consumers in several ways:

• Market Dominance: Microsoft holds a dominant position in the SaaS and productivity applications markets. When a dominant company ties products, it can use its market power to unfairly advantage its own products, thereby stifling competition.

• Restricted Consumer Choice: By tying Teams with Office 365 and Microsoft 365, Microsoft limits consumers' ability to choose alternative communication and collaboration tools. This practice can lead to reduced innovation and fewer choices for consumers.

• Barriers to Entry: Competitors in the communication and collaboration market may find it difficult to compete effectively if Microsoft's tying practices make it hard for them to gain a foothold. This can lead to reduced competition and potential monopolistic behavior.

• Interoperability Limitations: The EC highlighted that Microsoft's practices might exacerbate interoperability issues, making it harder for consumers to use competing products in conjunction with Microsoft's offerings, further entrenching Microsoft's market position.

• Reinforcement of Market Position: By tying Teams with its popular Office suites, Microsoft can reinforce its dominance in both the productivity software market and the communication and collaboration market, creating a feedback loop that strengthens its market power and reduces competitive pressures.

Potential Implications for Microsoft
The investigation could have significant implications for Microsoft. If the EC finds that Microsoft's tying practices have violated EU competition laws, the company could face substantial fines and be required to alter its business practices. This could include mandatory changes in how Microsoft sells and markets its products, ensuring that customers have more choices and that competitors have fairer opportunities in the market. Moreover, a negative outcome could harm Microsoft's reputation, potentially affecting its relationships with customers and partners. The case could also set a precedent, influencing regulatory approaches to tying practices in the tech industry globally, prompting other jurisdictions to scrutinize similar practices by Microsoft and other dominant tech firms.

First Ever: Deleting WhatsApp Message Results in Commission Fine

On 24 June 2024, Flavors & Fragrances Inc. and International Flavors & Fragrances IFF France SAS (together "IFF") faced with a fine of EUR 15.9 million for obstructing a Commission inspection as a senior employee of IFF intentionally deleted WhatsApp messages exchanged with a competitor. The case sends a strong message to companies that any attempt to obstruct justice, such as deleting communication records, will be met with severe penalties. This serves as a deterrent to other companies that might consider similar actions to hide evidence of anticompetitive behavior.

In March 2023, the Commission carried out an on-site inspection at IFF within the scope of possible collusion in the supply of fragrances and fragrance ingredients. During the on-site inspection, one of the senior employees intentionally deleted the WhatsApp message exchanged with a competitor containing business-related information after the employee had been informed about the on-site inspection of the Commission. After the detection of the deletion, IFF immediately proactively cooperated with the Commission and cooperated by helping the Commission recover the deleted data.

The Commission decided that on-site inspection was obstructed and decided to impose a fine amounting to 0.3% of IFF's total turnover. Then the Commission reduced the fine amount by 50% due to IFF's proactive cooperation and imposed a fine of EUR 15.9 million.

This is the first case the EC imposed a fine for the deletion of messages exchanged via social media apps, namely WhatsApp, on a mobile telephone.

EC Must Pay Interest on Fines It Has Unduly Imposed: CJEU Confirms in Deutsche Telekom

On 11 June 2024, the CJEU ruled that the EC must pay interest on the portion of the fine that was annulled (Case C-221/22 P). This decision was grounded in the principles of fairness and the need to ensure that entities are not unduly penalized beyond what is legally justified. The rate applicable to the interest which the Commission is required to pay to Deutsche Telekom is at the European Central Bank refinancing rate increased by 3.5 percentage points. The judgment in this case sets a precedent that could significantly impact future cases where fines imposed by the EC are later annulled or adjusted.

The origin of this case lies in an antitrust decision where the EC imposed a substantial fine on Deutsche Telekom for abuse of a dominant position on the Slovak market for broadband telecommunications services. The corporation appealed the decision, leading to a protracted legal battle. Eventually, the General Court partially annulled the fine based on procedural and substantive grounds, necessitating a recalculation and reduction of the initial penalty. The Commission brought an appeal against that judgment of the General Court before the CJEU. The CJEU dismisses the appeal and thus upholds the General Court's judgment.

The key legal issue in this case revolves around whether the EC is obligated to pay interest on the amount of the fine that was ultimately reduced. This issue touches on broader principles of fairness and the right to effective remedy under EU law. It also raises questions about the financial consequences of EC decisions and their rectification in light of judicial review.

Case C-221/22 P is a landmark and underscores the accountability mechanisms within the EU's legal structure, particularly in relation to competition law enforcement. By mandating the payment of interest on erroneously imposed fines, the CJEU has highlighted the importance of procedural correctness and fairness in administrative practices. This case serves as a critical reference point for future cases involving financial penalties imposed by the EC.

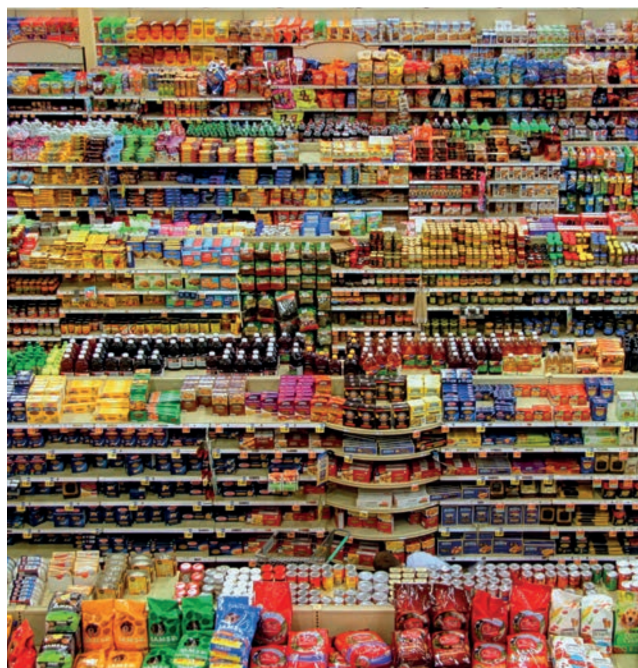
Antitrust Enforcement in Labour Markets: EC's Latest Insights

On 2 May 2024, the EC published its Competition Policy Brief regarding antitrust in labour markets. The policy addresses the Commission's assessments regarding competition law infringements on labour markets. Overall, the policy brief underscores the EC's commitment to enforcing competition law in labour markets, which is crucial for maintaining fair practices, protecting workers, and promoting economic growth and innovation.

The Commission begins with the announcement that it is currently carrying out unannounced inspections in the sector of online ordering and delivery of food, groceries and other consumer goods regarding no-poach agreements. Upon that, the Commission specifies that although it has not yet adopted a decision concerning a self-standing labour market agreement, both wage-fixing and no-poach agreements will in most cases qualify as restrictions by object under Article 101 of Treaty on the Functioning of the European Union ("TFEU").

The Commission defines wage-fixing agreements as agreements wherein employers agree to set wages or other types of compensation or benefits. Similarly, it defines no-poach agreements as agreements wherein the employers agree not to 'steal' employees from each other. The economic harm caused by wage-fixing and no-poach agreements are specified as reducing labour market dynamism with resulting negative effects on employee compensation, firm productivity, and innovation. Also, it is claimed that no-poach agreements reduce wages and hinder the efficient allocation of productive employees to productive firms.

The existing legal framework, on the other hand, allows the Commission and the national competition authorities to take decisive action against such agreements. Both wage-fixing and no-poach agreements are likely to qualify as restrictions by object under Article 101 of TFEU and not to meet the requirements to qualify as ancillary restraints; moreover, they are unlikely to meet the requirements for an exemption under Article 101/3 of TFEU.



EC Designates Apple's iPadOS as a Gatekeeper under the DMA

On 23 April 2024, the EC designated Apple with respect to its operating system for tablets, iPadOS, as a gatekeeper under the Digital Markets Act ("DMA"). Apple stated that it will ensure the compliance of iPadOS with DMA.

In 2023, the EC announced that it had designated as gatekeepers six firms and 22 core platform services, including those operated by Apple. The agency also had initiated a market investigation to further assess whether Apple's iPadOS should be designated as a gatekeeper, despite not meeting the thresholds.

Officials determined that Apple acts as a gatekeeper in relation to iPadOS, as the number of Apple's business users exceeded the quantitative threshold elevenfold, while the number of end users was close to the threshold and is expected to rise in the near future. Moreover, Apple end users are locked into iPadOS. The Commission added that Apple leverages its large ecosystem to discourage end users from switching to other operating systems for tablets. Apple has six months to ensure full compliance of iPadOS with the DMA obligations.

In response, Apple announced that it will extend the recently introduced IOS changes for apps in the EU to iPadOS this fall, as part of its efforts to comply with the DMA.

Key Points of the Report on the SPS Agreement Implementation

On 26 June 2024, the World Trade Organization ("WTO") members adopted a report on the Sanitary and Phytosanitary ("SPS") Declaration on global food security, scientific guidance, regional adaptations, and international cooperation.

Here are the key points from the report:

• Global Food Security: The report emphasizes the importance of SPS measures in ensuring food safety and protecting human, animal, and plant health, which are crucial for global food security. It highlights the need for transparent and science-based SPS regulations to facilitate safe international trade in food products.
• Scientific Guidance: The declaration underlines the role of scientific evidence and risk assessments in formulating SPS measures. It calls for the continuous update of SPS standards based on the latest scientific findings to address emerging food safety risks effectively.
• Regional Adaptations: Recognizing the diverse agricultural and ecological conditions across different regions, the report encourages the adaptation of SPS measures to regional contexts. It advocates for region-specific guidelines that consider local challenges and capabilities, promoting flexibility in the implementation of SPS standards.
• International Cooperation: The report stresses the importance of international collaboration in harmonizing SPS measures and addressing cross-border food safety issues. It calls for enhanced cooperation among WTO members, international organizations, and other stakeholders to share best practices, technical expertise, and resources.

Overall, the report aims to strengthen the global SPS framework to ensure safe and secure food supply chains, fostering international trade while protecting public health and the environment.

Increase in Tariffs for the Chinese Electric Vehicles

On 12 June 2024, the European Commission announced its intention to increase tariffs on Chinese carmakers from 10% to 38% starting on July 4, if the negotiations with China on the subsidy issue fail to yield results.

The tariffs on electric vehicles from China are intended by EU leaders to protect producers in the region from unfair competition. Last autumn, the Commission launched an investigation to determine whether the Chinese government was effectively subsidizing the production of electric cars and shipping them to Europe at prices below those of European competitors.

The EU has announced provisional tariffs ranging from 17.4% to 38.1% will be imposed on three leading Chinese manufacturers, including BYD, Geely, and SAIC. Other Chinese carmakers will face duty tariffs of either 21% or 38.1%, depending on their cooperation with the EU during its investigation. Tesla, which also manufactures in China, was exempted from these tariffs.

EC Extends Anti-Subsidy and Dumping Duties on SSCR from Indonesia, Taiwan, Türkiye, and Vietnam

On 7 May 2024, the EC countered the circumvention of its anti-subsidy measures on cold-rolled stainless steel ("SSCR") from Indonesia by extending the measures to also cover imports from Taiwan, Türkiye, and Vietnam.

In addition to its anti-subsidy measures, the Commission broadened its anti-dumping on SSCR from Indonesia to encompass imports from Taiwan, Vietnam, and Türkiye. These extensions stem from two parallel anti-circumvention investigations revealing that SSCR from Indonesia, subject to current anti-dumping and anti-subsidy duties, was entering the EU following minimal processing in Taiwan, Türkiye, and Vietnam. The investigations concluded that this practice had no economic justification other than avoiding anti-dumping duties on Indonesian imports.

The newly extended anti-subsidy duties are set at 20.5%, and the extended anti-dumping duties at 19.3%. Genuine producers of SSCR in Taiwan, Türkiye, and Vietnam are exempt from these measures.

New Communiqué Targets Unfair Competition: Extending Safeguards on Polyester Fibre Imports

On 19 April 2024, Communiqué No. 2024/6 on the Prevention of Unfair Competition in Imports ("Communiqué") was published. It aims to initiate an investigation upon domestic producers' request for the extension of the duration of the safeguard measure applied within the scope of the Safeguard Measure on the Import of Polyester Fibre. This measure was enforced with a Presidential Decree dated 23 August 2021 and numbered 4412.

In the preliminary examination made based on the application in question, it has been observed that:

• After the introduction of safeguard measures in 2021, imports increased again from 2022. Additionally, the ratio of imports to domestic production increased in the first six months of 2023.

• Although there was a certain recovery in the economic indicators of domestic producers, deteriorations had been noted in production, end-of-period stocks, productivity, and profitability indicators since 2022. Similarly, there was a decline in the employment indicator in the first six months of 2023.

As a result of the preliminary examination, the members participating in the meeting decided unanimously to launch a safeguard investigation. The investigation will review the existing safeguard measures to determine whether that in force for polyester fibre imports continue to be necessary to prevent or remedy serious harm. Additionally, it will examine the adaptation of domestic producers to market conditions. The investigation will be completed in nine months, which can be extended for another six months if necessary.

Türkiye Maintains Anti-Dumping Duties on Copper Pipes, Pipe Fittings, and Plywoods

During 5-18 April 2024, the Turkish Ministy of Trade ("Ministry") concluded three new expiry review investigations and opted to maintain existing measures.

On 5 April 2024, the Ministry completed its expiry review investigation concerning the imports of "tubes and pipes of refined copper"[1] originating in Greece through Communiqué No.2024/12 on the Prevention of Unfair Competition in Imports. During the on-the-spot verification visit, the Ministry determined that certain types of the concerned product were not produced by the domestic industry. Therefore, these product types were excluded from the scope of the measure. The Ministry assessed that if the existing measure were terminated, the continuation or recurrence of dumping and injury was likely. Accordingly, it was decided to maintain the existing measure, imposing a fine at a rate of 5% of the CIF value to the Greece-based exporter company that cooperated with the Ministry during the investigation, and 9% on the others.

The Ministry concluded the expiry review investigation into imports of "others" (pipe fittings)[2] originating in Brazil, Bulgaria, China, India, Indonesia, and Thailand on 5 April 2024 through Communiqué No.2024/11 on the Prevention of Unfair Competition in Imports. In parallel with its previous approach, the Ministry did not recalculate the dumping margin within the scope of this investigation and took into account the dumping margins determined in the original investigation. The maintenance of the existing measure in amounts ranging from USD 147 to 800/ton on a country basis was decided since it had been determined that dumping and injury were likely to continue or reoccur if the existing measure were terminated.

The expiry review investigation concerning "plywoods"[3] originating in China was completed on 18 April 2024 through Communiqué No.2024/10 on the Prevention of Unfair Competition in Imports. Accordingly, it determined that the continuation or recurrence of dumping and injury would be likely if the existing measures were terminated. Thus, the Ministry decided to maintain the existing anti-dumping measure at USD 140/m3.

[1] The concerned product is classified under CN Codes 7411.10.10.00.00 and 7411.10.90.00.29.

[2] The concerned product is classified under CN Code 7307.19.

[3] The concerned product is classified under CN Codes 4412.10, 4412.31, 4412.33, 4412.34, and 4412.39.

EC Imposed Definitive Anti-Dumping Duties on Polyethylene Terephthalate Imports from China

On 3 April 2024, the EC confirmed the previously imposed provisional measures on the imports of certain polyethylene terephthalate ("PET") products originating in China.

On 28 November 2023, the Commission imposed provisional duties on the imports of PET Plastics from China. This decision was based on findings indicating that PET plastic imports from China present a clearly foreseeable threat of injury to EU industry. These imports undercut the prices of the EU industry and force them to lower their prices. The provisional duties would remain in force for a maximum of six months.

After consulting with EU Member States, the Commission decided to impose definitive duties, ranging from 6.6% to 24.2% depending on the exporting producer, to protect the EU market of PET, valued at over EUR 5.5 billion. These duties will be imposed for a period of five years.

CNIL Releases First GDPR Compliance Recommendations for AI Systems

On 7 June 2024, the French Data Protection Authority (Commission Nationale de l'Informatique et des Libertés - "CNIL") published its first recommendations on GDPR compliance in the framework of the development of Artificial Intelligence ("AI") systems.

In the development process of the AI, there is a phase where a dataset is used to train the AI model. CNIL stated that many designers and developers inform CNIL that GDPR is quite challenging for them in this phase. In this regard, CNIL has published its recommendations for personal data sets containing personal data during AI training and for the AI systems; (i) based on machine learning, (ii) whose operational use is defined from the development phase and general-purpose systems that can be used for various applications and (iii) for which the learning is done "once and for all" or continuously.

In these recommendations, CNIL stated that both the GDPR and the AI Act can be applied where personal data is used as a data set. It also recommended that designers and developers to use the following steps; (i) defining a purpose for the AI system, (ii) determining your responsibilities, (iii) defining the legal basis that allows you to process personal data, (iv) checking if you can re-use certain personal data, (v) minimizing the personal data you use, (vi) setting a retention period, and (vii) carrying out a Data Protection Impact Assessment.

EDPB Report on ChatGPT Taskforce Initiatives

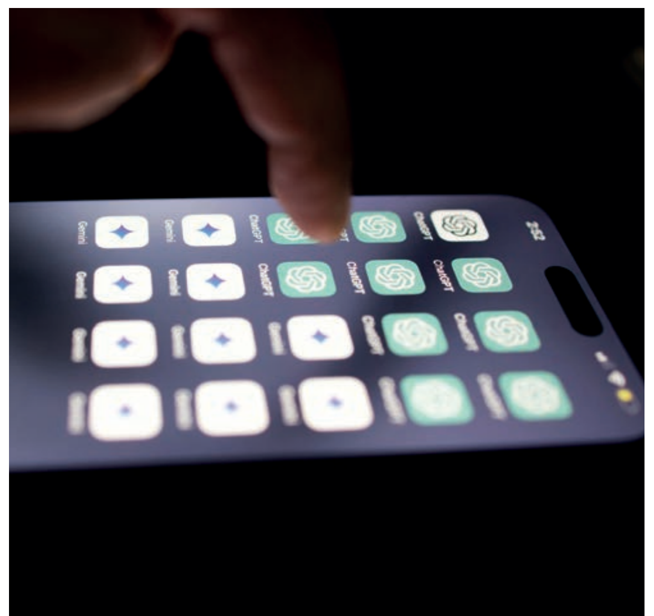
On 23 May 2024, the European Data Protection Board ("EDPB") published a report detailing the activities undertaken by the ChatGPT Taskforce.

Recently, a wide array of large language models ("LLMs") has emerged, utilizing vast datasets that include personal data, and have been made publicly available across various domains. One of the most prominent LLMs is ChatGPT, launched on November 30, 2022.

Multiple Supervisory Authorities ("Sas") have launched investigations into ChatGPT due to its data processing activities as a controller. In response, the EDPB established a taskforce to enhance cooperation and facilitate information exchange on potential enforcement actions related to the processing of personal data by ChatGPT, which lacks an establishment within the EU. During the EDPB Plenary meeting on 16 January 2024, the taskforce was assigned the following tasks:

- Exchanging information among SAs regarding their interactions with OpenAI and ongoing enforcement activities related to ChatGPT,
- Coordinating external communications by SAs concerning enforcement activities related to ChatGPT,
- Identifying issues that require a unified approach in the context of various enforcement actions related to ChatGPT by SAs.

The report also highlights key points:
- LLMs are trained using personal data,
- Technical challenges do not justify non-compliance with legal requirements,
- A legal basis is necessary for processing personal data,
- The data used often includes sensitive information, and web scraping in model development poses risks to the fundamental rights and freedoms of individuals,
- It is essential to implement measures to delete or anonymize personal data collected through web scraping before the training phase.



Turkish Regulation on Procedures and Principles Regarding Transfer of Personal Data Abroad Loading

The Turkish Personal Data Protection Authority ("Authority") published an announcement regarding the draft regulation on the transfer of personal data abroad.

On 9 May 2024, the Authority released the Draft Regulation on Procedures and Principles for Transferring Personal Data Abroad ("Draft") for public feedback and evaluation.
The Draft outlines principles and procedures concerning updates introduced to Turkish Personal Data Protection Law No. 6698 ("PDPL") regarding the cross-border transfer of personal data by Law No. 7499, which amends the Code of Criminal Procedure and Certain Laws.
Accordingly, the transfer of personal data abroad shall be permissible under the following conditions:
(i) if there is an adequacy decision regarding the destination country, specific sectors within that country, or international organizations;
(ii) in the absence of an adequacy decision, parties must provide one of the appropriate safeguards, ensuring that data subjects can also exercise their rights and access effective remedies in the destination country; and
(iii) if an adequacy decision is lacking and parties cannot provide one of the appropriate safeguards, the transfer may occur under exceptional circumstances such as incidental transfers provided that they are irregular, infrequent, not continuous and outside the usual business operations.
To sum up, the Draft lays out the rules for the transfer of personal data abroad. It emphasizes that the explicit consent of the data subject remains the main exception for cross-border transfers.

EC Unveils Guide to Data Act and its Practical Implementation

On 17 April 2024, the EC published its comprehensive overview of the Data Act, including its objectives and how it works in practice.

The Data Act is a law designed to enhance the EU's data economy and foster a competitive data market by making data more accessible and usable, encouraging data-driven innovation, and increasing data availability. By addressing eight of its chapters, the comprehensive overview explains how data sharing, contractual terms, processing, and enforcement works in practice.

For example, under Chapter V, on business-to-government data sharing, it is held that public sector bodies will be able to make more evidence-based decisions in certain situations of exceptional need through measures to access certain data held by the private sector. On the other hand, under Chapter IX, on enforcement, it is stated that the Member States must designate one or more competent authorities to monitor and enforce the Data Act.

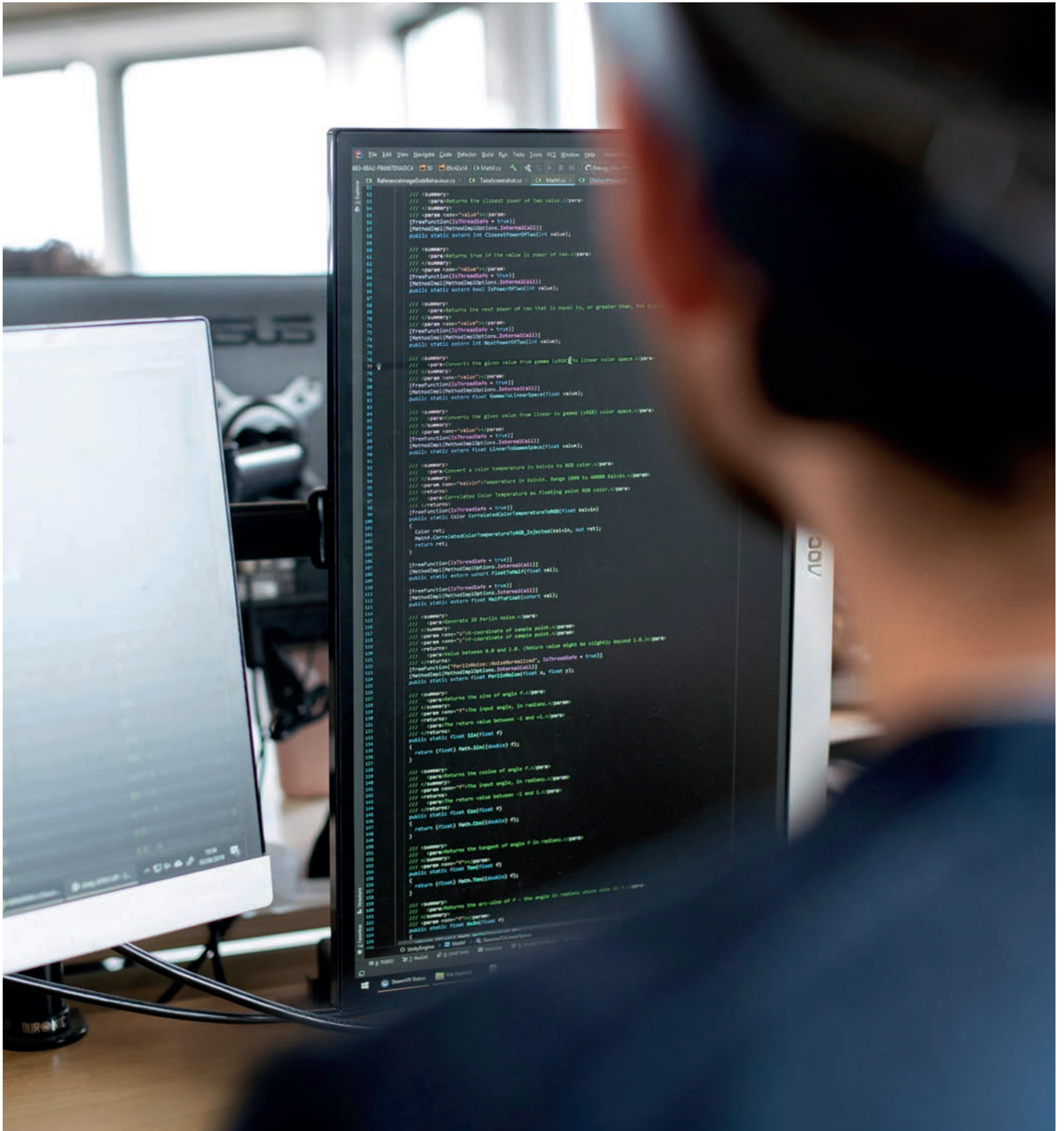
With its data strategy explained, the European data strategy sets out the path for the EU to become a leader in the data economy. The Commission indicated that this can be achieved through the creation of a European single market for data in which data can flow between sectors and Member States in a safe and trusted manner for the benefit of the economy and the society. The Data Act will enter into force on 12 September 2025.

EDPB Critiques "Consent or Pay" Models on Large Online Platforms

On 17 April 2024, the European Data Protection Board adopted an opinion addressing the validity of consent to process personal data for behavioural advertising within "consent or pay" models used by major online platforms.

Consent or pay models require users to choose between consenting to the use of their personal data for behavioural advertising or paying a fee. The EDPB advised against making paid services the default for users who decline data processing for advertising. Instead, platforms should offer a genuine alternative that does not involve a fee. If a fee is necessary, an additional free option should be available that uses less or no personal data for advertising.

The EDPB also emphasized that consent alone does not exempt platforms from complying with GDPR principles, such as purpose limitation, data minimization, and fairness. Platforms also must demonstrate the necessity and proportionality of their data processing practices. In assessing whether consent is truly free, factors like conditionality, detriment, imbalance of power, and granularity must be considered. Platforms need to evaluate whether fees discourage consent and whether non-consent could negatively impact users, such as by excluding them from services or losing access to networks.



A Thin Line between Legal and Illegal Info Exchanges in Commercial Vehicles Sector in Türkiye

by Mustafa Ayna, Özlem Başıböyük Coşkun, Arda Diler

Introduction

There has always been a thin line between legitimate market research and potentially anticompetitive information exchanges. Case law on such matters is of a particular importance. Here we provide highlights of the TCA's approach to information exchanges at the example of the commercial vehicles sector investigation. In 2023 the TCA initiated a preliminary inquiry into several undertakings active in the light and medium class and heavy commercial vehicles market to determine whether these undertakings had violated Article 4 of Law No. 4054 on the Protection of Competition ("Turkish Competition Law") (the equivalent of Article 101 TFEU) via exchange of information.

Following a preliminary inquiry, the TCA decided not to initiate an investigation into the undertakings active in the light and medium class and heavy commercial vehicles market since no evidence showing the existence of a violation existed.

The decision is of importance as it sheds light on the TCA's current approach towards assessments of both legitimate sources of information and the structure of competition in the relevant market. The findings suggest that the current practices of gathering and utilizing market information, primarily through lawful and transparent means, do not contravene competition rules.

Assessment of Findings

Most of the findings obtained from the undertakings party to the preliminary inquiry relate to (i) competitor price information and (ii) market share data. Apart from these, there are also correspondences indicating that the undertakings obtained competitor information on premium systems, campaigns, vehicle delivery times, vehicle specifications and details of customers' purchases such as brands, quantities, and prices. In a significant portion of the correspondence, it is understood that the source of the information is field research or publicly available sources. In some correspondence, however, the source of the information is not specified. For instance:

BMC Internal: "I spoke with Baykar, and learned the offers they received from Ford. I updated them according to the current costs of our own vehicles with AEBS. You can find the price comparison prepared accordingly in the attached file. Regards,"

ISUZU Internal: "Mr. (…..), The list of competitor prices we have learned from our customers and our dealer Enke is attached. I submit it for your information."

ISUZU Internal: "Hello, the updated market report for November according to ADA and HCVA data is attached. Since AMA November data is not available, the minibus-bus data are based on October. It will be updated separately when AMA November data is released. Regards,"

RENAULT TRUCKS Internal: "Friends; I need market information, but you need to collect it from customers within the framework of competition law. I would like to remind you again that you should not contact competitors. The information we are trying to obtain is to share your impressions from your customer visits. Please send it using the attached file." (…..)

"Hello, Mr. (…..), The brand price data information we have received from customers is attached for your information. We receive such price information from customers every month. The prices received are constantly changing and exaggerated prices are also said to be due to the lack of product supply. Especially Volvo, Scania, and MB price information are constantly changing. From the construction group, price changes are very noticeable on the basis of customer and quantity. Serious discounts may be available for quantity purchases. For your information."

In evaluating the findings, the TCA made the following assessments:

• Undertakings operating in the sector were able to obtain the price offers of competing undertakings frequently.

• Among the documents received within the scope of on-site examinations, no document indicates that the price offers of

competing undertakings had been shared directly between competitors and with the object of restricting competition.

• Price information could be obtained during customer visits, through dealers, as a result of field studies or from the websites of the undertakings.

• A bargaining system in which customers shared the price offer received from one undertaking with another undertaking to obtain a better price offer and increase their bargaining power was common.

• Both market research by undertakings and price information obtained through customers and dealers were used by undertakings to offer lower offers, to gain new customers or to prevent the loss of existing customers, and ultimately to make competitive moves.

• The market share data of competitors was available to undertakings through the Automotive Distributors Association ("ADA"), Automotive Manufacturers Association ("AMA"), Heavy Commercial Vehicle Association ("HCVA"), and the Turkish Statistical Institute ("TSI"), which shared data on the sector.

• The data shared publicly and retrospectively by the ADA, AMA, HCVA, and TSI did not lead to anticompetitive effects.

Consequently, the TCA concluded that the analyzed communications did not constitute an exchange of information that restricts competition.

Assessment of the market after determining that the analyzed communications did not violate competition law, the TCA made a further assessment as to whether the characteristics of the relevant market were conducive to a possible exchange of information.

In this context, firstly, they stated that many players were operating in the market. The TCA concluded that this situation might have caused difficulties for the undertakings to agree on possible coordination conditions and to reach collusive outcomes on prices.

Secondly, the TCA stated that the most important pricing criteria of undertakings operating in the light and medium class and heavy commercial vehicle sector were macroeconomic factors and market conditions such as raw material and energy prices, inflation, and exchange rate movements. Thus, recent issues in the automotive sector such as the chip shortage, supply problems, raw material prices, and fluctuations in exchange rates led to a rapid increase in commercial vehicle prices. Consequently, undertakings found it challenging to monitor each others' prices due to the necessity of constantly adjusting pricing strategies to accommodate fluctuating costs.

Ultimately, it was noted that the existence of product differentiation in the market and the diversity in the services offered price discrepancies, complicating the acquisition of competitor price information and understanding the pricing behaviour of competitors.

Based on this market assessment, the TCA concluded that the market structure does not preclude the establishment of competition violation. However, in parallel with the evaluations and findings, they decided not to initiate an investigation due to the lack of evidence indicating the existence of a violation within the scope of the preliminary investigation.

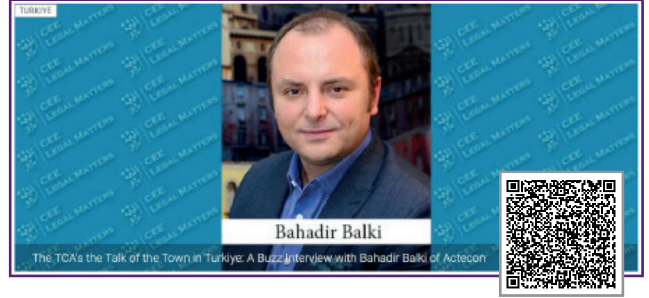
Conclusion

The TCA's decision not to initiate an investigation into the undertakings within the commercial vehicle sector underscores a nuanced understanding of market dynamics and competitive behaviour. This outcome highlights the importance of distinguishing between legitimate market research and potentially anticompetitive information exchanges. The findings suggest that the current practices of gathering and utilizing market information, primarily through lawful and transparent means, do not contravene competition laws.

Furthermore, the decision sheds light on the complexities of monitoring and interpreting competitor behaviour in a market characterized by fluctuating costs, diverse product offerings, and intense competition. It serves as a reminder to businesses about the legal boundaries of competitive intelligence.

Interview by CEE Legal Matters

Our Managing Partner Bahadir Balki was interviewed by the CEE Legal Matters on June 2024, regarding the recent developments in Turkish competition law. The Turkish Competition Authority's proactive measures in various sectors have been the element to follow in Türkiye according to Bahadir Balki, with the TCA's current priorities including labor market investigations, resale price maintenance, and digital market regulations.



Inspiring Young Minds: A Day of Learning with Bahadir Balki in İzmir Aliağa

Our Managing Partner, Bahadir Balki, visited several schools in İzmir Aliağa on June 6, including 80. Yıl Çamlık Primary School, Mehmet Saka Primary School, Atatürk Primary School, and Atatürk Secondary School.

He engaged with the students in discussions about competition and ethics and shared our books, Secret Agreement in the Jungle and The Best Painter of the Jungle, with them. Witnessing the students' enthusiasm for learning was truly indescribable.

We're excited to share photos from this meaningful day. A heartfelt thanks to our dedicated teachers who helped coordinate the event.

Project Everest - Scaling New Heights: Tunç Fındık's Everest Triumph and Our Commitment to Sustainability

We are thrilled to celebrate Tunç Fındık's incredible achievement of reaching the summit of Everest on May 22, with the support of ACTECON.

As we increasingly experience the alarming effects of global warming, such as declining oxygen levels, dwindling water resources, and changing weather patterns, it's crucial to recognize that we can all make a difference. By adopting sustainable practices in our business and personal lives, we can help slow down global warming and mitigate its effects.

We extend our heartfelt congratulations to Tunç Fındık and express our gratitude to everyone who has supported this cause.

Bright Paths in the Career Maze

On 13 May 2024, our managing partner Bahadır Balkı and our senior associate Can Yıldız introduced ACTECON and gave career advice to students in Ankara University's Mediation and Arbitration in Law Society.

Pioneering Legal Education: ACTECON Engages with Future Lawyers at LawFest 2024

Our Managing Partner, Bahadır Balkı, and Senior Lawyer, Can Yıldız, attended the LawFest event organized by the Lawment Association from April 26-28, 2024, in Kuşadası. This event marked the first law festival in our country, bringing together law students from universities across Türkiye, newly practicing lawyers, and experienced legal professionals from various fields.

Can Yıldız introduced competition law as a specialized area to our young colleagues, while Bahadır Balkı discussed the global evolution of the legal sector, emphasizing the trend toward institutionalization and the growth of law firms. He shared our perspective on the "legal business," the importance of differentiating in our work, and our commitment to social responsibility projects.

We extend our gratitude to the Lawment Association and the young colleagues who contributed to making this event a success.

Guiding the Next Generation: ACTECON Welcomes Istanbul University Law Students for Career Exploration

It's a pleasure for us to get to know our young colleagues. We hosted law students from Istanbul University's Liberte Club for a Career in Law.

Our Managing Partner Bahadır Balkı, Counsel Caner K. Çeşit and Senior Associate Alper Karafil took our guests through the way from law school to a career in competition law. We also touched upon the objectives and expectations.

ACTECON is happy to support young lawyers along their career.

Empowering Future Leaders: ACTECON Sponsors Scholarship for College of Europe Master's Program

As part of the Scholarship Programme for College of Europe Masters managed by Türkiye's Ministry of Foreign Affairs Directorate for EU Affairs, 15 students have been awarded scholarships for postgraduate education at the College of Europe. ACTECON is proud to be among the contributors of the scholarship programme, sponsoring the postgraduate education of one student.

At ACTECON, we are committed to supporting competition law advocacy in every possible way. No doubt, education plays a crucial role in fostering a competition culture.
College of Europe in Bruges holds a special place for competition law community as the institution has long been offering specialized education in EU matters and competition policy. In that sense, sponsoring a Turkish student's education with top experts is an invaluable opportunity for us.

We would like to extend our gratitude to Mr. Faruk Kaymakcı, Ambassador, Permanent Delegate of Türkiye to the European Union, Brussels for the scholarship invitation.

TURKTRADE Webinar

On April 30, our Managing Partner Dr. M. Fevzi Toksoy and Counsel Caner K. Çeşit made a presentation on recent developments in Turkish competition law space and discuss what businesses should expect in 2024 for TURKTRADE (Türkiye Foreign Trade Association) members.

20th anniversary of EU Merger Regulation Conference

On April 18, we celebrated the 20th anniversary of EU Merger Regulation!
The conference was an excellent opportunity to visit Brussels, meet colleagues and friends from the competition community, discuss consolidation, potential competition, innovation, conglomerates, ecosystems and more.
It was a privilege to hear the story of the regulation from the very makers. Opening speech by Margrethe Vestager (Commissioner for Competition and Executive Vice-President of the European Commission) , fireside chat with Mario Monti (President of the Council of Ministers of the Italian Republic) and Sir Philip Lowe (Partner at Oxera) - moderated by Olivier Guersent (Director-General of the European Commission's Directorate-General for Competition)

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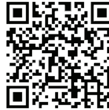

The Output® provides regular update on competition law developments with a particular focus on Türkiye and practice of the Turkish Competition Authority. The Output® also includes international trade and regulatory issues. The Output® cannot be regarded as a provision of expert advice and should not be used as a substitute for it. Expert advice regarding any specific competition, international trade and regulatory matters may be obtained by directly contacting ACTECON.

ACTECON is an advisory firm combining competition law, international trade remedies and regulatory affairs. We offer effective strategies from a law & economics perspective, ensuring that strategic business objectives, practices, and economic activities comply with competition law, international trade rules and regulations.