

Competition Law Bulletin in the Last Quarter of 2022

January 2023

The Competition Board (the "Board") published important decisions and a comprehensive amendment proposal regarding Law No. 4054 on the Protection of Competition (the "Competition Law") in the last quarter of 2022. This bulletin covers the competition law developments on (i) the draft amendment to the Competition Law, (ii) investigations concluded with the settlement mechanism, (iii) administrative fines imposed for providing false/misleading information to the Turkish Competition Authority, (iv) the scope of the newly introduced "technology undertakings" notion and (v) online sales restrictions.

1. Draft Amendment to the Competition Law Has Been Published

In November 2022, the Turkish Competition Authority shared the draft amendment law to Competition Law (the "**Draft Law**") with several public authorities for consultation. The Draft Law defines undertakings with significant market power emerging as a result of new technologies and digitalization and imposed *ex-ante* obligations on them. The Draft Law is considerably similar to The Digital Markets Act published by the European Commission, which entered into force on 1 November 2022. The Draft Law aims to integrate the Digital Markets Act into the Competition Law.

According to the Draft Law undertakings that (i) provide one or more core platform services, (ii) has a certain scale and a significant impact in terms of access to end-users or users' activities, and (iii) is potentially able to have the power to maintain this impact in an established and permanent manner will be considered as undertakings with significant market power. The Draft Law states that undertakings with significant market power will also be determined based on quantitative criteria such as annual turnover, number of end-users and commercial users, as well as qualitative criteria such as network influence, data ownership and the structure of the offered platform services. The exact scope of these quantitative and qualitative criteria will be determined by Turkish Competition Authority with a Communiqué.

The Draft Law imposes certain obligations on undertakings with significant market power to prevent them from abusing their market power. Under the Draft Law, undertakings with a significant market power should refrain from (i) favoring their own goods and services in ranking, scanning, and indexing, (ii) using non-public data while competing with other commercial users, (iii) tying the offered goods/services with other goods/services, (iv) preventing commercial

users from offering different prices or conditions in different channels or when working with competing undertakings.

The Draft Law imposes new administrative sanctions other than monetary fines on undertakings which fail to fulfil their obligations. According to the Draft Law, the Board will be able to directly impose structural remedies (e.g., carve-out) and prohibit mergers and acquisitions of undertakings that infringed its obligations twice in five years.

According to the Draft Law, the upper limit of the administrative fine for infringing these obligations is up to 20% of the undertakings' annual turnover, which is higher than the upper limit of administrative fines imposed on other competition law restrictions (i.e., up to %10 of the undertakings' turnover).

2. Increase in the Number of Investigations Concluded with Settlement

The settlement procedure, which was introduced with the amendments to the Competition Law made on 24 June 2020, can be defined as a reduction in administrative fines in return for an investigated undertaking's admission of the alleged competition law violation.¹ In the last quarter of 2022, the Board concluded many investigations in various sectors with settlement decisions.

In this regard, the Board ended the investigations launched against (i) Miele Elektrik Aletler Dış Ticaret ve Pazarlama Limited Şirketi², (ii) Korkmaz Mutfak Eşyaları Sanayi ve Ticaret Anonim Şirketi, Gençler Ev Araç ve Gereçleri Pazarlama Ticaret Anonim Şirketi and Punto Dayanıklı Tüketim Malları İthalat İhracat Ticaret Limited Şirketi³, (iii) Natura Gıda Sanayi ve Ticaret Anonim Şirketi⁴, (iv) Aslan Ticaret Dayanıklı Tüketim Malları ve Limited Şirketi⁵ and (v) Hixsan Teknoloji Sanayi ve Ticaret Limited Şirketi⁶ by accepting the settlement requests of the investigated undertakings. Thus, in 2022, the Turkish

¹ You may access our bulletin including detailed information on the settlement procedure via the following link:

https://www.kolcuoglu.av.tr/Uploads/Publication/settlement_as_a_new_procedure_in_competition_law.pdf

² The Board's decision dated 10 November 2022 and numbered 22-51/753-312

³ The Board's decision dated 10 November 2022 and numbered 22-51/754-313

⁴ The Board's decision dated 23 November 2022 and numbered 22-52/771-317

⁵ The Board's decision dated 8 December 2022 and numbered 22-54/834-344

⁶ The Board's decision dated 22 December 2022 and numbered 22-56/882-365

Competition Authority concluded a total of 12⁷ investigations through settlement.

Notably, most of the settlement decisions were adopted in investigations regarding the allegations of "resale price maintenance". Due to its practical benefits for undertakings, the number of investigations concluded with the settlement procedure is expected to increase in the future.

As a result of the settlement procedure, the Board is entitled to reduce the administrative fine imposed on the undertakings by 10% to 25%.

3. The Board's Decision on Providing False and Misleading Information

In its decision dated 21 July 2022 and numbered 22-33/527-213, the Board determined that Martı İleri Teknoloji Anonim Şirketi ("**Martı**"), an e-scooter rental company, provided false and misleading information regarding the information requests addressed within the scope of a preliminary investigation launched against Martı on the grounds that it abused its dominant position. Therefore, the Board imposed an administrative fine amounting to 0.1% of Martı's 2021 turnover. In its decision, the Board established that information on e-scooters' basic start fee and price per kilometer were requested from Martı, but the submitted prices were different than the prices announced to customers by Martı.

Although Martı alleged that it did not have any collective data regarding the discounts applied in the relevant periods, the information submitted upon the Board's second information request differed from originally submitted information. Therefore, the Board decided that Martı infringed its obligation not to provide false and misleading information to the Turkish Competition Authority.

In a previous decision concerning Türk Telekomünikasyon Anonim Şirketi's providing false and misleading information, the Board requested the undertaking's explanations regarding the provision of false and misleading information. On the contrary, the Martı decision does not indicate whether the Board granted Martı an opportunity to explain the originally submitted information.

4. The Board's Decisions on the Notion of "Technology Undertaking"

On 4 March 2022, the Turkish Competition Authority introduced the "technology undertaking" notion with the Communiqué No. 2022/2 amending the Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board ("**Communiqué**"). According to the Communiqué, the TRY 250 million turnover threshold will not apply in merger control filings regarding the acquisition of technology undertakings, which refer to companies operate in the Turkish geographical market, engage in R&D activities or provide services to users in Turkey.

Due to uncertainties regarding the scope of the "technology undertakings" under the Communiqué, the Board's decisions were expected to shed light on this scope. Accordingly, in 2022, the Board rendered decisions concerning the technology undertaking notion. In its first decision, the Board considered International Financial Group Limited, which provides savings and investment products to individual investors through a local broker and digital platforms'

services to a limited extent in the life insurance sector, as a technology undertaking⁸. In another relevant decision, the Board decided that Airties Kablosuz İletişim Sanayi ve Dış Ticaret Anonim Şirketi, which provides home WiFi solutions for wideband operators and software services ensuring WiFi network to wideband operators' customers, falls within the scope of the technology undertaking definition since it is active in software services⁹. In addition, in two other relevant decisions, the Board considered that undertakings active in (i) corporate cyber security consultation¹⁰ and (ii) operation of an online open bidding platform for the purchase and sales of various construction equipment¹¹, as technology undertakings.

These decisions indicate that the Board's interpretation of the "technology undertakings" is broad. However, the Board's approach regarding the scope the "technology undertakings" notion will become clearer with future decisions on undertakings carrying out different commercial activities.

5. The Board's Decision on Resale Price Maintenance and Online Sales Restrictions: Adidas

The Board concluded its preliminary investigation against Adidas Spor Malzemeleri Satış ve Pazarlama Anonim Şirketi ("**Adidas**"), which was launched on the allegations that Adidas (i) intervened in its authorized dealers' retail prices and discount campaigns and (ii) discriminated against its small dealers by obliging them to use bags with Adidas' commercial web address while not requiring the same from its larger dealers¹². Based on the documents obtained during the on-site investigation, the Board determined that Adidas recommended prices to its authorized dealers but did not force them to comply with these. Among the findings, there is a particular one indicating that Adidas considered to enter into an agreement which obliges Amazon to procure the relevant products only from Adidas and only allow authorized dealers to sell the Adidas products on its platform. The findings also indicate that Adidas' counsel advised that such restrictions may be considered problematic in terms of competition law. However, during the on-site inspection, the case handlers determined that there was not any provision allowing only authorized sellers to sell on Amazon and prohibit third parties from selling the relevant products. Accordingly, the Board decided not to launch an investigation on Adidas, since it did not find any concrete information or document showing that Adidas infringed Competition Law.

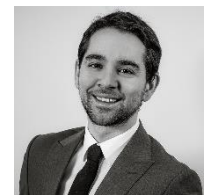
With the widespread use of e-commerce, sales restrictions in online channels also started to pose a significant competition law risk for undertakings in the retail sector. This decision proves that a proactive approach in terms of competition law compliance is an effective method to prevent the risk of potential investigations.

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⁷ This amount to the total number of settlement decisions announced as of the date this bulletin is prepared.

⁸ The Board's decision dated 18 May 2022 and numbered 22-23/372-157

⁹ The Board's decision dated 2 June 2022 and numbered 22-25/403-167

¹⁰ The Board's decision dated 9 June 2022 and numbered 22-26/425-174

¹¹ The Board's decision dated 8 September 2022 and numbered 22-41/582-242

¹² The Board's decision dated 21 April 2022 and numbered 22-18/300-133