

Competition Law Developments in 2020

January 2021

The year 2020 brought along significant developments in the field of competition law, both in Turkey and worldwide. Particularly, the reflections of COVID-19's economic effects on competition law practice, as well as the developments in digital markets were the hot competition law topics worldwide. As for Turkey, the most notable development was the amendment of Law No. 4054 on the Protection of Competition (the "Competition Law") and its implications on competition law practice.

This bulletin highlights some recent competition law developments as well as the Competition Board's (the "Board") notable decisions published in the last quarter of 2020.

Developments in Digital Markets

As discussions were held on the effectiveness of existing competition law tools against the competition problems in digital markets and the need for a new regulatory framework, several prominent competition law authorities set out legislative proposals regarding digital markets. The United Kingdom was the first to take a step towards adopting a regulatory framework. On 8 December 2020, the UK's Competition and Markets Authority published a legislative proposal, including its recommendations to establish a "Code of Conduct" for digital market players with a significant market status (*i.e.*, SMS firms) and apply closer scrutiny on M&A transactions involving SMS firms.

Likewise, on 15 December 2020, the European Union Commission announced its "Digital Services Act" and "Digital Markets Act" proposals.¹ These proposals, which the EU Commission declared to be of a complementary nature to the competition law, oblige firms with a gatekeeper role (*i.e.*, key platforms for accessing digital markets) to comply with several *ex-ante* rules. Some of these rules will directly shape the platforms' business models by (i) allowing third parties to inter-operate with the gatekeeper's own services in certain situations, (ii) enabling their business users to access the data generated through their use of the gatekeeper's platform and (iii) allowing their business users to promote their offers and conclude contracts with their customers outside the gatekeeper's platform. According to the proposals, the EU Commission will be able to impose monetary fines on platforms that do not comply with these *ex-ante* rules. Furthermore, the EU Commission will have the discretion to impose behavioral and structural remedies (*e.g.*, the divestiture of a business) on platforms in case of systematic non-compliance.

While the UK and EU are taking viable steps towards the *ex-ante* regulation of digital markets, the United States Department of Justice

and Federal Trade Commission initiated two separate lawsuits on the grounds that the tech giants Google and Facebook were engaged in anti-competitive behaviors. These developments will most likely keep competition law in digital markets as a hot topic throughout 2021.

As for Turkey, the Turkish Competition Authority (the "TCA") launched two different sector inquiries on digital markets and e-commerce platforms². The results are expected to be announced in 2021. The TCA has also been carrying out investigations against several undertakings operating in digital markets. The most notable investigation is the one launched against Google. In September 2018 and February 2020, the Board imposed two separate administrative monetary fines on Google, due to its conduct in the Android operating system market and online shopping comparison services market. In November 2020, the Board rendered another violation decision against Google and once again imposed a monetary fine, based on the grounds that the number of text advertisements and their display on Google's general search results page excluded the organic search results. Currently, the Board is carrying out another investigation against Google regarding its local search services.

Amendment of the Competition Law

Another noteworthy development in Turkey was certainly the amendment of the Competition Law in June 2020.³ The amendment introduced *de minimis*, commitment and settlement procedures to Turkish competition law. Following the amendment, the Board published two draft communiqués for public consultation, which govern the *de minimis* and commitment procedures' application, enabling third parties to participate in the secondary legislation's

¹ Please click the following link to access the relevant announcement: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349

² Please click the following link to access our bulletin regarding the relevant sector inquiry: https://www.kolcuoglu.av.tr/Uploads/Publication/turkish_competition_authority_launches_sector_inquiry_on_e-commerce_platforms.pdf

³ Please click the following link to access our bulletin regarding the relevant amendment: https://www.kolcuoglu.av.tr/Uploads/Publication/legislation_proposal_amending_competition_law_ratified.pdf

preparation⁴ which is expected to be completed in 2021. In the meantime, on 6 November 2020, the Board announced that in an investigation launched against undertakings providing temporary bonded storage services, the commitment mechanism is applied for the first time. Accordingly, the Board ceased its investigation on Havaalanları Yer Hizmetleri A.Ş., by accepting its commitments.

On the other hand, following the Board's decision to carry out oral hearings (that were postponed due to COVID-19) online, we observed many infringement decisions and respective monetary fines in the last quarter of 2020.

Lastly, on 15-16 December 2020, the TCA held the second annual "Istanbul Competition Forum", with the agenda of "Competition Issues in Digital Markets". Issues discussed during the forum were the need to reform competition policies due to the new challenges concerning digital markets and the TCA's competition law practices during COVID-19.

The Board's Notable Decisions in the Last Quarter of 2020

1. Request to cease an investigation with commitments was rejected

In its decision announced on 23 November 2020, the Board evaluated Arslan Nakliyat's request to cease an investigation with commitments submitted. However, the Board rejected this request on the ground that the commitment package was not timely submitted as specified under the Competition Law.

According to the amended Competition Law, investigated undertakings are entitled to submit their commitments during the pre-investigation and investigation stages. However, even though Arslan Nakliyat's commitments were submitted before the oral hearing, the Board did not accept these commitments, holding that the investigation stage ends upon submission of the third written defence. Accordingly, the Board decided that commitments submitted thereafter would not be acceptable. The decision constitutes a precedent for the establishment of the period during which undertakings may submit commitments.

Therefore, until the entry into force of the communiqué on commitments, investigated undertakings seeking to submit commitments must apply to the TCA before submission of their third written defences.

Another important aspect of the decision is that the investigation relates to a restrictive agreement between competitors. Although the Competition Law states that the commitment mechanism would not be applicable to hardcore competition law restraints such as customer sharing or price fixing, the Board's decision does not include any evaluation on this matter.

2. Monetary fines were imposed on Ford, BMW, Daimler and Porsche for unnotified transaction

In 2017 Ford, BMW, Daimler and Porsche established a joint venture (*i.e.*, IONITY) that operates in various fields related to electric powered vehicles; yet did not notify the Board on this transaction. However, on 6 April 2020, the Board became aware of the transaction through the notification regarding Hyundai and Kia's involvement in IONITY's control structure.

Ford, BMW, Daimler and Porsche asserted that the transaction is not subject to the Board's prior approval as per the "effects doctrine", since IONITY would only operate in the European Economic Area and thus would not carry out any business activities in Turkey.

However, as stated in many of its precedents, such foreign-to-foreign transactions are subject to the Board's prior approval, if the applicable turnover thresholds are met, even though the joint venture to be established will not operate in Turkey.

In this regard, the Board concluded that IONITY's parent companies' Turkish turnovers are above the applicable thresholds and, accordingly, they must have notified the Board before establishing IONITY. As a result, with its decision dated 28 July 2020, the Board imposed a monetary fine on Ford, BMW, Daimler and Volkswagen (*i.e.*, Porsche's ultimate shareholder) amounting to 0.1% of their turnover in Turkey in 2019 and also granted an approval for IONITY's establishment.

3. Monetary fine was imposed on Mey İçki following the Regional Administrative Court's annulment

In recent years, the Board had launched two separate investigations against Mey İçki, regarding its rebate systems in the "raki market" and "vodka and gin market". In early 2017, the Board decided that Mey İçki abused its dominant position in the "raki market" by applying anti-competitive rebates and imposed administrative monetary fines. Subsequently, in late 2017, the Board decided that (i) Mey İçki's rebate systems applied in the "vodka and gin market" are identical to its rebate systems applied in the "raki market" which constituted a violation and (ii) these rebate systems are applied concurrently as part of the same business strategy. Therefore, as per the *non bis in idem* doctrine, the Board had not imposed any monetary fines against Mey İçki for its conduct in the "vodka and gin market". However, following an appeal process, the Ankara Regional Administrative Court overruled the Board's decision. The Ankara Regional Administrative Court stated that even though Mey İçki's rebate systems were part of the same business strategy, these two different product markets should be treated separately and thus, violations in these markets must be sanctioned independently.

Upon the Council of State's approval of the Regional Administrative Court's annulment decision, the Board eventually concluded that Mey İçki abused its dominant position in the "vodka and gin market" by applying anti-competitive rebate systems, through its decision dated 11 June 2020.

The decision exhibits the importance of the relevant product market definition in terms of the monetary fines' determination.

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⁴ Please click the following link to access our bulletins regarding the *de minimis* and commitment Communiqués:

https://www.kolcuoglu.av.tr/Uploads/Publication/draft_de_minimis_comminique_published_for_public_consultation-b6DXm0w4.pdf

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