

Competition Law Bulletin in the Last Quarter of 2021

January 2022

2021 has been an active period in the field of competition law in Turkey. The ratification of the secondary legislation on the recently introduced commitment, settlement and *de minimis* mechanisms, the Turkish Competition Authority's reports on sector inquiries regarding fast-moving consumer goods (FMCG), e-marketplace platforms and payment services sector, and the Competition Board's (the "Board") notable decisions made 2021 a very dynamic period in terms of competition law. This bulletin briefly covers the significant competition law developments in the last quarter of 2021.

1. Market Share Threshold for Vertical Agreements' Block Exemption Lowered

Law No. 4054 on the Protection of Competition (the "**Competition Law**") prohibits agreements that restrict competition, but also establish an exemption for those agreements that meet certain conditions. Exemption is frequently encountered in terms of vertical agreements executed between undertakings operating at different levels of the supply chain. The Block Exemption Communiqué on Vertical Agreements published by the Board in 2002 (the "**Block Exemption Communiqué**") provides legal certainty by specifying the types of vertical agreements that fall within the scope of the block exemption.

According to the Block Exemption Communiqué, the market shares of the parties to a vertical agreement must not exceed certain thresholds for the agreement to be granted with a block exemption. With the introduction of Communiqué Amending the Block Exemption Communiqué No. 2002/2 on Vertical Agreements, which was published in the Official Gazette dated 5 November 2021 (the "**Amendment Communiqué**"), the market share threshold (which had been 40% since 2007) was lowered to 30%. Accordingly, for a vertical agreement to benefit from a block exemption, **(i)** the supplier's market share in the market for which the contracted goods or services are supplied and **(ii)** in the event of exclusive supply agreements, the purchaser's market share in the market for which the contracted goods or services are purchased must not exceed 30%.

In accordance with the Amendment Communiqué, the agreements that fall outside the block exemption after such decrease of the market share threshold must comply with the relevant competition law rules by 5 May 2022.

2. Deleting WhatsApp Conversations During On-site Inspections

The Competition Authority officials are entitled to examine all kinds of physical or electronic data during an on-site inspection. In the event of hindrance or obstruction of on-site inspections, the investigated undertakings are imposed with an administrative monetary fine equal to five per thousand of their turnover generated at the end of the latest fiscal year.

The Guidelines on the Examination of Digital Data During On-site Inspections (the "**Guidelines**"), which was published on 8 October 2020, clarifies the Turkish Competition Authority's powers by drawing a precise framework for the examination of digital data and the procedures to be followed during on-site inspections. The Guidelines explains that all electronic devices, including personal devices, that contain work-related data can be examined. Accordingly, in its decisions on the obstruction of on-site inspections that were published consecutively in November 2021,¹ the Board concluded that deleting Whatsapp correspondence or group chats during on-site inspections constitutes a hindrance to the on-site inspection.

During these on-site inspections, the Turkish Competition Authority officials examined mobile phones and WhatsApp correspondence through digital forensic tools. The digital forensic tools revealed that certain correspondence was deleted from the mobile phones, and detected the exact timing of these deletions via log records. Accordingly, the Board determined that deleting such data from mobile phones is an act of hindering and rejected the investigated undertakings' following defences: **(i)** the deleted correspondence did not indicate a competition law violation, **(ii)** the deleted correspondence was not related to work (e.g., personal

¹ The Board's **(i)** *ETİ* decision dated 29 April 2021 and numbered 21-24/278-123, **(ii)** *Unmaş* decision dated 20 May 2021 and numbered 21-26/327-152, **(iii)** *Çiçeksepeti* decision dated 27 May 2021 and numbered 27/354-173 and **(iv)** *İGSAŞ* decision dated 12 August 2021 and numbered 21-38/544-265.

correspondence) and **(iii)** the deleted correspondence could be recovered through digital forensic tools.

These Board decisions indicate a very strict approach towards deleting digital data during on-site inspections and clarified that deleting any digital data on personal electronic devices during on-site inspections will be considered as an act of hindering/obstruction of on-site inspections, regardless of the data's content.

3. Report on Financial Technologies in Payment Services

On 9 December 2021, the Turkish Competition Authority published its Report on Financial Technologies in Payment Services (the "**Report**"), which contains an analysis on the competitive implications of the developments in financial technologies regarding payment services and evaluations on the current situation of financial technologies (fintech) in payment services.²

The Report contains various findings on the rather atypical structure of the fintech market regarding payments services, the competitive concerns that may be caused by the incumbent players (i.e., banks) in the market, and the regulatory framework of the relevant market. In this regard, the Report states that while fintech companies depend on banks' infrastructures for their activities, they can also directly provide some of the services provided by banks. Accordingly, the Report concludes that **(i)** there is a vertical relationship between fintech companies and banks in which the banks are suppliers and the fintech companies are purchasers, and **(ii)** fintech companies receive services from banks in the upstream market, while concurrently competing with these banks in the downstream market.

In addition, the Report states that incumbent financial institutions in the market (i.e., banks) may restrict competition through certain unilateral or collective exclusionary conduct, such as the refusal to deal (e.g., exclusion of new players from their infrastructures). The Report also emphasizes the importance of the "data ownership" concept and notes that each bank may be in a dominant position in terms of the provision of customer account information. The Report further discusses whether large-scaled technology and platform companies' (i.e., Techfin) fintech investments that can take advantage of big data in the downstream market would disrupt the competition.

The Report also underlines the necessity of maintaining competition and innovation in the fintech markets as a regulatory concern, besides concerns such as the protection of financial stability.

4. Recent Decisions on Restriction of Sales on E-Marketplaces

On 21 December 2021, the Competition Authority announced a precedential decision on the restriction of dealers' sales on e-commerce platforms. According to its BSH Ev Aletleri Sanayi ve Ticaret Anonim Şirketi ("**BSH**") decision dated 16 December 2021 and numbered 21-61/859-423, the Board decided that BSH's authorized distributor agreements violate Article 4 of the Competition Law, since it includes provisions prohibiting the authorized distributors from selling through e-commerce platforms and imposing various sanctions on the dealers in the event of non-compliance. Accordingly, the Board decided that these provisions do not fall within

the scope of the block exemption and cannot benefit from an individual exemption. This decision demonstrates a strict approach towards the restriction of distributors' sales through e-commerce platforms such as Trendyol and Hepsiburada.

Although the details of the Board's approach will be clarified in the reasoned decision, the decision on BSH is important as it constitutes the first prohibition decision concerning restriction of distributors' sales on e-commerce platforms.

In addition, on 27 September 2021, the Board announced that it launched an investigation against Arçelik, BSH, Samsung and LG and their distributors, based on the allegations that they violated Article 4 of the Competition Law by restricting the internet sales of their authorized distributors and/or engaging in resale price maintenance. Even though the details of this investigation are not public at this stage, it appears that this investigation is also directly related to the prohibition of distributors' sales through e-commerce platforms. However, the extent to which the Board will maintain its current approach regarding the restriction of online sales is yet to be determined.

5. Record Administrative Monetary Fine for FMCG Retailers

With its decision dated 2 October 2021 and numbered 21-53/747-360, the Board imposed a record administrative monetary fine of approximately TRY 2.7 billion on five chain markets and one supplier operating in the food retail market.

The fine was due to retailers' information exchange and price coordination through a mutual FMCG supplier. The decision concluded that the retailers **(i)** coordinated price increases through indirect contacts over a mutual supplier, **(ii)** indirectly shared competitively sensitive information, such as future prices, price change dates, seasonal activities and campaigns and thus **(iii)** formed a *hub and spoke* cartel. The Board also decided to render a formal opinion letter to be sent to all investigated undertakings, which would contain the factors that suppliers and retailers should take into account while exchanging competitively sensitive information about both their direct competitors and other parties with which they have a vertical relationship.

Considering the fined undertakings' public statements on appealing the decision, the Administrative Court's approach on this matter will be determinative concerning the standard of proof with regard to hub and spoke cartels.

6. Settlement Decisions

One of the amendments made to the Competition Law on 24 June 2020 was the introduction of the settlement procedure to be followed in competition-law investigations. After the determination of the procedures and principles regarding the settlement procedure with the Settlement Regulation dated 15 July 2021,³ the first settlement decision was rendered as part of an investigation⁴ regarding the alleged restriction of online sales and resale price maintenance.

Then came the Board's second settlement decision that also concerned resale price maintenance and restriction of online sales.

² Please click the following link to access the relevant announcement:

<https://www.rekabet.gov.tr/tr/Guncel/odeme-hizmetlerindeki-finansal-teknoloji-0d889fa9e658ec11a2190050568595ba>

³ You may access our bulletin including detailed information on the Settlement Regulation via the following link:

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

⁴ The Board's decision dated 5 August 2021 and numbered 21-37/524-258 on Türk Philips Ticaret Anonim Şirketi and four other undertakings.

KOLCUOĞLU DEMİRKAN KOÇAKLI

In its decision dated 30 September 2021 and numbered 21-46/672-336 on Singer Dikiş Makineleri Ticaret Anonim Şirketi ("**Singer**"), the Board determined that Singer interfered with the resale prices offered at physical sales points and in online platforms and, therefore, restricted online sales. Following the settlement negotiations and upon Singer's acceptance of the alleged violation and waiver of its right to appeal, the administrative monetary fine imposed on Singer was reduced by 25%.

In light of the above, considering its practical benefits, undertakings are expected to resort more to the settlement procedure in the upcoming period.

Indeed, by resorting to the settlement procedure, undertakings may avoid lengthy investigation processes and benefit from a twice-used discount of 25% arising from the settlement procedure itself and the early payment provision in Law No. 5326 on Misdemeanors.

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