

Quarterly Competition Law Bulletin – 2023 Second Quarter

July 2023

In this quarter, the Turkish Competition Authority (the “TCA”) published its decision statistics for the first six months of 2023. According to the statistics, the Competition Board (the “Board”) rendered a total of 195 decisions in the first half. Amongst these decisions, 56 relate to competition law infringements, 96 relate to mergers and acquisitions, two relate to negative clearance/exemption, two relate to privatization and 39 are classified under the “other” category. Out of the 56 infringement decisions, 13 resulted in the dismissal of the complaint, eight were concluded with commitments, and 35 were resolved with the settlement procedure. Approximately 80% of the violation decisions relate to the violation of Article 4 of the Law No. 4054 on Protection of Competition (“Competition Law”).

During this period, as part of its strategic plan studies for the 2024-2028 period, the TCA also organized workshops with the participation of company representatives, legal counsels and academics. Accordingly, the TCA held highly productive sessions with the participation of many stakeholders, where they shared their expectations and requests from the TCA for the 2024-2028 period.

One of the most important developments in competition law during this period was the Constitutional Court’s decision regarding the Board’s on-site inspection powers. The Constitutional Court rendered a milestone decision by ruling that on-site inspections conducted by the TCA personnel without a judicial award are unconstitutional.

In this period, the TCA also published several important reasoned decisions which relate to the following matters: (i) the conditions under which the gathering and exchange of strategic information among associations of undertakings may be granted with individual exemption, (ii) the current approach to dealership agreements exceeding five years in the motor fuel sector, (iii) re-evaluation of the commitments previously rendered binding by the Board, (iv) restrictions that undertakings in the small household appliances market impose on their authorized sellers’ e-marketplace sales; and (v) a Phase-II clearance decision regarding an acquisition in the FMCG retail sector. You may find detailed explanations on these decisions below.

1. The Constitutional Court’s Decision on On-Site Inspections Conducted Without a Judicial Award

With its decision published in the Official Gazette dated 20 June 2023, the Constitutional Court ruled that on-site inspections conducted as per Article 15 of the Competition Law without a judicial award violated the right of immunity of residence set out under Article 21/1 of the Turkish Constitution. In this regard, the Constitutional Court determined that the definition of “residence” also includes workplaces, and that on-site inspections are considered within the scope of the “residence” definition. The Constitutional Court’s based its conclusion on the ground that on-site inspections are carried out in areas where the public does not have access, such as undertakings’ office spaces where their management affairs are conducted. Therefore, the Constitutional Court concluded that on-site inspections conducted without a judicial award are unconstitutional.

The Constitutional Court also emphasized the need to amend Article 15 of the Competition Law, which grants the TCA the power to conduct on-site inspections, to resolve this structural problem. Accordingly, the Constitutional Court decided to refer the issue to the Turkish Grand National Assembly.

In addition, the Constitutional Court ruled that the right to fair trial within a reasonable time was violated due to an unreasonably long period between the start date of the preliminary investigation and the finalization of the administrative judicial process, which exceeded nine years.

The decision significantly restricts the scope of TCA’s on-site inspection powers, which were already expanded with legislative changes in June 2020. Nevertheless, the decision’s effects on the TCA’s practice on on-site inspections and ongoing annulment lawsuits before administrative courts remains to be seen.

2. The Limits of Information Exchange within Associations of Undertakings: The TCA's Turkish Ceramics Federation Decision

With its Turkish Ceramics Federation ("SERFED")¹ decision, the Board concluded that gathering and public disclosure of certain commercially sensitive information concerning the association members (such as energy usage data, capacity, production and sales amounts) through an independent market research company may be granted with an individual exemption.

In 2020, the Board had examined another exemption application made by SERFED regarding data sharing.² At that time, the Board rejected SERFED's individual exemption application because the data collected by the association members contained information specific to undertakings and was not historical enough. However, in this recent decision, the TCA referred to an opinion letter of the Federal Trade Commission ("FTC"), and assessed that data sharing within an association of undertaking could benefit from individual exemption under the following conditions: (i) in line with the FTC's threshold, none of the undertaking's data should account for more than 25% of the total shared data, and (ii) data covering a one-year period could only be shared with a three-month lag. In addition, the Board considered the following factors to have a positive impact on its exemption assessment: (i) information is exchanged on a voluntary basis, (ii) information is gathered through an independent research company, and (iii) at least five undertakings are requested to participate to carry out the information exchange.

Considering the Board's previous decisions not granting individual exemption to information exchange schemes of various sector associations, this decision provides further guidance to the associations of undertakings on the conditions that information gathering comply with Competition Law.

3. Exemption to Fuel Dealership Agreement Exceeding Five Years: The Total Decision

In a recently published decision, the Board examined the 10-year long dealership agreement between Güzel Enerji Akaryakıt Anonim Şirketi ("Total") and several dealers regarding a solar power plant ("SPP") investment, the costs of which are covered by Total. Unlike its previous strict approach to not grant individual exemptions to dealership agreements exceeding five years in the fuel sector, the Board decided to grant a seven-year exemption to Total's dealership agreements.³ Accordingly, the Board determined that Total's SPP investments would both reduce dealers' energy costs and bring environmental benefits due to a transition to renewable energy sources. The Board emphasized those environmental benefits (e.g., improvement in carbon footprint) of the agreements and found that sustainability can also be considered as an efficiency gain.

In addition, the Board examined the return period of Total's SPP investment costs and concluded that the envisaged 10-year exclusivity in the agreements was unnecessarily long. Considering that the return on the SPP investment could be achieved even within five years, the Board granted a seven-year exemption for the agreements, taking into account the expected environmental benefits. Therefore, it can be concluded that the Board has a positive approach to similar agreements that support sustainability.

Similarly, in 2019, the Board examined Shell's 12-year long exclusive dealership agreements with 15 dealers regarding LNG station investments and granted individual exemption for the entire agreement duration. The Board's main reasoning was that LNG stations provide increased air quality and environmental benefits and the high investment costs would have a very long return period.

4. Re-evaluation of Commitments: The TCA's Şişecam Decision

The Board had conducted a preliminary investigation against Türkiye Şişe ve Cam Fabrikaları Anonim Şirketi ("Şişecam") concerning the allegations that Şişecam was restricting the activities of undertakings operating in the glass recycling sector. During the preliminary investigation, Şişecam had submitted commitments that were deemed acceptable, and a commitment decision was issued accordingly. However, upon Şişecam's request, the Board evaluated the revision of these commitments and examined Şişecam's new commitment proposals. In this regard, the Board analyzed whether "there was a substantial change in any element forming the basis of the original decision", as set out under Article 43 of Competition Law.

During its assessment, the Board determined that since the adoption of the initial commitment package, (i) the increase in the blending cost used in glass production became more important for glass recycling, (ii) undertakings operating in the recycling market had exited the market and the limited number of new market entrants did not produce ready-to-use broken glass packaging that met the required criteria, (iii) due to the increase in blending costs, there had been an increase in the import quantity of waste glass, (iv) the recycling rate did not increase as expected, resulting in a lower supply of glass packaging waste, and finally, (v) ability to find waste glass for recycling and collection/separation facilities became more challenging. Based on these findings, the Board decided to (i) stretch the scope of the commitments on restricting the waste flat glass and waste glass packaging supply, (ii) limit the commitment to terminate waste glass import to a specific tonnage and (iii) remove the condition to not to purchase more than 35% of ready to use broken glass packaging from a single supplier.

Article 43 of Competition Law, which requires "a substantial change in any element forming the basis of the original decision", allows the Board to re-launch an investigation after accepting the commitments submitted by the parties or ceasing an ongoing investigation. However, in this decision, the Board interpreted Article 43 of Competition Law broadly and did not re-launch an investigation even if these conditions were met. Instead, the Board chose to re-evaluate the revised commitments submitted by Şişecam.

5. Commitments on the Restriction of Internet Sales: BSH and Arçelik Decisions

The Board had previously initiated an investigation against Arçelik Pazarlama Anonim Şirketi ("Arçelik") and BSH Ev Aletleri Sanayi ve Ticaret Anonim Şirketi ("BSH"), both of which operate selective distribution systems, on the grounds that they prohibited their authorized dealers from selling on online marketplaces. The Board rejected the initial commitment package submitted by Arçelik and BSH, but allowed them to revise their commitments. The Board published a reasoned decision stating that it accepted the revised

¹ The Board's decision dated 22 September 2022 and numbered 22-43/638-268

² The Board's decision dated 20 August 2020 and numbered 20-38/526-234

³ The Board's decision dated 1 December 2022 and numbered 22-53/801-329

commitments and consequently concluded the investigation for both companies.⁴

The revised commitments submitted by Arçelik and BSH do not completely prohibit dealers' sales on online marketplaces but introduce certain restrictions for authorized dealers selling through the online channel. Among others, the restrictions approved by the Board are as follows: (i) sales through marketplaces should only be made to end consumers and not include bulk sales or sales to corporations, (ii) the store ratings for sales on marketplaces should be in the top 20% according to marketplace ratings, (iii) authorized dealers' physical sales should at least constitute 85% of their total turnover, (iv) the criteria used for ranking on online marketplaces should be applied equally to each authorized dealer, (v) products sold on online marketplaces should have the same quality and content as offered on the suppliers' website, (vi) out-of-stock products should not be offered for sale, (vii) suppliers should be informed of sales made through the online channel, and (viii) suppliers should be allowed to supervise such sales.

The decision establishes important criteria for internet sales restrictions that can be applied to authorized dealers within the selective distribution system.

CONTACT



Competition Law Counsel
Neyzar Ünübol

nunubol@kolcuoglu.av.tr



Senior Associate
Ali Tunçsav

atuncsav@kolcuoglu.av.tr

⁴ The Board's decision dated 8 September 2022 and numbered 22-41/580-240