KOLCUOĞLU DEMİRKAN KOÇAKLI

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Quarterly Competition Law Bulletin

April 2020

As we leave behind the first quarter of 2020, we are publishing this quarterly bulletin for the first time, where we will summarize the developments in the area of Competition Law in Turkey and highlight recent notable decisions of the Competition Board (the "Board") on a quarterly basis.

The Board could not adopt final decisions between June 2019 and October 2019, due to the lack of decision quorum, but made a rapid start to 2020. After the appointment of Birol Küle as the chairman of the Turkish Competition Authority (the "TCA"), long-awaited oral hearings began to be held consecutively. Consequently, many investigations have been concluded in the first three months of 2020.

In January, the TCA announced that it started to prepare a "Digitalization and Competition Policy Report". The TCA stated that the report's preparation is open to any kind of cooperation and policy/legislative proposals from related parties. The report, which the TCA intends to complete in 2020, aims to determine the TCA's competition policy in digital markets and to evaluate how competition rules will be applied in respect of digital platforms.

In March, the Board postponed two oral hearings to be held in April as part of the measures taken against the COVID-19 outbreak. All applications can still be made and documents can be delivered via the TCA's e-government application.

Featured Final Decision Announcements

- The Board's Artı Marin/Mastervolt decision is the first decision to include an infringement of Article 4 of Law No. 4054 on the Protection of Competition (the "**Competition Law**") through parallel import. Another remarkable aspect of the decision was that the Board adopted the decision as a result of its additional investigation carried out after the 7th Administrative Court of Ankara annulled the Board's "no violation" decision dated 11 May 2016. Upon examining the allegations regarding the prevention of parallel import of Mastervolt branded products in Turkey by Artı Marin Mobil Enerji Sistemleri A.Ş. and Mastervolt International Holding BV, the Board decided that the conduct was an infringement of Article 4 of the Competition Law.
- The Board decided that the economic entity composed of Google Reklamcılık ve Pazarlama Ltd. Şti., Google International LLC, Google LLC, Google Ireland Limited and Alphabet Inc. holds a dominant position in the general search services market and online shopping comparison services market and that Google infringed Article 6 of the Competition Law by placing competitors in a disadvantaged position, leading to disruption of competition in the shopping comparison services market. The Board imposed a fine of approximately TRY 100 million and various obligations on Google to end the infringement and to ensure effective competition in the market.
- BP Petrolleri A.Ş., OPET Petrolcülük A.Ş., Petrol Ofisi A.Ş., Shell & Turcas Petrol A.Ş. and Güzel Enerji Akaryakıt A.Ş. (former Total Oil Türkiye A.Ş.) were investigated on whether their arrangements with dealers regarding motor fuel retail prices infringed Article 4. Upon the investigation, The Board decided that BP, OPET, Petrol Ofisi and Shell infringed Article 4 by engaging in retail price maintenance and imposed a record total fine of TRY 1.5 billion on the undertakings.

Decisions on Infringements, Acquisitions and Exemptions

Google Android Decision and Settled Commitments

Within the scope of its investigation on Google, the Board ruled that **(i)** Google is in a dominant position in the market of "licensable smart mobile operating systems"; **(ii)** the Google search engine is set default at points specified by Mobile Application Distribution Agreements (the **"MADA"**) executed between Google and original device producers; **(iii)** Google Webview is designated as the default and sole constituent for the relevant function in mobile phones; and **(iv)** Google search services are installed exclusively on Android OS regarding revenue sharing agreements, and that in light of the above Google was abusing its dominance in the market for "general internet search services".[1] The Board imposed a fine of TRY 93 million on Google, along with several obligations concerning amendments to agreements executed with device manufacturers who want to use Android OS in devices to be sold in Turkey.

Google submitted its contemplated amendments to fulfill its obligations, but the Board did not consider the amendments sufficient to fulfill Google's obligations. On 7 November 2019, the Board imposed a daily fine that amounts to 0.05% on Google's 2018 Turkey turnover for each day Google continued not complying with the Board decision.[2] Later, in its press statement on 15 December 2019, Google stated that it will not be able to work with manufacturers on new mobile phones with Android OS produced for the Turkish market. Furthermore, in its press release dated 18 December 2019 the TCA underlined that Google's practices have been subject to similar measures before the European Commission and Russia's competition authority and insisted that Google must fully comply with its obligations as it has done in the European Union and Russia.

Currently, the process between Google and the TCA has been concluded and Google informed the TCA on a new compliance package including its new amendment suggestions on 16 December 2019, 25 December 2019 and 6 January 2020 respectively. In this regard, Google stated that it had informed business partners with whom it had already signed a MADA, that it will not approve new devices to be released in the Turkish market in context of the current MADA and Android One Agreement. Furthermore, Google introduced the drafts of the Turkey MADA, Turkey Revenue Sharing Agreement and Google Search Widget Placement Agreement for Turkey, which will be executed between original device manufacturers for devices to be released in Turkey. The Board determined that contents of the declaration and agreement drafts submitted by Google resolved the competition law concerns raised in the Board's decision and fully met the imposed obligations and ended the daily monetary fine as of 6 January 2020.[3] As a result, Google has fulfilled the obligations imposed by the Board, albeit with a delay.

Due to the delay, the Board imposed an administrative fine of 60 days for the period between 7 November 2019 and 6 January 2020, in addition to the administrative fine of TRY 93 million imposed on Google as a result of the investigation.

Turkcell RPM Decision and Changes on the Fines Imposed

In 2011, the Board launched an investigation against Turkey's largest GSM company Turkcell İletişim A.Ş., claiming that it set resale prices and forced dealers to *de facto* exclusivity. At the end of the investigation, the Board decided to impose an administrative fine of TRY 91,942,343 on Turkcell, which is 1.125% of its 2010 turnover, stating that Turkcell abused its dominant position in the GSM services market.[4] In the same decision, the Board did not find an infringement concerning resale price maintenance (RPM). Consequently, the Council of State ruled that Turkcell set the resale prices of top-up cards and digital top up and partially annulled the Board's decision.[5] The Board initiated an additional investigation and contrary to its approach in the first decision, ruled that Turkcell had infringed Article 4 of the Competition Law by determining the resale prices of top-up cards. In this regard, the Board increased the fine, due to Turkcell's repetition of its infringement and once again imposed an administrative fine of 1.125%[6] of Turkcell's 2010 turnover.

On 30 July 2019, Turkcell applied to the TCA within the scope of Article 11 of the Administrative Judicial Procedure Law, requesting the reassessment of the decision. Turkcell stated that **(i)** all actions considered as violations by the Board including RPM are integral as a part of a general strategy, in other words, that they are of the same nature and willing to achieve the same goal, therefore a single fine must be imposed on Turkcell; **(ii)** even if Turkcell accepts that Article 4 and Article 6 of the Competition Law are violated separately, a single fine must be imposed for conduct that occurred during the same period; **(iii)** it is illegal to consider repetition as twice which is accepted as an aggravating reason both in the Board's decision dated 2011 which was partially canceled by the Council of State and in the Board's decision dated 2019 upon the Council of State's cancellation decision; and **(iv)** the compulsion of Turkcell to pay two separate administrative fines constitutes a violation of the principle of *ne bis in idem* (not twice for the same) with the Board's established precedent and court jurisprudence. The Board rejected all other objections of Turkcell and decided that it was not appropriate to increase the fine due to repetition, because an increase in the fine for repetition was already applied in the decision of 2011.[7] Accordingly, the Board decided to cancel the fine increase due to the repetition of resale price maintenance and reduced the amount of administrative fine imposed on Turkcell to 0.75% of its 2010 turnover.

Administrative Court's Annulment of "Sahibinden" Decision

In October 2018, the TCA ruled that Sahibinden Bilgi Teknoloji Pazarlama ve Ticaret A.Ş., **(i)** is in dominant position in the online platform services market for real estate sales/rental services and online platform services market for vehicle sales services and that it **(ii)** abused its dominant position by implementing excessive prices to corporate clients serving in the real estate sales/rental and vehicle rental markets.[8] The Board imposed an administrative fine exceeding TRY 10 million. Sahibinden appealed to the Administrative Court and requested this decision's cancellation.

The 6th Administrative Court of Ankara annulled the Board's decision.[9] It ruled that some of the findings that form the basis of the infringement "do not exceed an observation or a hypothesis", while establishing the criteria of "being data and evidence based" as a standard of proof. The court also stated that the comparison between Sahibinden and other platforms active in different markets are inaccurate, as higher prices do not actually challenge but rather ease market entry and as corporate sellers and individual sellers are from different consumer groups, whether a decrease in corporate sellers' prices (economic implications of two-sided markets) would lead to charging individual users must be also reviewed.

The Board is expected to reevaluate the matter following the evaluations and determinations of the Administrative Court regarding the standard of proof in establishing an infringement for excessive pricing.

[1] The Board's decision dated 19 September 2018 and numbered 18-33/555-273.
[2] The Board's decision dated 7 November 2019 and numbered 19-38/577-245.
[3] The Board's decision dated 9 January 2020 and numbered 20-03/30-13.
[4] The Board's decision dated 6 June 2011 and numbered 11-34/742-230.
[5] 13th Chamber of Council of State's decision dated 16 October 2017 and numbered E. 2011/4560, K. 2017/2573.
[6] The Board's decision dated 10 January 2019 and numbered 19-03/23-10.
[7] The Board's decision dated 12 November 2019 and numbered 19-39/610-263.
[8] The Board's decision dated 1 October 2018 and numbered 18-36/584-285.
[9] 6th Administrative Court of Ankara's decision dated 18 December 2019 and numbered 2019/246 E, 2019/2625 K.

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Preliminary Inquiry regarding the Tender Mechanism in Google Shopping Unit Advertisement Displays

Upon a complaint filed in February 2019, the Board started a preliminary inquiry against Google[10] As part of the preliminary inquiry the Board investigated allegations that **(i)** the tender mechanism for the advertisement displays in the Google Shopping Unit leads to exclusion of some e-commerce companies; **(ii)** if one e-commerce company dominates the Google Shopping Unit advertisement displays, this would deteriorate competition between e-commerce platforms and make it difficult to compete in the market and, depending on the action's duration, some e-commerce companies would be excluded and average auction prices for advertisement display would be excessive; and **(iii)** global e-commerce players can manipulate Google's advertisement algorithm utilizing their market power and dominate online advertisement spaces.

The Board responded to allegations that Google Shopping Unit domain could be monopolized by one e-commerce company, arguing that although Google is in dominant position in the market for general search services and product-based advertising services, during the auctions through Google Shopping Unit, determination of the order of the ads are based one five factors such as bid amount, ad and landing page quality, ad rank thresholds, user's search context and expected impact of ad extensions. Accordingly, prices are not the sole determinant of winning an auction. The Board decided that this auction model in its current form, does not provide a structure that allows Google to discriminate among e-commerce companies. In addition, regarding the claims of the complainants about excessive prices, the Board stated that in the concrete case it is not possible to apply the economic value test because the price formed with these auctions may differ in a matter of seconds and comparison of prices with competing search engines is not possible. The Board also stated that Google is not able to apply excessive prices for advertisement display in the Shopping Unit because the prices are shaped by an auction process which is regulated and executed through algorithms. Based on its findings, the Board rejected the complaints and decided not to initiate a full-fledged investigation against Google.

Acquisition of IGA Akaryakıt Within the Scope of the Istanbul New Airport Project

The TCA granted an unconditional permission for acquisition of IGA Havalimanı Akaryakıt Hizmetleri A.Ş.'s shares through capital increase by a joint venture to be established by Türk Hava Yolları Anonim Ortaklığı, Total Oil Türkiye A.Ş. and Zirve Holding A.Ş.[11]

In its evaluation, the Board determined that **(i)** IGA Akaryakıt is in a dominant position in the jet fuel supply market; **(ii)** THY's dominant position in the Istanbul Airport aviation transport market will be strengthened as a result of the transaction; and **(iii)** the transaction does not create any dominant position or strengthen dominant position in terms of other relevant product markets (such as the fuel supply market, liquid bulk port operating market and dry bulk port management market). While the Board examined the possible effects of dominance on the market's competitive structure, it analyzed the possibility of exclusion of other jet fuel companies from the market. The Board specifically assessed whether the transaction would eliminate other jet fuel companies' opportunity to supply jet fuel to THY (customer foreclosure) and restrict access to the infrastructure or increase the cost of access to infrastructure for other jet fuel companies (input restriction). As a result, the Board stated that THY can direct fuel purchases to any fuel company and that the transaction will not cause any customer foreclosure and IGA Akaryakıt's cost advantage provided by consolidating airport needs will ultimately create a consumer benefit and will not create input foreclosure.

The Board determined that THY's current dominant would be strengthened as a result of the transaction but concluded that the competition will not be significantly restricted, for which reason the Board granted unconditional clearance.

Shell LNG Exemption

On 12 November 2019, the Board granted a 12-year individual exemption to the "LNG Investment and Operation Protocol" to be executed between Shell Petrol A.Ş. and its 15 dealers.[12] An exemption application was filed for the promotion of widespread use of trucks that consume liquefied natural gas (LNG) as an alternative fuel source in Turkey. The Board, taking into account of opinions of the Ministry of Transport and Infrastructure and the Energy Market Regulatory Authority decided that **(i)** as LNG vehicle technology is relatively expensive and does not play an active role in the Turkish market, the introduction of LNG vehicle technology will lead to new developments and improvements in the market; **(ii)** promotion of widespread use of auto-LNG and LNG vehicles will provide fuel economy from which the consumers would benefit indirectly; **(iii)** since Shell's market shares in traditional fuels under different breakdowns are not suitable for market foreclosure, competition will not be distorted in an important part of the relevant market; and **(iv)** given the factors such as serious uncertainties in the auto-LNG supply chain in medium term and long break-even point of Shell's investment to build a non-existent supply-value chain, Shell's agreements will not restrict competition more than necessary. Accordingly, the Board granted an individual exemption to exclusive supply relationship between Shell and its 15 dealers for 12 years.

Exemption Regarding TÜLİD Member Port Operators

The Board granted an individual exemption to the board of directors' decision of Türkiye Liman İşletmecileri Derneği ("**TÜLİD**") regarding the exchange of information between port operators that are members of TÜLİD[13]. The information to be exchanged includes the composition of the number of cargos handled, the number of vessel admissions and employees in ports. The Board determined that the data to be publicly shared by the member undertakings will not be considered as sensitive to competition, because it is retrospective and the amount of cargo handled in the ports in many cost-oriented aspects such as the supply-demand balance will lead to an improvement in related services. In this regard, the Board decided to issue negative clearance for sharing of information on ship acceptance and number of employees. However, since the data regarding handled cargo based on load groups at the ports and some breakdowns such as export-import-cabotage-transit are strategic information, it is not possible to grant negative clearance to these sets of date.

The Board granted an exemption regarding sharing of information on cargo handled for five years, on the condition that the information delay period determined by TÜLİD as 20 days is increased to two months.

Roche Exemption Decision

The application for negative clearance/exemption made by Roche Müstahzarları Sanayi A.Ş. in 2016 was resolved by the end of 2019. In 2016, Roche requested a negative clearance or exemption for working exclusively with a limited number of pharmaceutical warehouses for the distribution of products that it imports to the channel other than distribution to tenders (independent pharmacies and private hospitals). However, the Board rejected Roche's request as the information regarding concrete criteria to determine the warehouses with which Roche will work or at least the identification of the potential warehouses was not provided within the application.[14] Upon the Board's rejection, Roche requested the reevaluation of the file, but the Board rejected the reevaluation request.[15] In 2017, Roche

[10]The Board's decision dated 7 November 2019 and numbered 19-38/575-243.
[11]The Board's decision dated 19 December 2019 and numbered 19-45/769-331.
[12] The Board's decision dated 12 November 2019 and numbered 19-39/601-255.
[13] The Board's decision dated 14 November 2019 and numbered 19-40/655-280.
[14] The Board's decision dated 18 August 2016 and numbered 16-28/476-213.
[15] The Board's decision dated 16 November 2016 and numbered16-39/641-287.

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applied to the TCA for a negative clearance/exemption for decreasing the number of pharmaceutical warehouses to be worked with, to between five and ten.

The Board once again rejected Roche's request for negative clearance/exemption, because limiting the number of exclusive pharmaceutical warehouses to the range of five-ten would result in elimination of competition in a significant part of the pharmaceuticals market.[16] The Board stated that the pharmaceutical warehouse market is highly concentrated and the limited number of pharmaceuticals warehouses that Roche will supply can determine the sales conditions by creating pressure on both pharmacies and small scale producers. The Board also stated that these warehouses can foreclose a significant part of the pharmacies' demand for Roche's products by offering tying and loyalty discounts. The Board also expressed that Roche's agreements with a limited number of warehouses would increase entry barriers because new entrants would not be able to distribute Roche's products.

An interesting aspect of the decision is that unlike the case rapporteurs' opinion that Roche's agreements could receive negative clearance, in other words that these agreements do not contradict the Competition Law, the Board decided that Roche's agreements infringe Article 4 of the Competition Law and cannot be granted an exemption.

Decisions Regarding Procedural Issues

Confidentiality of Attorney-Client Correspondence

Huawei Telekomünikasyon Dış Ticaret L.Ş. requested from the Board the return of a document taken by the TCA officials during an on-site investigation conducted on the grounds of a preliminary inquiry, based on confidentiality of attorney-client correspondence. The Board examined the relevant documents which were submitted in a sealed envelope and decided that the documents could not qualify as attorney-client correspondence[17]. The decision stated that, although the documents are part of an e-mail chain including the independent attorney and the undertaking's in-house legal counsel, the documents only include two e-mails between the in-house counsel and the undertaking's officers and although the independent attorney is mentioned in the carbon copy (cc) part of these two e-mails, the e-mails does not include any statements made by or addressed to the independent attorney. According to the Board's decision, an e-mail correspondence that does not include the statement of or addressed to an independent lawyer cannot benefit from the attorney-client privilege, even if the independent attorney is the e-mail's recipient.

Obstruction of On-Site Inspection

The Board imposed an administrative fine on the Turkish Pharmacists Association (the "**TEB**") with its decision dated 7 November 2019, for obstruction of on-site inspection. The Board imposed an administrative fine for each day starting from the next day of the on-site examination until the TEB's written invitation has entered to the TCA's records, in accordance with Article 17(b) of the Competition Law. The TEB appealed to the 15th Administrative Court of Ankara, requesting the suspension of execution of the Board's decision. The Court decided to suspend the execution of the administrative fine imposed on the TEB. In its decision, the Court recited Article 15 of the Competition Law, which states that the TCA can perform on-site inspection with the decision of the Criminal Judgeship of Peace in case an obstruction of on-site inspection occurs. In the concrete case, the TCA applied to the Criminal Judgeship of Peace requesting a decision to perform on-site inspection at TEB's premises, however the TCA's request was rejected. The Court ruled on that under these circumstances there is no legal ground to impose a daily monetary fine on the TEB in accordance with Article 17(b) of the Competition Law. The TCA's request to lift the decision on the suspension of execution was rejected by the Ankara Regional Administrative Court.

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[16] The Board's decision dated 12 December 2019 and numbered 19-44/732-312.

[17] The Board's decision dated 14 November 2019 and numbered 19-40/670-288.