KOLCUOĞLU DEMİRKAN KOÇAKLI

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# Quarterly Competition Law Bulletin
# 2021 Third Quarter

October 2021

**The third quarter of 2021 has been an active period in terms of the use of alternative resolution methods such as commitment and settlement in the Competition Board's (the "Board") decisions, as well as many other reasoned decisions published by the Board during this period. One of the most significant developments in this quarter was the introduction of the Regulation on the Settlement Procedure Applicable to the Investigations Regarding Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position (the "Settlement Regulation") on 15 July 2021, which determines the procedures and principles regarding the settlement procedure. Following its introduction, the settlement procedure was applied for the first time in the Board's decision dated 5 August 2021 and numbered 21-37/524-258. In addition, the Board also ceased several investigations during this period through the commitment mechanism.**

**Another important development in this quarter was the annulment of several Board decisions concerning resale price maintenance ("RPM"), through which the Board had initially imposed administrative fines. In this regard, administrative court decisions regarding the annulment of the Board's decisions on (i) Türk Henkel Kimya Sanayi ve Ticaret Anonim Şirketi ("Türk Henkel") dated 19 September 2018 and numbered 18-33/556-274 and (ii) OPET Petrolcülük Anonim Şirketi ("Opet") dated 12 March 2020 and numbered 20-14/192-98, contain critical findings on the standard of proof regarding RPM.**

**The Board's decision on (i) Sahibinden Bilgi Teknolojileri Pazarlama ve Ticaret Anonim Şirketi ("Sahibinden") where the Board re-evaluated the allegations of excessive pricing and (ii) Biletix Bilet Dağıtım Basım ve Ticaret Anonim Şirketi ("Biletix") which relates to the allegation of abuse of dominance by imposing excessive additional costs to ticket prices (e.g., service fees, transaction fees, shipping fees) were among the more important decisions published during this period.**

**This bulletin includes further details on the developments specified above.**

## 1. The Settlement Regulation and the Board's First Settlement Decision

One of the most significant amendments made to the Competition Law on 24 June 2020 was the introduction of the settlement procedure. The principles regarding the settlement procedure were determined by the Settlement Regulation, which entered into force on 15 July 2021.[1] The settlement procedure, which has been part of the European Union competition legislation for many years, provides a reduction in administrative fines in return for the investigated undertaking acknowledging the existence and scope of a competition law violation.

Shortly after the introduction of the Settlement Regulation, the first settlement decision of the Board was announced on 9 August 2021. With its decision dated 5 August 2021 and numbered 21-37/524-258, the Board approved the settlement statements submitted by the investigated parties, i.e., Türk Philips Ticaret Anonim Şirketi (**"Türk Philips"**) and four other undertakings and adopted a settlement decision. The investigation was initially launched to determine whether Türk Philips and its authorized sellers violated Article 4 of the Competition Law by restricting internet sales and RPM.

> The applicable legislation only allows for a fine reduction of, at most, 25% in the settlement procedure. However, the reduction amount applied by the Board in the Türk Philips settlement decision was not announced.

[1] 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

## 2. The Board's Recent Commitment Decisions

Following the amendments made to the Competition Law on 24 June 2020 and the introduction of Communiqué No. 2021/2 on the Commitments to Be Submitted in Investigations Regarding Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position, the Board had ceased many investigations by approving commitments submitted by the parties under investigation.[2] In this regard, both the Board and the investigated parties adopted the commitment procedure very quickly. The Board continued to adopt commitment decisions in the third quarter of 2021.

The Board's Yemek Sepeti and Çiçek Sepeti decisions are the most recently published Board decisions that were ceased with commitments.[3]

These decisions are also significant as they are the very first examples of the Board's commitment decisions on digital platforms.

In both decisions, the Board did not approve the first set of commitments submitted by the parties and the commitment mechanism eventually succeeded with a second set of commitments. Since the applicable legislation allows the parties to amend their commitments only once, the decisions also reveal the importance of the Board's discretion to allow the parties to amend their commitments on the efficiency of the commitment process.

## 3. Administrative Court Decisions on RPM

With its decision dated 19 September 2018 and numbered 18-33/556-274, the Board imposed an administrative fine of TRY 6,944,931.02 on Türk Henkel on the grounds that it violated Article 4 of the Competition Law through RPM. This has been a prominent decision since that time and, even though the case handlers' opinions were that the case findings did not lead to a competition law violation, the Board decided that there was sufficient evidence to prove the existence of RPM by Türk Henkel. Following the decision, Türk Henkel filed a lawsuit for annulment, but Türk Henkel's requests were rejected by the Administrative Court and the Ankara Regional Administrative Court.

Upon Türk Henkel's appeal, the 13th Chamber of the Council of State overturned the Ankara Regional Administrative Court's decision on 6 July 2021. The Council of State decided that to establish an indirect RPM, **(i)** the recommended prices should turn into fixed prices within the framework of the *"pressure or encouragement"* criteria set out under the applicable legislation and **(ii)** the Board should have evaluated whether there was coercion regarding RPM. The Council of State made comprehensive assessments on the merits of the violation, determined a high standard of proof regarding the existence of RPM and stated that it was not clear whether the price changes were the result of Türk Henkel's employees' pressure or encouragement. The Council of State concluded that the Board could not provide clear and concrete evidence to prove RPM, on the grounds that the Board did not assess in its decision whether the alleged RPM conduct actually took place or not.

Similarly, with its decision dated 12 March 2020 and numbered 20-14/192-98, the Board had imposed an administrative fine of TRY 433,932,124.60 on Opet on the grounds that it violated Article 4 of the Competition Law through RPM. Upon Opet's annulment of the Board's decision, the 7th Administrative Court of Ankara decided that **(i)** the Board's assessments regarding RPM must be clear and definite without any hesitation to establish that Opet's dealers violated Article 4 of the Competition Law, **(ii)** to reach a conclusion solely based on "suspicion" would be insufficient from a legal perspective, and **(iii)** the Board should have provided concrete evidence and reasoning to justify its suspicion. In this regard, the Court decided to annul the Board's decision on the grounds that the case file does not include any evidence that Opet's dealers interfered with the sales prices or were instructed to do so.

These administrative court decisions both envisage a high standard of proof regarding RPM.

Since the Board does not have an established practice regarding RPM, these administrative decisions are expected to guide the Board's future decisions on resale price maintenance.

## 4. The Board's Sahibinden Decision

With its decision dated 1 October 2018 and numbered 18-36/584-285, the Board had determined that Sahibinden **(i)** is in a dominant position in the online platform services for real estate sales/rental services and online platform services for vehicle sales services and **(ii)** abused its dominant position by applying excessive prices to its corporate customers active in the real estate sales/rental and vehicle rental markets. However, upon Sahibinden's appeal, the 6th Administrative Court of Ankara decided to annul the decision. The administrative court's annulment decision had set a high standard of proof regarding excessive pricing and included very definitive findings on the elements of excessive pricing.[4]

Following the appeal process, the Board re-investigated the case and decided through its decision dated 5 August 2021 and numbered 21-37/540-263 that Sahibinden did not apply excessive prices and, thus, did not violate Article 6 of the Competition Law. While the Board reiterated in its decision that Sahibinden is in a dominant position in the online platform services for providing advertising space for real estate sales/rental services and online platform services for vehicle sales services markets, it concluded that Sahibinden did not apply excessive prices in these markets between 2015 and 2017.

## 5. The Board's Biletix Decision

With its decision dated 20 June 2019 and numbered 19-22/341-M, the Board launched an investigation against Biletix alleging that Biletix abused its dominant position by adding excessive sales costs to ticket prices, such as service fees, transaction fees and shipping fees, as well as executing exclusive agreements with event organizers. The Board had conducted several investigations against Biletix in the past, but did not establish any violation decisions. Similarly, the Board did not establish any violations against Biletix in its recent decision published on 12 August 2021, but obliged Biletix not to execute any exclusive agreements with event organizers.

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[2] For example, the Board's **(i)** Havaalanı Yer Hizmetleri decision dated 5 November 2020 and numbered 20-48/655-287, **(ii)** MNG Kargo decision dated 10 December 2020 and numbered 20-53/746-334, **(iii)** Türk Hava Yolları decision dated 11 March 2021 and numbered 21-13/169-73 and **(iv)** OSEM decision dated 7 January 2021 and numbered 21-01/8-6.

[3] You may access our bulletin including detailed information on these decisions via the following link: https://www.mondaq.com/turkey/antitrust-eu-competition-/1107250/rekabet-kurulu39nun-dijital-platformlara-304li351kin-taahht-kararlari

[4] You may access our bulletin including detailed information on the relevant decision via the following link: https://www.mondaq.com/turkey/antitrust-eu-competition-/896706/rekabet-kurulu39nun-sahibinden39e-ynelik-a351305r305-fiyatlama-karar305-304ptal-edildi

In its decision, the Board defined the relevant product market as "the intermediary services market for the sales of event tickets (excluding football matches) through platforms" and determined that Biletix is dominant in the relevant market by mainly establishing its market power through executing exclusive agreements with event organizers. On the other hand, the Board decided that the additional costs (i.e., service fees, transaction fees and shipping fees) that Biletix demanded from its consumers and organizers **(i)** cannot be considered as "tying" since these fees are charged for a single service at different stages, **(ii)** does not include any concrete evidence or finding as per the cost and profit margin comparison with its competitors' price policies, and **(iii)** cannot be considered under any other exploitative practice categories defined by Article 6 of the Competition Law.

Due to the lack of a clear connection between the extra costs demanded by Biletix and the structure of the market, the Board decided that (i) Biletix's pricing behavior directly affects consumers rather than having an impact on the competitive structure of the market and, thus (ii) the Competition Authority would send an opinion to the Ministry of Trade to take further measures within the scope of Law No. 6502 on the Protection of Consumers and to avoid any damages that may arise due to such pricing policy.

The Board stated that Biletix's exclusive agreements executed with event organizers could not benefit from block exemptions or individual exemptions as per Communiqué No. 2022/2 on the Block Exemption on Vertical Agreements and the relevant provisions of the Competition Law, and decided that Biletix must **(i)** remove/amend the exclusivity provisions in these agreements within a reasonable timeframe and **(ii)** not include any provisions in its agreements executed with event organizers and other parties that could lead to *de facto* exclusivity.

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