

Quarterly Competition Law Bulletin 2020 Second Quarter

July 2020

As we left behind the second quarter of 2020, we are publishing this bulletin which consists of recent competition law developments in Turkey and the Competition Board's (the "Board") notable decisions in this period.

The most significant development in the second quarter is certainly the enactment of the long-awaited Law Amending the Law on Protection of Competition, in June. The substantial amendments, which will make a difference with regard to the implementation of competition law in Turkey, has in a way updated Law No. 4054 on Protection of Competition (the "Competition Law"). With the enactment of the amendment law, the Turkish Competition Authority is now expected to publish communiques setting out the rules on the implementation of *de minimis*, commitment and settlement procedures.

Another significant development is the initiation of two separate investigations in May regarding the COVID-19 pandemic. In its press release in March, the Turkish Competition Authority has signalled surveillance on price extortion following the COVID-19 pandemic. On 7 May 2020, the Competition Authority announced that it has initiated an investigation against 29 undertakings including retail chains and fast-moving consumer goods (FMCG) suppliers. The relevant announcement indicated that the investigation relates to excessive price increases in the retail market following the COVID-19 pandemic. Furthermore, as an interim measure, the Competition Authority obliged the investigated undertakings to periodically notify the Authority with price increases on the food and cleaning products during the entire investigation period. The Competition Authority also announced another investigation initiated against medical mask producers due to price increases up to 600-700 percent, alleging that the competition in the medical mask market is distorted.

Lastly, as the oral hearings were all postponed due to the COVID-19 pandemic, the Board was not able to render final decisions regarding the investigations that were in the oral hearing phase.

1. Price Agreement between Gas Stations in Burdur

With its decision dated 9 January 2020 and numbered 20-03/28-12, the Board decided that gas stations located in Burdur have violated Article 4 of the Competition Law by fixing auto gas, LPG and fuel oil prices. The primary evidence leading to the decision was "Whatsapp" group conversations between the gas stations' employees. Even though some undertakings argued that their employees did not actually participate in these "Whatsapp" group chats, the Board did not accept these defences. The decision sets out that company representatives who were involved in such "Whatsapp" group chats, where competitively sensitive information is exchanged between competitors may only be acquitted either by (i) immediately and clearly establishing his/her stance against these conversations or (ii) notifying the relevant governmental authorities regarding such information exchange. In a previous decision dated 18 April 2011 and numbered 11-24/464-139, the Board had recognized a legal presumption indicating that a company's presence in an anti-competitive meeting will be deemed to violate the Competition Law if the company does not clearly state opposition against the anti-competitive aspects of the meeting. With its recent decision, the Board has broadened such legal presumption in scope.

If involved in a "Whatsapp" group chat together with the employees of competitor undertakings, company representatives should clearly object to any anti-competitive information exchange/correspondence in this chat group in order to avoid competition law liabilities.

Another interesting aspect of this decision is the administrative monetary fines imposed on the investigated undertakings. Even though the decision establishes that these gas stations formed a cartel by exchanging price related information, the Board imposed the lowest possible monetary fine specified under "other violations". Article 5 of the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition and Abuse of Dominant Position (the "Regulation on Fines") differentiates between "cartels" and "other violations" and foresees higher administrative monetary fines for cartels. The Board's reasoning for the determination of the fine is based on the undertakings' low profit margins and their possible exit from the market due to higher fines. Indeed, there are previous decisions where the Board imposed lower monetary fines by considering "cartel" violations as "other violations" specified in the Regulation on Fines. In this decision, the Board did

not hold back from establishing a “cartel” violation, but bended the application of the Regulation on Fines as per the principle of proportionality of punishment.

2. Competition Restriction in the Labour Market

In its preliminary investigation decision dated 2 January 2020 and numbered 20-01/3-2, the Board assessed allegations that container transportation companies located in and around Izmir were fixing drivers’ wages and not allowing drivers to switch between competitor undertakings. This decision is rather interesting in terms of competition law application in the labour market. The Board determined that there were multiple information exchanges between competing undertakings regarding fixing drivers’ wages and preventing driver transfer.

The decision repeats the Board’s *BFit* decision dated 7 February 2019 and numbered 19-06/64-27, where the Board ruled that non-solicitation obligations are contrary to Article 4 of the Competition Law.

By indicating that concerted practices and agreements in the labour market may indirectly affect the market for goods and services, the Board decided that the investigated conduct is a *by object* competition law restriction.

Nonetheless, due to the limited effects of these agreements and reasons of procedural economy, the Board did not initiate an in-depth investigation on these undertakings and only rendered a formal opinion to discontinue such anti-competitive conduct.

3. Exemption Granted to Broadband Internet Infrastructure Sharing

With its decision dated 13 February 2020 and numbered 20-10/110-66, the Board assessed the exemption application regarding the cooperation agreements between Vodafone Net and Superonline. According to these agreements, Vodafone Net and Superonline will offer wholesale broadband access to each other where their infrastructure is available and will mutually provide support services to their subscribers. These agreements, which were granted with an exemption by the Board, will allow Vodafone Net to offer retail broadband internet services in regions where Superonline has an established infrastructure, and vice versa.

The decision states that the agreement is a collaboration with horizontal and vertical effects in the broadband internet services and emphasizes the fact that the competitors will have access to each other's strategic information in the wholesale broadband internet services market. Therefore, the Board determined that the agreement may cause coordination of competitive conduct of the undertakings and thus violates Article 4 of the Competition Law. However, the Board granted an exemption on these agreements until 15 March 2025, since they satisfy all the conditions for an individual exemption specified under Article 5 of the Competition Law.

In its decision, the Board determined that infrastructure sharing between Superonline and Vodafone Net may strengthen the intra-brand competition in the market, increase alternative operators’ market power against the dominant undertaking in the market (*i.e.*, Türk Telekom) and may also expand potential subscribers’ internet operator alternatives.

4. Standard Essentials Patent and FRAND Disputes

As a result of its investigation initiated against Koninklijke Philips NV (Philips), the Board decided that Philips was in a dominant position in the market for digital video broadcasting subtitle technology and abused its dominant position by not licensing its standard essentials patents (SEP) under fair, reasonable and non-discriminatory (FRAND) conditions. The Board did not rule on a competition law violation for the Turkish subsidiary, Türk Philips Ticaret Anonim Şirketi.

The decision is the very first case where the Board assessed compliance of patent licensing conditions with the Competition Law. The Board decided that Philips was abusing its dominant position in the relevant technology market mainly because **(i)** Philips did not apply to an independent third party for determining the license fee before requesting a court injunction against Vestel’s unlicensed use of Philips’ patented technology, **(ii)** the license fee was determined on a non-transparent basis, and **(iii)** licensee’s ability to claim invalidity of the patent was limited and the burden of proof was reserved on the licensee.

On the other hand, the Board did not rule on any competition law violation on Philips’ alleged excessive license fees, which was yet another allegation assessed by the Board within the scope of the investigation.

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