Quarterly Competition Law Bulletin 2020 Third Quarter

October 2020

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

The most significant development in this quarter is certainly the launch of a sector inquiry on e-commerce platforms (*i.e.,* e-marketplaces). On 16 July 2020, the Turkish Competition Authority (the "TCA") announced that e-commerce platforms, which are considered as major players of the online retail channel and the driving force behind the rapid growth of e-commerce in Turkey, are within the scope of the inquiry. The TCA aims to reveal a comprehensive snapshot of the sector's competitive dynamics and determine the steps to be taken to ensure an effective and competitive market structure. To this end, the Board will consult e-marketplace players and end-users for further information and their experience.[1]

During this quarter, the Board could not render any final decision regarding the investigations that were in the oral hearing phase, because all the scheduled oral hearings were postponed due to COVID-19. Recently, the TCA announced that five of these oral hearings will be conducted in November through online channels, upon the investigated undertakings' requests. In this regard, some of the pending investigations are expected to be finalized in the fourth quarter of 2020. On the other hand, the oral hearings concerning the remaining investigations may be further postponed until 2021, unless the investigated undertakings request an online hearing. This may lead to higher administrative fines, as fines are calculated based on undertakings' turnover of the financial year preceding the decision date.

1. Record Monetary Fine Imposed on Motor Fuel Distributors Due to Resale Price Maintenance

The Board launched an investigation against BP Petrolleri Anonim Şirketi (**BP**), Opet Petrolcülük Anonim Şirketi (**Opet**), Petrol Ofisi Anonim Şirketi (**Petrol Ofisi**), Shell & Turcas Petrol Anonim Şirketi (**Shell**) and Güzel Enerji Akaryakıt Anonim Şirketi (**Total**) based on allegations that these undertakings were engaged in resale price maintenance ("**RPM**") through interfering in their dealers' sales prices (*i.e.*, pump price). As a result of the investigation, the Board decided that BP, Opet, Petrol Ofisi and Shell violated Article 4 of Law No. 4054 on Protection of Competition (the **"Competition Law"**). The Board imposed the following monetary fines on the investigated undertakings: **(i)** TRY 213,563,152.66 to BP, **(ii)** TRY 507,129,085.76 to Petrol Ofisi, **(iii)** TRY 348,154,458.54 to Shell and **(iv)** TRY 433,932,124.60 to Opet.

In its decision, the Board analyzed the prices applied between January 2015 and January 2019 in five cities with highest motor fuel and LPG consumption in Turkey. The Board also compared the daily sales prices (*i.e.*, price cap) recommended by the investigated undertakings for each motor fuel and LPG product and daily minimum pump prices (*i.e.*, minimum sales prices) actually applied by the dealers. In this regard, the Board concluded that BP, Petrol Ofisi and Shell violated Article 4 of the Competition Law, on the grounds that **(i)** there are correspondence supporting that these undertakings interfered in the pump prices of the dealers and **(ii)** dealers' pump prices were equal to the recommended prices to a significant extent.

[1] Please click the following link to access our law bulletin regarding the relevant sector inquiry: http://www.kolcuoglu.av.tr/e-bulletin/Turkish_Competition_Authority_Launches_Sector_Inquiry_on_E-Commerce_Platforms.pdf

On the other hand, the Board also established a violation decision against Opet, solely based on the correlation between the pump prices and recommended sales price cap, without any correspondence or document evidencing that Opet interfered in its dealers' sales prices.[2] The Board's conclusion that Opet carried out RPM activities is mainly based on two grounds: **(i)** Opet's dealers' compliance with the recommended prices resembles conduct in the markets where the competition is prevented and **(ii)** there are no economic/rational justification that such behavior of the dealers is not triggered by Opet's incentives/intervention.

The Board's RPM assessment regarding Opet resembles the presumption of "concerted practice" specified under Article 4 that is applicable to the violations on a horizontal level.

Finally, the Board did not establish any violation decision against Total because **(i)** there were no documents indicating that Total determined its dealers' resale prices and **(ii)** Total's dealers' compliance rate with pump prices to their recommended prices were lower.

2. Google removed shopping ads from search results in Turkey following the Board's decision

On 13 February 2020, the Board had found that Google abused its dominant position in the general search services market and restricted the activities of rival CSSs, which later resulted in Google ceasing its shopping ads services in Turkey. In addition to the administrative monetary fine, the decision also imposed an obligation on Google to implement various measures to cease such violation within three months following the receipt of the reasoned decision. If these measures are not fulfilled in due time, Google may face daily administrative fines as per Article 17 of the Competition Law. Currently, the remedies proposed by Google to fulfil its obligation are considered insufficient by the Board and therefore Google has ceased its shopping ads services.

In July 2020, Google announced that it will cease its shopping ad services in Turkey as of 10 August 2020.[3] Google stated that, following the Board's decision regarding Google's shopping ads, Google submitted a series of remedies to the TCA to ensure that equal conditions are offered to "Comparison Shopping Services" (CSSs); however it is uncertain whether the Board will accept the suggested remedies. Further, Google indicated that it removed its shopping ad unit from the search results in Turkey until the issue is resolved. It continues to work with the Authority to find a suitable solution to this matter.

Google and the TCA had a similar disagreement in late 2019, which also related to compliance with the obligations set out in the Board's "Android" decision concerning the Android operating system's license terms. Following the Android decision, Google failed to amend its Mobile Application Distribution Agreements (the **"MADA"**) in due time, as stipulated by the Board. Then, Google had notified its business partners with whom it had already signed a MADA, that it will not approve the release of new devices to the Turkish market after 12 December 2019 under the current context of the MADA. This meant that new devices with the Android operating system will not be released to the Turkish market. Although Google stated that such action was taken to comply with the Board's decision[4], the Board did not find this suitable to fulfil the obligations set out in the decision. In other words, the Board did not accept the suspension of the agreements for new devices to be released in Turkey as an appropriate remedy. As a result, Google submitted a compliance package to the Board on 6 January 2020 and the Board imposed a daily monetary fine on Google for a 60-day period between 6 August 2019 (*i.e.*, expected fulfilment date of the measures) and 6 January 2020 (*i.e.*, submission date of the compliance package).

Similar to the Android decision, Google's failure to fulfil the obligations set out in the Board's "Shopping" decision within the granted three-month period may also result in daily monetary fines. Whether or not Google's action to cease the shopping ads services will impact the duration of the daily monetary fines will be determined by the Board's awaited decision on this matter.

3. Information exchange between Arçelik and Vestel is not an infringement

With its decision dated 2 January 2020 and numbered 20-01/13-5, the Board decided that Arçelik Pazarlama Anonim Şirketi (**Arçelik**) and Vestel Ticaret Anonim Şirketi (**Vestel**) did not violate Article 4 of the Competition Law through exchange of competitively sensitive information.

The investigation was initiated upon Arçelik's leniency application submitted pursuant to Article 4 of the Regulation on Active Cooperation for Detecting Cartels. Despite the information and documents obtained within the scope of the leniency application, the Board rejected the allegations of competitively sensitive information exchange between the investigated undertakings. The Board found that **(i)** Arçelik was not aware of such information exchange between Arçelik and its competitor Vestel, initiated by an Arçelik employee, **(ii)** Arçelik did not shape its future strategies based on the provided information and the expected responses to be provided by Vestel, instead continued to determine its future strategies independently and unilaterally and **(iii)** the market data did not support an anti-competitive agreement or a concerted practice between the two undertakings.

The Board decided not to impose any administrative monetary fine on the investigated undertakings. Its reasoning was that **(i)** such information exchange was independently realized by an Arçelik employee through leaking information to a Vestel employee without Arçelik's knowledge and approval and **(ii)** the relevant information exchange did not involve the parties' "common will", that is a prerequisite in establishing the existence of an anti-competitive agreement or a concerted practice.

4. Approval of the Joint Venture to be Established by Socar and BP

With its decision dated 9 July 2020 and numbered 20-33/426-193, the Board approved the establishment of a joint venture that will operate in the Turkish petrochemical market and be jointly controlled by the State Oil Company of the Azerbaijan Republic (**Socar**) and BP p.l.c. (**BP**). In particular, the decision sets out significant findings regarding the full-functionality of a joint venture, as well as the limits of the commercial relations between a full-functional joint venture and its parent companies.

[2] The compliance rates (correlation) between the real sales prices applied by the dealers and the maximum prices recommended by the investigated undertakings were not disclosed in the decision, due to the commercially sensitive nature of such information.

[3] Please click the following link to access the announcement: https://turkiye.googleblog.com/2020/07/google-alisveris-reklamlari-ile-ilgili29.html

[4] Please click the following link to access the relevant explanations: https://www.rekabet.gov.tr/Karar?kararId=bc454b82-1067-4227-bb8b-e15d56f2880c / para. 9.

Full-functional joint ventures are subject to a mandatory notification in Turkey. For a joint venture to be considered as "full-functional", it must **(i)** have sufficient resources to operate independently in the market, **(ii)** carry out its own sales and purchase activities independently from its parent companies and **(iii)** operate on a lasting basis.

In its decision, the Board concluded that the joint venture to be established between BP and Socar is full-functional even though it will both sell products to and supply products from its parent companies.

The Board's conclusion on full-functionality is based on the grounds that **(i)** the joint venture's sales to its parent companies will correspond to a very small portion of its total production and will in any case remain below the 50% threshold, **(ii)** even though the majority of raw materials required for the joint venture's production will be supplied by its parent companies, all the agreements between the joint venture and its parent companies will be negotiated independently and on an arms-length basis and **(iii)** the joint venture will yield an added value to the raw materials supplied by its parent companies by producing end-products.

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