

## Quarterly Competition Law Bulletin – 2021 First Quarter

April 2021

The first quarter of 2021 has been a dynamic period due to the developments in competition law legislation as well as the reports and decisions published by the Turkish Competition Authority (the "TCA"). Secondary legislation on commitment and "De Minimis" procedures, which were introduced into the Turkish competition law with the amendment of Law No. 4054 on the Protection of Competition (the "Competition Law") on 24 June 2020, entered into force in this period. In addition, the TCA published a regulation on the procedures and principles applicable to the settlement mechanism, for public consultation.

In the first quarter of 2021, the TCA also published a preliminary report regarding the results of its sector inquiry on the fast-moving consumer goods (FMCG) retail sector. The preliminary report concludes that FMCG retailers' market shares and buyer powers increased significantly and this caused a considerable imbalance between the bargaining powers of retailers and suppliers. The report's policy suggestions to resolve these issues include (i) implementing a new regulation to prevent abuse of buyer power and establishing an autonomous administrative authority to enforce this regulation, (ii) prohibiting unfair commercial practices such as long payment terms and unilateral contractual changes and (iii) scrutinizing major FMCG retailers' behaviors.<sup>1</sup>

The TCA's interest towards digital markets did not lose pace in the first quarter. In January 2021, the TCA, which had previously initiated two different sector inquiries, one on e-commerce platforms and the other one on digital markets, announced the initiation of yet another inquiry regarding the "online advertising" sector. The TCA stated that the purpose of this inquiry is to determine behavioral and structural competition problems in the online advertising sector and to offer solutions to these problems.

This bulletin will elaborate on the details of the secondary legislation mentioned above and highlight some of the Competition Board's (the "Board") notable decisions announced in this period.

### Secondary Legislation

#### 1. Communiqué on Commitments

The TCA's Communiqué No. 2021/2 on Commitments to be Submitted in Preliminary and Full-Fledged Investigations Regarding Anti-Competitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position (the "**Communiqué on Commitments**") was published on 16 March 2021 and entered into force on the same day.<sup>2</sup> The commitment mechanism allows for a preliminary or full-fledged investigation conducted as per Articles 4 and 6 of the Competition Law to be concluded without the establishment of a violation, by submitting commitments appropriate to eliminate competition concerns. Some of the significant rules

introduced by the Communiqué on Commitments regarding the commitment procedure are listed below:

- The commitment mechanism will not be applicable for "clear and hardcore" violations. The Communiqué on Commitments defines "clear and hardcore" violations as (i) price fixing, customer/supplier/territory/trade channel allocation, restrictions or quotas on supply, bid-rigging, exchanging competitively sensitive information such as future prices, production or sale volumes between competitors and (ii) determination of the buyer's fixed or minimum sales prices between undertakings that operate at different levels of the production or distribution chain.

<sup>1</sup> Please click the following link to access our law bulletin which includes detailed information on the relevant sector inquiry:  
[https://www.kolcuoglu.av.tr/Uploads/Publication/preliminary\\_sector\\_inquiry\\_report\\_re\\_fmccg\\_retail\\_sector.pdf](https://www.kolcuoglu.av.tr/Uploads/Publication/preliminary_sector_inquiry_report_re_fmccg_retail_sector.pdf)

<sup>2</sup> Please click the following link to access our client alert which includes detailed information on the draft Communiqué on Commitments:  
[https://www.kolcuoglu.av.tr/Uploads/Publication/kdk\\_client\\_alert\\_the\\_competition\\_authority\\_published\\_the\\_draft\\_communique\\_on\\_commitments\\_for\\_public\\_consultation.pdf](https://www.kolcuoglu.av.tr/Uploads/Publication/kdk_client_alert_the_competition_authority_published_the_draft_communique_on_commitments_for_public_consultation.pdf)

- According to the Communiqué on Commitments, investigated undertakings can submit their willingness to propose commitments within three months following the receipt of the investigation notice. However, this time limit will not be applied to the **(i)** preliminary investigations ongoing as of 16 March 2021 (*i.e.*, the effective date of the Communiqué on Commitments) or **(ii)** ongoing investigations in which the three-month term starting from the investigation notice's receipt already passed.
- Upon the request to submit a commitment, the Board will either decide to initiate the commitment discussions or deny the request and follow the regular investigation process. Following the commitment discussions, the Board may decide to approve the submitted commitments, grant undertakings the right to amend commitments only for once, if the commitments are found unsuitable, or cease the commitment process.

Therefore, undertakings only have one opportunity to amend the proposed commitments.

## 2. "De Minimis" Communiqué

Communiqué No. 2021/3 on Agreements, Concerted Practices and Association of Undertakings' Decision That Do Not Significantly Restrict Competition (the "**De Minimis Communiqué**"), which governs the principles and procedures applicable to the "De Minimis" mechanism, was published on 16 March 2021 and entered into force on the same day.<sup>3</sup> The De Minimis Communiqué sets out the market share thresholds for agreements, concerted practices and association of undertakings' decisions which do not significantly impede competition and thus may not be subject to the TCA's investigations.

The De Minimis Communiqué also excludes "clear and hardcore" violations from its scope, meaning that such violations will not benefit from the "De Minimis" exception.

According to the De Minimis Communiqué, agreements between competitors with a combined market share below 10% in any of the affected markets and agreements between non-competitors with market shares each below 15% in any of the affected markets will not significantly impede competition and thus the agreement parties may not be subject to an investigation by the Board.

Finally, Article 6 of the De Minimis Communiqué regulates the Board's discretion to launch an investigation regarding an agreement/ a decision which is within the scope of the "De Minimis" exception. Accordingly, the Board may still launch an investigation regarding an agreement or an association of undertakings' decision if it deems necessary, even if the market share thresholds under the De Minimis Communiqué are not exceeded.

## 3. Draft Settlement Regulation

On 18 March 2021, the TCA published the Draft Regulation on the Settlement Procedure for Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position (the "**Draft Regulation**") for public consultation. The Draft Regulation governs the principles and procedures applicable to the settlement mechanism.

The Regulation on Settlement Procedure for Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and

Abuse of Dominant Position is expected to come into force in the upcoming months.

## Recent TCA Decisions

### 1. Record monetary fine imposed on Unilever

The Board conducted an investigation on whether Unilever violated Articles 4 and 6 of the Competition Law by creating *de facto* exclusivity through preventing its competitors' sales in the ice cream market. Accordingly, the Board imposed an administrative monetary fine of TRY 480 million on Unilever with its decision announced on 22 March 2021 and numbered 21-15/190-80.

In its decision, the Board determined that **(i)** Unilever abused its dominant position in the industrial ice cream market through its rebate schemes and **(ii)** the non-compete obligation in the agreement executed between Unilever and Getir violated Article 4 of the Competition Law.

In addition to the administrative monetary fine, the Board decided to impose certain behavioral remedies regarding the exclusive usage of Unilever's in-point ice cream freezers. Accordingly, if there are only Unilever's ice cream freezers in sales points with a surface area of 100 m<sup>2</sup> or lower, 30% of the freezers' visible storage area must be open to competitors' products.

The Board's reasoned decision is expected to be published in the upcoming months.

### 2. Investigation on Facebook and Interim Measures

With its decision dated 11 January 2021 and numbered 21-02/25-10, the Board launched an investigation against Facebook Inc. and its affiliates ("**Facebook**"), to determine whether Facebook has violated Article 6 of the Competition Law by obliging WhatsApp users to share data with other Facebook entities.

The Board also adopted an interim measure, stating that Facebook's terms regarding the use of WhatsApp user data for other services may have exploitative and exclusionary effects. In its interim measure decision, the Board obliged Facebook to cease the terms allowing the use of WhatsApp user data for other services as of 8 February 2021 and notify its users about the renewed terms, regardless of whether they have accepted the terms allowing the use of WhatsApp user data for other services.

The competition concerns that the tech giant's data usage terms may entail are listed as follows in the decision: **(i)** WhatsApp data being tied to other Facebook entities' products and data, **(ii)** Facebook abusing its power in the market for consumer communication services through obstructing its competitors' operations in the field of online advertising and **(iii)** consumer exploitation by excessive data collection and use of data for other services.

As the investigated conduct relates to an area where competition and personal data protection law coincide, the Personal Data Protection Authority also initiated an investigation on this matter.

### 3. The Acquisition of Marport Not Cleared

On 31 October 2019, the Board had announced that it will conduct a Phase II review regarding the acquisition of Marport's sole control by Terminal Investment Limited Sàrl. According to its decision published on 12 March 2021, the Board did not clear the transaction, stating

<sup>3</sup> Please click the following link to access our client alert which includes detailed information on the draft De Minimis Communiqué : [https://www.kolcuoglu.av.tr/Uploads/Publication/draft\\_de\\_minimis\\_comminique\\_published\\_for\\_public\\_consultation-b6DXm0w4.pdf](https://www.kolcuoglu.av.tr/Uploads/Publication/draft_de_minimis_comminique_published_for_public_consultation-b6DXm0w4.pdf)

that the transaction will significantly impede effective competition in the relevant markets.

In its reasoned decision, the Board ruled that **(i)** the relevant product market is “terminal management for container handling services” and the relevant geographical market is “Northwest Marmara”, **(ii)** the significant impediment to effective competition ( “**SIEC**”) test, as also applied under the EU regulation, concluded that the transaction would lead to significant changes in the market structure and **(iii)** although the competitive concern is relatively low regarding the transition from joint control to sole control, factors such as the

acquirer’s significant market power and the current excess capacity in the market will increase the competitive concerns raised by the concentration.

The transaction is the first unapproved concentration after the introduction of the SIEC test into the Competition Law.

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