

Quarterly Competition Law Bulletin – 2022 First Quarter

April 2022

Significant changes to the secondary competition legislation were introduced in the first quarter of 2022. In this regard, Communiqué No. 2010/4 on Mergers and Acquisitions Subject to the Approval of the Competition Board (the “Communiqué on Mergers and Acquisitions”) and the Regulation on Settlement Procedures to be Applied to Investigations Regarding Anti-Competitive Agreements, Concerted Practice and Decisions and Abuse of Dominant Position (the “Settlement Regulations”) were amended. The Competition Board (the “Board”) initiated a Phase-II review procedure for two acquisitions in this period and, published final decisions where it put forward its approach towards the prohibition of online sales through e-marketplaces, the application of settlement procedures and competition law violations in the labor market.

Amendments to the Secondary Legislation

1. Amendment of the Communiqué on Mergers and Acquisitions

Communiqué No. 2022/2 amending the Communiqué on Mergers and Acquisitions Subject to the Approval of the Competition Board (the “**Amendment Communiqué**”), which was published in the Official Gazette of 4 March 2022, raised the turnover thresholds specified under Article 7 of the Communiqué on Mergers and Acquisitions.¹ As per these amendments, the transaction is subject to a mandatory merger control filing;

- where the transaction parties’ aggregate Turkish turnover exceeds TRY 750 million and at least two of the transaction parties’ Turkish turnover exceeds TRY 250 million each; or
- where the Turkish turnover of the transferred assets or businesses in acquisitions or of any of the parties in mergers exceeds TRY 250 million and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY 3 billion.

The TRY 250 million threshold will not apply for acquisitions of technology companies that operate in the Turkish geographical market, engage in R&D activities, or provide services to users in Turkey.

In addition, the notification form used for merger control filings have also been amended. In this regard, except for mergers and acquisitions that do not lead to any affected markets in Turkey, long-

form filing submissions became mandatory irrespective of the transaction parties’ market shares in the affected markets.

2. Amendment of the Settlement Regulation

The Settlement Regulation,² which entered into force on 15 July 2021, has been revised with the amendment published in the Official Gazette dated 18 March 2022. Accordingly, the provision that prohibits serving the reasoned settlement decision on the settled parties until the adoption of a final decision for all the other undertakings has been repealed. With this amendment, in hybrid settlement cases as such, the reasoned decision could be served on the settled undertakings without having to wait for completion of the investigation for the other parties.

Since the administrative fines become payable only after the Board serves its reasoned decision on the parties, this amendment will result in the earlier payment of the settled parties’ administrative fines.

Competition Law Infringement and Exemption Decisions

1. The Board’s Decision on the Ban of Dealers’ Online Sales

A significant development in this period has been the Board’s long-awaited reasoned decision regarding BSH Ev Aletleri Sanayi ve Ticaret Anonim Şirketi (“**BSH**”). In brief, the Board’s reasoned decision sets out that banning dealers’ sales through online marketplaces (i.e., e-commerce platforms) cannot benefit from a block exemption as per

¹ You may access our client alert including detailed information on the changes made to the Communiqué on Mergers and Acquisitions via the following link: https://www.kolcuoglu.av.tr/Uploads/Publication/new_merger_control_thresholds_pursuant_to_changes_made_to_communique_no_2010_4.pdf

² You may access our bulletin including detailed information on the settlement procedure via the following link: https://www.kolcuoglu.av.tr/Uploads/Publication/settlement_as_a_new_procedure_in_competition_law.pdf

Block Exemption Communiqué No. 2002/2 on Vertical Agreements. The reasoned decision rules that suppliers are not permitted to ban their dealers' sales made through e-commerce platforms. The reasoned decision also states that banning dealers' online sales through e-marketplaces meet none of the conditions set out under Article 5 of Law No. 4054 on the Protection of Competition (the "**Competition Law**") and thus cannot benefit from an individual exemption.³

The decision is significant as the Board adopted a stricter approach than that of the European Union's (EU) on the ban of dealers' online sales, which is based on the European Commission's *Coty* decision and the Draft Guidelines on Vertical Restrictions.

2. First Infringement Decision Regarding Gentlemen's Agreements in the Labor Market

On 2 March 2022, the Turkish Competition Authority announced that several private hospitals and an association of undertaking violated Article 4 of the Competition Law by restricting competition in the labor market and price fixing. According to the decision, the Board imposed a total administrative fine of approximately TRY 58 million on 18 private hospitals and an association of undertaking. The Turkish Competition Authority has not yet published the grounds that led to such administrative fine.

The decision establishes that several private hospitals operating in Samsun and Bursa **(i)** determined prices for private practitioners' operating room usage as well as for certain operations and report approvals, **(ii)** implemented gentlemen's agreements not to solicit doctors from one institution to another and **(iii)** restricted competition in the labor market by determining their employees' salary increase rates. This is the Board's first decision where it ruled that agreements restricting employee transfers and coordinating salaries infringe competition law and imposed administrative fines.

On the other hand, the Board's investigation launched against 32 undertakings, including leading e-commerce platforms and FMCG retailers due to gentlemen's agreements in the labor market, has not yet been concluded.

3. The Board's Reasoned Decision on Chain Markets

The Board's reasoned decision where it imposed a record administrative fine of approximately TRY 2.7 billion on five chain markets and one supplier operating in the FMCG retail sector was published on the Turkish Competition Authority's website.

In summary, the reasoned decision sets out that **(i)** sales prices and price transition dates were coordinated directly between retailers and indirectly through a common supplier, **(ii)** competitively sensitive information, such as future prices, price transition dates, periodic activities and campaigns were exchanged directly between retailers or through common suppliers, **(iii)** the investigated undertakings, through suppliers, interfered with the other undertakings' prices that reduced or did not increase their prices to coordinate prices throughout the market, **(iv)** if the competing prices were not increased to coordinated levels, the coordination between the undertakings was maintained by penalization strategies specific to a product and/or region, **(v)** retailers indirectly aligned their prices by using a common supplier as a "hub" while determining prices; hence, the Board decided that several retailers violated Article 4 of the

Competition Law through cartel-like agreements or concerted practices having the characteristics of a hub-and-spoke arrangement that aimed to determine many of their products' retail sales prices.

Accordingly, the decision states that on a global level, the competition authorities' and the court's decisions on hub-and-spoke arrangements generally relate to the FMCG sector, and there has been an increase in hub-and-spoke arrangements in the FMCG sector in the past few years.

4. Reversal of the Decision on Unilever's Prevention of On-Site Inspection

With its decision dated 7 April 2019 and numbered 19-38/584-250, the Board had decided to impose an administrative fine of approximately TRY 30 million on Unilever for preventing an on-site inspection.⁴ However, in July 2021, the Ankara 6th Administrative Court annulled the Board's decision on the grounds that the on-site inspection had not been prevented/obstructed. The Ankara 6th Administrative Court based its decision on the grounds that **(i)** Unilever had not rejected the on-site inspection request but only stated that it will take a long time to obtain the global head's approval for e-discovery authorization, **(ii)** Unilever obtained the "eDiscovery" search approval on the same day and it was made available to the Competition Authority officials, and **(iii)** the time period between the eDiscovery authorization request and the start of the "eDiscovery" search was reasonable. Subsequently, the Turkish Competition Authority appealed the reversal of the Ankara 6th Administrative Court's decision.

The Ankara Regional Administrative Court, which examined the appeal request, decided to reverse the Ankara 6th Administrative Court's decision as it found that the on-site inspection was prevented for 6 hours and 45 minutes. The main reasons for the decision were that **(i)** it was possible to give permission only for Turkey to access the "eDiscovery" search system and that this request had been directed to Unilever Turkey, and **(ii)** Unilever's reasoning that it had to obtain access permission from managers working abroad is not legally binding.

Within the scope of the decision, the Ankara Regional Administrative Court underlined the importance of the time factor with respect to on-site inspections by referring to the 13th Division of the Council of State's *Eti* decision dated 29 April 2021 and numbered 21-24/278-123 which found that even a 40-minute delay would be sufficient to wipe out the evidence.

Merger and Acquisition Decisions

With its decision dated 17 March 2022 and numbered 22-13/201-M, the Board initiated a Phase-II review regarding Migros Ticaret Anonim Şirketi's acquisition of Aymar Ticaret Limited Şirketi's tenancy rights and fixed assets of its 25 stores located in Trabzon and Giresun. The decision is considered as a reflection of the findings in the Turkish Competition Authority's Preliminary Report on the FMCG Retail Sector Inquiry (the "**Preliminary Report**") of February 2021, which stated that "*mergers and acquisitions in the FMCG sector may be subjected to increased scrutiny.*" The Preliminary Report implied that geographical market definitions could be narrowed, depending on the specific conditions of the case and the level of competitive concerns.

The Board also initiated a Phase-II review regarding Çimko Çimento ve Beton Sanayi ve Ticaret Anonim Şirketi's acquisition of Çimsa

³ You may access our bulletin including detailed information on the relevant decision via the following link:

https://www.kolcuoglu.av.tr/Uploads/Publication/competition_boards_decision_on_the_prohibition_of_sales_through_e-commerce_platforms.pdf

⁴ You may access our bulletin including detailed information on the Board's authority to conduct on-site inspections and the relevant decision via the following link:

<https://www.kolcuoglu.av.tr/Uploads/Publication/kdkbulletincompetitionboardsiteinspectionauthorityandtheunileverdecision.pdf>

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Çimento Sanayi ve Ticaret Anonim Şirketi's ("Çimsa") several factories, facilities and warehouses. Considering the Board's precedents on the cement industry and the investigation initiated in April 2021 against cement companies including Çimsa, it is expected that the Board will continue to closely examine merger and acquisition transactions in the cement industry.

Following the adoption of the SIEC (i.e., significant impediment to effective competition) test with the amendments made to the Competition Law on 24 June 2020, the number of merger and acquisition transactions subjected to a Phase-II review is expected to increase.

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