

Quarterly Competition Law Bulletin – 2022 Third Quarter

October 2022

Following the expiration of three Competition Board (the "Board") members' terms of office in August 2022, the Board had lost its final decision quorum. During this period, the Board could not adopt final decisions on processes such as M&A notifications or (preliminary) investigations and waited for the appointment of new members. The Board resumed its routine practice once new members were appointed on 3 September 2022.

Although the lack of the Board's decision quorum disrupted the final decision processes roughly for a month, the third quarter of 2022 still presented many developments in the competition law area. During this period, the Board (i) announced its decision to apply interim measures on Krea İçerik Hizmetleri ve Prodüksiyon Anonim Şirketi ("Krea"), which operates under the Digiturk brand, (ii) published several reasoned decisions on the hindrance of on-site inspection for different undertakings, (iii) ceased several overdue (preliminary) investigations and (iv) initiated a Phase-II review for a notified acquisition and conditionally approved another with commitments. The Board also rejected the commitments submitted by second-hand vehicle sale platforms, in an investigation launched against them.

1. The Board's Interim Measure Decision on Krea

The Board has been adopting interim measure decisions more frequently during the past couple of years. The Board also rendered an interim measure decision in this period, after investigating the allegation that Krea offers the Turkey Super League and 1st League football matches' exclusive broadcasting and sub-broadcasting rights to other broadcasting organizations in a discriminatory manner.¹ The Board determined that certain broadcasters increased their ratings by broadcasting "news related highlights" and "extensive match highlights" earlier and thus obstructed other broadcasters' activities. As a result, the Board decided to apply an interim measure on Krea on the grounds that serious and irreparable damages may occur until the adoption of the final decision, and obligated Krea not to allow any of these broadcasters to broadcast these highlights before specific periods of time.

This is the third interim measure decision adopted by the Board, following the Facebook and Trendyol decisions.

2. Decisions on the Obstruction of On-Site Inspection:

The Board imposed administrative monetary fines on (i) mineral water producer Kınık Maden Suları Anonim Şirketi, (ii) section

products manufacturer Europen Endüstri İnşaat Sanayi ve Ticaret Anonim Şirketi and (iii) one of Turkey's largest e-marketplaces D-Market Elektronik Hizmetler ve Ticaret Anonim Şirketi ("Hepsiburada"), for obstructing on-site inspections.² In each of these decisions, the Board imposed administrative fines on the grounds that the undertakings' employees deleted e-mail and WhatsApp correspondence after the initiation of the on-site inspection. Also, in another decision regarding Hepsiburada, the Board established that there were no sufficient evidence showing that the on-site inspection was hindered or obstructed, and thus decided not to impose a monetary fine.³

On the other hand, the Board adopted a different approach while assessing whether the on-site inspection conducted in Yeni Mağazacılık Anonim Şirketi ("A101") was obstructed.⁴ The on-site inspection was carried out within the scope of the investigation initiated against five supermarket chains and one of their suppliers, which ended with a record high fine.⁵ In its assessment, the Board determined that three A101 employees deleted the WhatsApp application in their phones, and even though the application was reuploaded and restored, the officials could not find any relevant correspondence. However, the Board decided not to impose an administrative fine on A101 for the obstruction of on-site inspection, based on the grounds that (i) any log records showing that the

¹ The Board's decision dated 29 September 2022 and numbered 22-44/652-281

² The Board's decisions (i) dated 3 March 2022 and numbered 22-11/161-65, (ii) dated 23 September 2021 and numbered 21-44/645-322 and (iii) dated 13 January 2022 and numbered 22-03/35-16

³ The Board's decision dated 7 October 2021 and numbered 21-48/678-338

⁴ The Board's decision dated 23 June 2022 and numbered 22-28/464-187

⁵ You may access our bulletin including detailed information on the Board's reasoned decision through the following link:

https://www.kolcuoglu.av.tr/Uploads/Publication/quarterly_competition_law_bulletin_2021_first_quarter.pdf

WhatsApp application was deleted could not be obtained and **(ii)** whether this data was deleted before or during the on-site inspection could not be conclusively determined.

Two Board members voted against the decision stating that according to the established case-law, the inability to access the log records does not constitute evidence that the correspondences were not deleted. They asserted that the findings were sufficient to conclude that the on-site inspection was obstructed.

3. Investigation in the New and Second-hand Vehicle Sales Market

The Board did not impose an administrative fine on distributors and fleet rental companies engaging in new and second-hand vehicle sales in its investigation on whether they violated Law No. 4054 on the Protection of Competition (the "**Competition Law**").⁶ The Board particularly examined the allegations that competitors exchanged competitively sensitive information. The Board's analysis provides guidance on the legitimate information gathering methods in the sector and avoiding competitively sensitive information exchange between competitors. In this regard, the Board decided that information obtained through legitimate methods, such as secret shopping and market research, cannot be considered within the scope of competitively sensitive information exchange. On the other hand, the Board concluded that the indirect information exchanged between fleet rental companies about the second-hand vehicle market did not involve any competitively sensitive content, since the relevant information only consisted of retrospective, publicly accessible and generic market information.

4. Preliminary Investigation on Several Banks and Financial Institutions

About three years ago, the Board had launched a preliminary investigation against 27 banks and financial institutions in Turkey, on whether they have violated the Competition Law while conducting deposit, credit, foreign currency, bill of exchange, bond, stock and brokerage activities. In its recently published decision, the Board decided not to launch an investigation on these undertakings, based on the grounds that the exchanged information cannot lead to any cooperation and thus cannot be considered as competitively sensitive.⁷ The Board concluded that the exchanged information, such as data concerning bill of exchange, credit risk weights, stock details, bonds, transaction volume, etc., **(i)** only consist of retrospective data that does not enable the recipient to make any predictions, **(ii)** does not contain any price or quantity information and **(iii)** can be obtained through publicly available sources.

5. Investigation Against Second-hand Vehicle Sales Platforms: Commitments About Negative Matching Agreements Rejected

On 8 July 2022, the Board initiated an investigation upon the allegation that second-hand vehicle sales platforms violated Article 4 of the Competition Law by restricting online search results through negative matching practices. Subsequently, the press reported that some of the second-hand vehicle sales platforms' commitments submitted during the investigation were rejected, on the grounds that negative matching agreements regarding digital advertising are

considered as hardcore restraints. Although the decision has not been published yet, by rejecting the commitments, the Board demonstrated that it maintains its strict approach towards negative matching agreements adopted in its Modanisa decision.⁸

In the Modanisa decision, the Board had determined that agreements between competitors in relation to establishing their brand names and certain similar words as negative keywords can lead to anticompetitive effects similar to a customer/market allocation agreement.

6. Acquisitions Scrutinized by the Board

The establishment of a joint venture between Dalsan Alçı Sanayi ve Ticaret Anonim Şirketi and Saint Gobain Rigips Alçı Sanayi ve Ticaret Anonim Şirketi, two undertakings operating in the plaster manufacturing sector, was notified to the Competition Authority on 1 June 2022. On 27 September 2022, the Board announced that it initiated a Phase-II review regarding the transaction.

On the other hand, the Board recently approved the indirect acquisition of Ferro Corporation's sole control, a technological performance tools manufacturer, by American Securities LLC.⁹ The Board concluded that the remedies submitted to and accepted by the European Commission (the "**Commission**") equalized the horizontal overlaps in the porcelain enamel coating and domestic appliances' glass coating markets, which are defined as the affected markets in Turkey. Therefore, the Board ruled that these remedies would eliminate the competitive concerns arising from the transaction. The Board did not launch a Phase-II investigation and cleared the acquisition with the commitments submitted to the Commission.

During the last few years, the Board's established practice regarding multijurisdictional acquisitions has been to wait for the Commission's final decision and adopt the same remedies as accepted by the Commission. The Board's reasoned decision regarding the approval of this transaction is also in line with this approach.

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⁶ The Board's decision dated 3 March 2022 and numbered 22-11/170-69

⁷ The Board's decision dated 26 August 2021 and numbered 21-40/576-279

⁸ The Board's decision dated 25 November 2021 and numbered 21-57/789-389

⁹ The Board's decision dated 24 February 2022 and numbered 22-10/144-59