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One of the most significant developments in this period was the long-awaited Final Report on E-Commerce Platforms Sector Inquiry's (the "Final Report") publication by the Turkish Competition Authority (the "TCA") on 14 April 2022.

The Final Report reiterated the TCA's main competition concerns in its Preliminary Sector Inquiry Report on E-Commerce Platforms and revised the policy recommendations for these concerns. The TCA's policy recommendations signal the amendment of the secondary legislation targeting largest e-commerce platforms. Meanwhile, the Law on the Amendment of the Law on the Regulation of Electronic Commerce, which the Ministry of Commerce has been working on for a long time was finally published on 7 July 2022. It includes certain provisions bringing solutions to the problems identified by the TCA.[1]

Another notable development was the amendment 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"). According to the amendment which entered into force on 15 June 2022, income which are not accounted under undertakings' net turnover will also be considered when calculating their annual gross income. Accordingly, the scope of the "annual gross income", which constitutes the basis for the determination of monetary fines as per the Regulation on Fines, has been expanded.

In addition to the above, during the second quarter of 2022, the Competition Board (the "Board") and the administrative courts published many significant precedents which guide competition law practice. You may find the details of these below.

The Board Decisions

1. Digital Advertising Agreements Between Competitors: Sefamerve/Modanisa Decision

On 25 November 2021, the Board concluded on the exemption request for the digital advertising cooperation agreement between two online retailers, Modanisa Elektronik Mağazacılık ve Ticaret Anonim Şirketi ("**Modanisa**") and EST Marjinal Medikal Tanıtım ve İletişim Sanayi ve Ticaret Limited Şirketi ("**Sefamerve**").[2] Under the agreement, Sefamerve and Modanisa reciprocally agreed to establish their brands names and words relating to their brand names (i.e. "nisa" and "sefa") as negative keywords on search engines and social media platforms. The parties also agreed on not bidding on each other's brands in digital advertising by using keywords related to their brand names. As a result, Modanisa and Sefamerve could not use these expressions as key words on digital advertising (i.e., non-brand bidding agreement), and ads which used these as keywords are prevented from appearing in search results (i.e., negative matching agreement).

The decision demonstrates the first example of the Board's approach towards competition law implications of search engine advertising and negative matching agreements between competitors. In its decision, the Board determined that narrow non-brand bidding obligations not to target advertisers' registered brand names can be considered within the scope of "brand protection" and could benefit from an individual exemption. On the other hand, the Board decided that wide non-brand bidding obligations (obligations involving not bidding on keywords which are not registered brand names) and negative matching obligations exceed the limits of "brand protection". The Board ruled that the agreement can lead to a similar negative effect as customer/market allocation agreements and infringes Article 4 of Law No 4054 on the Protection of Competition (the "**Competition Law**"). According to the Board, wide non-brand bidding and negative matching agreements both restrict competition more than necessary, reduce consumers' choice, may lead to

[1] You may access our bulletin including detailed information on the Law on the Amendment of the Law on the Regulation of Electronic Commerce via the following link: https://www.kolcuoglu.av.tr/Uploads/Publication/amendments_to_the_law_on_the_regulation_of_e-commerce.pdf

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

increased prices and lower product/service quality and thus, cannot benefit from an individual exemption.

The Board concluded that wide non-bidding obligation regarding keywords that were not registered brands (i.e. "nisa" and "sefa") and negative matching obligations must be removed from the agreement to benefit from individual exemption.

The decision clearly sets out the limits of agreements between competitors regarding digital advertising in terms of competition law and the conditions under which this type of agreements can benefit from exemption.

2. The Board's First Decision on Data Portability: Nadirkitap Decision

The Board announced its final decision on the investigation launched against Nadirkitap Bilişim ve Reklamcılık Anonim Şirketi ("**Nadirkitap**"), an online second-hand book sales platform. The investigation was launched based on the allegations that Nadirkitap obstructed its rivals' activities by not providing data to sellers who want to market their products via rival intermediary service providers.[3] In its decision, the Board considered that **(i)** second-hand books and new books are not substitutes, **(ii)** online second-hand book sales and brick and mortar second-hand book sales are not substitutes, **(iii)** marketplaces and other online retailers are not substitutes and **(iv)** platforms that only sell books and platforms that sell various products are substitutes. Accordingly, the Board decided that Nadirkitap is holding a dominant position in the "intermediary services in the online sales of second-hand books" market.

The Board further ruled that **(i)** restricting sellers' access to data regarding their books' inventories uploaded to the Nadirkitap platform and **(ii)** limiting portability of such data "without any objective justification" constitutes an abuse of dominance according to Article 6 of the Competition Law. In addition to imposing an administrative fine, the Board imposed an obligation on Nadirkitap to provide the relevant data to the requesting sellers.

The Board's Nadirkitap decision is the first to consider the prevention of data portability on digital platforms as a violation of Article 6 of the Competition Law.

The decision infers that even small-size digital platforms which cater a very restricted consumer base and operate in niche markets may be considered as a dominant undertaking, through a narrow market definition.

3. The Joint Application of Leniency and Settlement Fine Reductions

The Board imposed administrative fines on two natural mineral water producers, Beypazarı İçecek Pazarlama Dağıtım Ambalaj Turizm Petrol İnşaat Sanayi ve Ticaret Anonim Şirketi ("**Beypazarı**") and Kınık Maden Suları Anonim Şirketi ("**Kınık**"), for exchanging future price information.[4] The Board accepted both parties' settlement requests and leniency applications and reduced the administrative fines imposed on both undertakings.

According to the Regulation on Active Cooperation for Detecting Cartels (the "**Leniency Regulation**") Kınık, the first leniency applicant, got a 30% fine reduction and Beypazarı, the second applicant, got a 30% fine reduction. In addition to the leniency fine reductions, the Board further reduced the administrative fines imposed on both parties by 25%, as per the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position the ("**Settlement Regulation**")[5].

While the Board has discretion to apply a reduction between 10% and 25% under the Settlement Regulation, the Board reduced the fine by the highest rate.

By adding up the leniency and settlement reductions, the administrative fines imposed on Kınık and Beypazarı were respectively reduced by 60% and 55% in total. Accordingly, the decision clarifies how administrative fines will be calculated in cases where leniency and settlement procedures are applied together.

4. Dealership Agreements Restricting Online Sales: Solgar Vitamin

The Board rejected to grant a negative clearance/exemption to the dealership agreements to be concluded between Solgar Vitamin ve Sağlık Ürünleri Sanayi ve Ticaret Anonim Şirketi ("**Solgar**"), 12 pharmaceutical warehouses and approximately 25,000 pharmacies.[6] The agreement set out the distribution of Solgar and Navita branded food supplement products through pharmaceutical warehouses and pharmacies and limited sales to final consumers through channels other than pharmacies. Accordingly, the agreement banned sales made through e-commerce platforms, retail chains and other retailers.

Solgar argued that the agreement would improve product tracking and prevent sale of counterfeit or unlicensed products. The Board concluded that consumers would not benefit from these restrictions based on the grounds that the prohibition of online sales will **(i)** cease product supply through different channels while limiting easy access to products without any time or place restrictions, **(ii)** reduce product range and variety and **(iii)** have a negative effect on prices. The Board concluded that the prohibition of sales through the online channel does not create any new development or economic or technical improvement in these products' production and distribution.

The Board indicated that the prohibition of sales through channels other than pharmacies is not a proportionate measure and restricts competition more than necessary to fight counterfeit or unlicensed products. The Board further noted that other food supplement sellers operating in the e-commerce channel take less restrictive measures in relation to counterfeit product sales. The Board indicated that the Ministry of Agriculture and Forestry and -in certain cases– the Ministry of Health conducts inspections in relation to food supplements and recalls the unlicensed products from the market. To conclude, the Board decided that the agreements infringe Article 4 of the Competition Law and did not grant an individual exemption.

Similar to the BSH decision, the Solgar decision demonstrates the Board's strict approach towards online sale bans.

[3] You may access our bulletin including detailed information on the Board's decision on Nadirkitap via the following link: https://www.kolcuoglu.av.tr/Uploads/Publication/tca_s_first_decision_on_data_portability.pdf
[4] The Board's decision dated 24 February 2021 and numbered 22-10/140-M
[5] 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
[6] The Board's decision dated 9 September 2021 and numbered 21-42/611-298

Administrative Court's Annulment Decisions

1. Hindrance of On-Site Inspection: Sahibinden Decision

In May 2021, upon the deletion of certain Whatsapp correspondence during an on-site inspection, the Board imposed an administrative fine on Sahibinden Bilgi Teknolojileri Pazarlama ve Ticaret Anonim Şirketi ("**Sahibinden**") on the ground that it hindered the on-site inspection.[7] Sahibinden then requested the decision's annulment and the stay of execution.

The Ankara 2nd Administrative Court decided to stay the execution of the TCA decision on the grounds that **(i)** at the beginning of the on-site inspection Sahibinden warned its employees via e-mail not to delete any data during the on-site inspection, **(ii)** the TCA was able to access the deleted correspondence on other employees' phones, **(iii)** the phone on which the correspondence was deleted is the employee's personal mobile device and **(iv)** the deleted correspondence did not include any business related matters. Upon the TCA's appeal of the Ankara 2nd Administrative Court's decision, the Ankara Regional Administrative Court upheld the lower court's decision. The decision is important since the number of undertakings fined due to hindrance of on-site inspection is rising in the recent years.

The above-mentioned criteria established by the Ankara 2nd Administrative Court departs from the Board's approach set out in a previous decision where it expressed that "deleted correspondence is assumed to contain competitive elements regardless of their content".

2. Partial Annulment of Interim Measure: Trendyol Decision

In September 2021, the Board had announced[8] its decision to apply interim measures on DSM Grup Danışmanlık İletişim ve Satış Ticaret Anonim Şirketi ("**Trendyol**"), one of the largest e-commerce platforms in Turkey, on the grounds that Trendyol **(i)** interfered with the platform algorithm to provide certain advantages to its own products, **(ii)** used sellers' data to favor its retail activity and **(iii)** discriminated between the sellers in its marketplace. The interim measures on Trendyol included **(i)** ceasing practices that will provide itself an advantage over its competitors through algorithms, coding and other similar practices, **(ii)** ceasing sharing and using data which are obtained from its marketplace activities, **(iii)** ceasing all practices that will lead to discrimination between the sellers in its marketplace, including interventions carried out through algorithms, coding and similar practices, **(iv)** taking all technical, administrative and organizational measures to enable these interim measures' monitoring and **(iv)** storing parametrical and structural changes made through algorithms, source codes of software and user access logs, user authorization logs and administrator supervision logs for a term of eight years.[9]

Upon the appeal, with its decision dated 25 May 2022, the Ankara 9th Administrative Court partially annulled the interim measure decision. The Court annulled the interim measure requiring Trendyol to cease all practices that will lead to discrimination between the sellers in its marketplace on the grounds that **(i)** the Board did not assess whether the sellers are equal and that there are no sufficient information/documentation showing that they are, **(ii)** there may be different practices for sellers which are in different status and **(iii)** there is no final decision stating that Trendyol has committed discrimination and that this practice is an abuse of a dominant position.

In addition, the Court partially annulled the interim measure imposing an obligation on Trendyol to store the parametrical and structural changes made through algorithms, source codes of software and user access logs, user authorization logs and administrator supervision logs for a term of eight years. The Court indicated that although there is no legislative provision regarding the interim measures' validity period, the interim measure decision can only be valid from the date of the Board's interim measure decision until the date of the final decision. Consequently, the Court annulled this interim measure for the period corresponding to the dates after the final decision's adoption.

The Board's interim measure decision raised concerns since an eight year-long obligation is not proportionate and that it also covers the period after the adoption of a final decision. As such, the Ankara 9th Administrative Court's decision created a precedent for interim measures' validity period.

3. Selective Distribution Systems in Pharmaceutical Sector: Johnson & Johnson Decision

The Board had rejected the exemption request for the "Pharmaceutical Warehouse Sales Agreement" regarding the establishment of a selective distribution system between Johnson and Johnson Sıhhi Malzeme Sanayi ve Ticaret Limited Şirketi ("**JJ**") and pharmaceutical warehouses for the distribution of some of JJ's products.[10] JJ argued that the main purpose of the selective distribution system where the authorized warehouses could not sell the drugs to unauthorized warehouses, is to prevent the relevant drugs' sales through parallel exports and to track the drugs sold abroad by only working with a limited number of pharmaceutical warehouses. Even though the applicable law states that a selective distribution system may benefit from a block exemption if the relevant undertaking's market share is below 40%, the Board had examined whether the product quality necessitates the establishment of a selective distribution system. Accordingly, the Board had concluded that **(i)** the products subject to the agreement are not exceptional as there are many products having the same qualities, **(ii)** the selective distribution system is not suitable for the human medicine sector, **(iii)** the restriction under the agreement does not create any efficiency or improvement and **(iv)** the agreement imposes a restriction that is more than necessary on resellers.

With its decision dated 27 April 2022, the Ankara 13th Administrative Court annulled the Board's decision. In brief, the Court considered that **(i)** the agreement aims to prevent the parallel export and this is confirmed by the fact that the drugs' departure abroad cannot be tracked with barcodes, **(ii)** the drugs constitute only four of the 37 pharmaceutical products distributed by JJ and **(iii)** the relevant products' market share are below 40% (even below the new 30% market share threshold introduced with the latest amendment). The Ankara 13th Administrative Court also emphasized on the fact that the Board can always withdraw the exemption if the agreement is no longer capable of fulfilling the exemption conditions. For these reasons, the Court concluded that the Board's decision is unlawful.

[7] The Board's decision dated 27 May 2021 and numbered 21-27/354-174
[8] The Board's decision dated 30 September 2021 and numbered 21-34/452-227
[9] You may access our bulletin including detailed information on the Board's interim measure decision on Trendyol via the following link: https://www.kolcuoglu.av.tr/Uploads/Publication/competition_board_s_interim_measure_decision_on_trendyol.pdf
[10] The Board's decision dated 3 September 2020 and numbered 20-40/553-249

Ankara 13th Administrative Court's decision increases predictability on the selective distribution systems' applicability in the pharmaceutical sector.

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