The Output®

QUARTERLY BULLETIN

4th Quarter 2023

20 Years Dedicated to Competition

ACTECON

Reactivating Cooperation in Detecting Cartels

The CJEU Has a Say on Sports Governance

Absolute Online Sale Bans: Rolex Fined in France

Welcoming the New EU Data Act

New Regulation on Electric Vehicle Imports

Competition & Data Protection: More Cooperation and Information Sharing on the Way

Lesson Learned from the H&M Case

Fevzi Toksoy, PhD
Managing Partner

Bahadır Balkı, LL.M.
Managing Partner

Dear reader,

Among the most notable developments of the fourth quarter of 2023, we may name the adoption of the revised leniency regulation in Türkiye in December 2023, and the cooperation and information sharing protocol between the Turkish Competition Authority ("TCA") and the Data Protection Authority. The leniency regulation brings certain significant amendments to the leniency policy, reactivates cooperation with the TCA and aligns it more with the European Union ("EU") rules. As for the cooperation and information sharing protocol, it aims to ensure an active and effective regulatory environment, which is vital nowadays considering that processing of personal data increasingly by big data technologies may raise significant concerns in terms of competition and protection of personal data.

We also have witnessed further practical application of the technology undertaking exception in Turkey with several TCA clearances granted to such transactions involving technology undertakings that (i) are active, (ii) have R&D activities in the Turkish geographic market, or (iii) provide services to customers in Turkey.

There have been several investigations concluded with the settlement procedure. The trend in favor of the settlement procedure, particularly in relation to vertical restrictions, continues to grow. The encouraging factor here is of course a 25% settlement discount on the fine the undertakings concerned may get. You may see more analysis of the settlement procedure (particularly in the Resale Price Maintenance ("RPM") case in the small household appliances sector) in our in the focus section. Here the fine was reduced by the maximum rate showing that the applicability and popularity of the settlement procedure is on the rise.

As for the developments in other jurisdictions that have occupied most of the headlines in the fourth quarter of 2023 are the Court of Justice of the European Union ("CJEU") three important rulings that may have a significant impact on the sports governance and application of competition law to sports, as well as abuse of dominance rules in general, and the significant fine in France for the absolute online sale bans in the luxury sector. There have also been procedural developments in relation to the Digital Markets Act ("DMA").

As always, enjoy your reading and many thanks for staying with us.

Sincerely,
ACTECON Team

ISSN 2687-3702

Published by

Çamlıca Köşkü Tekkeci Sk.
No:3-5 Arnavutköy Beşiktaş
34345 Tel: 90 212 211 50 11

Editor in Chief
Mahmut Reşat Eraksoy

Editor
Hanna Stakheyeva

Type of Publication
Periodical

Graphic Design
BARAS MEDYA
barasmedya.com
Tel: +90 212 801 72 18

In this issue:

Reactivating Cooperation in Detecting Cartels

As of 16 December 2023, the Regulation on Active Cooperation in Detecting Cartels ("Leniency Regulation") has been in force in Türkiye. The Leniency Regulation brings certain significant amendments to the leniency policy within the country. Among others, it introduces:

• a concept of "cartel facilitator" and makes it clear that unconventional cartels such as hub-and-spoke cartels can also benefit from the leniency,
• a requirement to submit documents with "significant added value",
• the possibility to submit a leniency application and benefit from it for non-cartel violations, and
• certain time restrictions, such as a three-month deadline for applicant(s) to apply for leniency.

The Leniency Regulation also adjusts minimum and maximum discount ranges for the administrative fines and obliges the applicant(s) to provide a written and/or oral statement from the managers and employees. Furthermore, the undertakings whose leniency applications the TCA does not accept are provided with a guarantee that the information and documents submitted will not be used in the investigation file.

The changes harmonize Türkiye's competition law with the EU rules and are expected to encourage the submission of more leniency applications and contribute to cartel detection.

Investigating Long-term Exclusivity Agreements in the Online Audiobook Streaming Services Market

The investigation into Storytel Turkey Yayıncılık Hizmetleri A.Ş. ("Storytel") was concluded with a commitment decision on 14 December 2023. The investigation was initiated into Storytel for allegedly violating Articles 4 and 6 of Law No. 4054 on the Protection of Competition ("Turkish Competition Law") by preventing competitors from entering and growing in the online audiobook streaming services market through long-term exclusivity agreements with publishers and authors. Storytel submitted commitments to address the TCA's anti-competitive concerns.

Pursuant to the commitments, Storytel agrees that existing Narration License Agreements signed with publishers/rights holders will be amended so as not to grant Storytel an exclusive right to produce the audiobook format of a particular book. In addition, Storytel will not be granted exclusivity/full license over content distributed through Content Distribution Agreements. Lastly, Narration Agreements will not include any obligations on Narrators to narrate exclusively for Storytel.

The Board accepted the commitments in the final package submitted by Storytel on the grounds that they could eliminate the competitive issues identified within the framework of the file caused by Storytel's conduct and decided to conclude the investigation by rendering the final commitments binding for Storytel.

"Technology Undertaking" Exception in Action: More Clearances Granted

On 7 November 2023 two new reasoned decisions were published on the TCA's website, both in the technology section. The first was a clearance decision for the acquisition of NuVasive Inc., a medical device company focused on developing, manufacturing, selling, and providing procedural solutions for spine surgery, by Globus Medical Inc. The second was a clearance decision for the acquisition of PHOTOMATH Inc., an online homework and study-help tools provider, by Google LLC (28 April 2023, 23-19/362-124 and 23-19/354-121).

The notifications were made pursuant to the "technology undertaking" rule of the TCA introduced in 2022, which provides significantly lower thresholds for technology undertakings that (i) are active, (ii) have R&D activities in the Turkish geographic market, or (iii) provide services to customers in Turkey. Technology undertakings are defined as undertakings active in the areas of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals, and health technologies.

Upon the notification of the acquisition of the sole control of NuVasive by Globus Medical Inc., the TCA stated that NuVasive operates in the health technologies sector. It provides spinal surgery solutions, including surgical access instruments, spinal implants, fixation systems, biological products and facilitating technologies, as well as imaging, navigation, and products used during surgery, and operates in the health technologies sector. NuVasice can be considered as a technology undertaking within the scope of the second paragraph of Article 7 of Communiqué No. 2010/4.

Regarding the acquisition of the sole control of PHOTOMATH, a provider of 'online homework and study help,' the TCA similarly decided that PHOTOMATH's activities remain within the scope of the technology undertaking rule. The Board decided to authorize both transactions on the grounds that they would not reduce effective competition significantly in any goods or services market in the whole or part of the country within the scope of Article 7 of Law No. 4054.

Check It Twice: Fines for Providing False and Misleading Information

On 6 October 2023 the TCA published its reasoned decision imposing an administrative monetary fine on Farmasi Enternasyonal Ticaret A.Ş. ("Farmasi"), a company active in the sale of personal care and cosmetic products, on the grounds that the information and documents submitted by Farmasi in response to the TCA's information requests constituted false/misleading information twice.

In 2022, the TCA launched an investigation into Farmasi to determine whether Farmasi had violated Article 4 of Turkish Competition Law by determining the resale prices of its resellers and restricting online sales. The investigation was concluded with a settlement. Within the scope of the investigation, the TCA requested from the undertaking (i) information on the effective dates of the Entrepreneur Agreement ("Agreement"), the Entrepreneur Work Handbook ("Handbook"), and similar attachments; (ii) copies of the first version of the documents on their effective date; and (iii) information on the revisions on the documents along with their amendment dates. In its responses, Farmasi submitted some versions of the Handbook and the Agreement by stating that the Agreement and the Handbook had come into force in 2011, that they had been revised multiple times over the years, that Farmasi was not in a position to provide all previous versions of the documents due to the online editing, and that the submitted current version of the Handbook had been applicable since January 2021. In its response, Farmasi also submitted another handbook, the Regulation for Entrepreneur ("Farmasi Regulation") to the TCA, stating that it had been implemented since 2018 for the sake of completeness.

Although Farmasi informed the Authority that it had submitted the current version, which had been implemented since January 2021, the TCA found that the submitted Handbook did not contain the provision indicating the direct resale price maintenance and online sale restrictions towards its resellers. This provision was found in the correspondence dated after January 2021 obtained from the on-site inspections conducted by the TCA in Farmasi. In addition, the TCA conducted desktop research through publicly available sources and found that the mentioned anti-competitive provision had entered into force on 01 July 2017 and that the Farmasi Regulation also had a similar provision indicating the direct resale price maintenance and online sale restrictions towards the resellers on April 2017. Accordingly, the TCA found that a correspondence dated May 2018 obtained from the on-site inspections indicated the mentioned provision within the Farmasi Regulation, although the provision had not been included in the response petitions submitted by the undertaking. Further, from the desktop research of publicly available sources, the TCA found that a similar anti-competitive provision also had appeared in a different document on Farmasi's website as of such date. In conclusion, the TCA emphasized that the Agreement and Handbook were important for determining the duration of the violations, and taking into account the correct duration increases the rate of fines to be imposed.

In addition, during its settlement application, Farmasi stated that its export sales of Farmasi were conducted via an undertaking, namely Tan Alize, within the same economic entity along with Farmasi, and requested that the amount of export-purposed sales made by Farmasi to Tan Alize be deducted while calculating the administrative monetary fine. Following that, the TCA sent additional information requests to Farmasi to determine the relevant amount and it was understood that Farmasi had provided the export amount incorrectly in its first response.

The TCA decided that Farmasi had provided false/misleading information to the TCA twice and therefore imposed an administrative monetary fine against Farmasi separately for each conduct.

This decision serves as a precedent, emphasizing the importance of undertakings should exercise caution and thoroughly double-check all information and documents before submitting them to the TCA.

No Whip "Second-Hand": Trendyol's Commitments Package Accepted

On 4 October 2023, the TCA published the reasoned decision concerning the acceptance of the commitments submitted by DSM Grup Danışmanlık İletişim ve Ticaret Satış A.Ş.'s ("Trendyol") within the scope of the investigation regarding its exclusionary practices in the market for online second-hand goods sales.

Upon the complaint Modacruz Elektronik Hizmetler ve Ticaret A.Ş. ("Modacruz")[1] in 2021, the TCA launched a full-fledged investigation against Trendyol to determine whether the undertaking had leveraged its market power in the multi-category e-marketplace to the market for platform services that mediate the sale of second-hand goods. Approximately three months after the investigation, Trendyol requested to submit a commitment package to eliminate the competition concerns raised by the TCA. After the commitment negotiations, the TCA closed the investigation following the settlement over the final text of the commitment package.

The TCA, in its reasoned decision, determined four competitive concerns related to the exclusion of competitors. These concerns included (i) Trendyol's self-preferencing through data-sharing, (ii) Dolap's prevention of data portability, (iii) Trendyol's below-cost pricing strategy in Dolap's services, and (iv) Trendyol's strategy for the inclusion of the Dolap's services in Trendyol's mobile application). To eliminate these concerns, Trendyol submitted a package to be applicable until 1 April 2026 consisting of the following five commitments to the TCA:

1. Responding to sellers' requests in the appropriate format for the procurement of data regarding the products uploaded by sellers to the platform: Trendyol committed that in the event that sellers who have registered and whose e-mail accounts have been verified on the Dolap platform request the relevant data regarding the products they have uploaded, Trendyol will prepare the necessary infrastructure to meet such requests in the appropriate format and will share information such as product images, titles, and descriptions with the sellers.

2. Not sharing Trendyol's user-based navigation data, data regarding whether a purchase is made, data regarding the content of the purchase with the Dolap Business Unit, and the non-usage of such data on the Dolap platform: Trendyol pledged to refrain from sharing the data on the Trendyol marketplace with Dolap. This includes data related to navigation (i.e., page views, visibility, and clicks), information about purchase transactions, and details on the shopping content of users.

3. Non-use of the seller and user data on the Trendyol marketplace in algorithms namely "Search," "Bottom-Product Suggestion," and "Cabinets Suggested to User" used in Dolap: Trendyol committed to not use the data of its users and sellers in the three mentioned algorithms in the Dolap application.

4. Coverage of the costs by the revenue generated by the domestic Dolap services for annual periods: To eliminate below-costs concerns, Trendyol pledged that its domestic Dolap revenue will cover the costs incurred within the scope of the Dolap services (i.e., the cargo, advertisement, and POS [point of sale] costs) for April-March annual periods.

5. Providing periodic training on competition law: Trendyol committed to providing comprehensive training to all Trendyol employees regarding commitments and the concerns of the TCA.

In addition, Trendyol pledged to submit to the TCA independent auditor reports for three periods related to the cost coverage commitment. They also committed to submitting a final report demonstrating compliance with the commitments within 60 days after the commitments have expired. Trendyol also committed to act upon the Board's evaluation which will be made at the expiry date of the commitments. Trendyol was given a period of 30 days from the notification of the short decision regarding the acceptance of the commitments for their implementation.

The TCA assessed the commitment package as proportionate and sufficient to eliminate the competition concerns, suitable to address these concerns, feasible for swift implementation, and suitable for effective implementation.

[1] Modacruz, active in the market for online second-hand goods sales, filed a complaint with the TCA claiming that Trendyol had violated its dominant position through exclusionary practices in the market for online second-hand goods sales by way of differentiated treatments towards its subsidiary dolap.com Elektronik Hizmet ve Ticaret AŞ ("Dolap"), i.e., the competitor of Modacruz, by sharing consumer data on Trendyol's marketplace and preventing the transfer of data used by sellers on Dolap to Modacruz.

Highlights of Settled Cases

The fourth quarter of 2023 was a busy period for the TCA in terms of the settlement procedure. The trend in favour of the settlement procedure, particularly in relation to vertical restrictions, continues to grow.

Among the short-form and reasoned decisions regarding investigations concluded with a 25% settlement discount on the fine are:

• Erbak, a manufacturer in the FMCG sector, faced an investigation for setting resale prices, resulting in a fine of TRY 16.8 million.

• Russell Hobbs Turkey, operating in the small home appliances market, was investigated for determining resale prices and received a fine of TRY 2 million.

• Namet, a processed meat manufacturer/supplier in the FMCG sector, was investigated for setting resale prices, resulting in a fine of TRY 72.9 million.

• İpek Gıda, active in the small home appliances market, faced an investigation for determining resale prices and was fined TRY 2.6 million.

• Kozmoklinik, a cosmetics and personal care products manufacturer, violated Article 4 of the Competition Law by setting resellers' prices and received a fine of TRY 202 thousand.

• Colastin, a food supplement supplier, violated Article 4 of the Competition Law by setting resellers' prices and received a fine of TRY 46.5 thousand.

• ETÜ (Eczacıbaşı Tüketim Ürünleri), a supplier of various FMCG products, violated Article 4 of the Competition Law by setting resellers' prices and participating in a cartel to coordinate price increases. The TCA imposed a fine of TRY 17.5 million for the cartel and TRY 8.7 million for resale price maintenance violations.

• Sunny, a small appliances and consumer electronics supplier, violated Article 4 of the Competition Law by setting resellers' prices and received a fine of TRY 3.9 million.

• Farmasi, a cosmetics and personal care products manufacturer, violated Article 4 of the Competition Law by setting resellers' prices and received a fine of TRY 19.1 million.

Particularly in the cosmetics sector, which has been under the scrutiny of the TCA for some time due to alleged RPM and online sale restrictions, on 15 November 2023 the investigation against Ashley Joy Kozmetik San. Ve Tic. A.Ş. ("Ashley Joy") was concluded with a settlement, and the investigations into Pierre Fabre Dermo Kozmetik Ltd. ("Pierre Fabre") and Farmasi Enternasyonal Ticaret A.Ş. ("Farmasi") were concluded with commitment packages.

In the Ashley Joy decision, the Board initiated an investigation to determine whether Ashley Joy had violated Article 4 of the Competition Law by setting the resale prices of its resellers. From the findings obtained during the investigation period, the TCA found that Ashley Joy executives intervened in the resale prices of multiple resellers and also monitored the resale prices of its products and threatened to withhold products from undertakings that do not comply with the prices set by the company. As a result of the settlement application made by Ashley Joy, the Board decided that Ashley Joy would pay an administrative fine amounting to TRY 769,578.93 as a result of a 25% discount and the investigation was terminated.

In the investigation launched against Pierre Fabre and Farmasi, for the allegations of resale prices maintenance and restricting internet sales, the undertakings' commitments were evaluated. It was decided to conclude the investigation in terms of restricting internet sales, considering that the competitive concerns would be eliminated through the commitments. Regarding the allegations of resale price maintenance, both Farmasi and Pierre Fabre applied to the commitment process and the Board accepted their applications. The Board imposed administrative fines of TRY 19,181,311.27 and TRY 1,197,104, respectively, and concluded the investigations.

Placing the Digital Economy among the TCA's Top Priority Focus Areas

On 11 October 2023, the TCA released the president Birol Küle's statements concerning the latest efforts of the TCA. The main emphasis has been made on the digitalization and digital economy.

The TCA president Birol Küle described the importance of the digital economy and its reflection on competition policies. It is stated that the competition law is essential for sustainable growth and development in all sectors including the digital economy by guaranteeing the rights of undertakings and consumers. Accordingly, he stated that the TCA has been concentrating on the digital economy since 2020 and has established an expertise department focused on the digital economy exclusively and produced several reports, including "The E-Marketplace Platforms Sector Inquiry," "The Online Advertising Sector Inquiry," and "The Report on the Reflections of Competition Law on Digital Transformation." He said the TCA is still working on "The Mobile Ecosystem Sector Inquiry Report."

He also stated that administrative monetary fines are a significant tool for resolving competitive market failures. He emphasized that the number of successful on-site inspection processes had improved, resulting in an increase in the number of fines. Eighty-seven per cent of the fines of the last decade had been imposed in the previous four years, corresponding to TRY10.4 billion. He also underlined the significant effects of the commitment and settlement procedures, which had come into force with a legislative amendment in 2020, and provided numerical data in this regard. He indicated that of the investigations initiated after the amendment, 12 had been terminated with efficient commitments, and 92 undertakings had settled with the TCA by paying a total of approximately TRY 836 million. He stressed that the TCA's investments in information technology had increased its capacity to conduct on-site inspections regarding digital data, especially on the algorithms of online platforms.

He illustrated with examples that the TCA has taken action to address infringements in the digital sector among others and taken target-oriented measures. Among the examples he provided were investigations against online platforms, and investigations in the FMCG, optical, pharmaceutical, cosmetic, staple food, cement, ready-mixed concrete, glass, ceramics, civil aviation, port and fuel sectors. Additionally, there were investigations related to online sales restrictions, the labour market, and the gun-jumping decision concerning the acquisition of Twitter.

Due to the focus points on the digital market and administrative monetary fines in the statement, it remains to be seen whether the TCA will increase the frequency of its on-site inspections and measures, especially in the digital markets.

[2] *Decision dated 03.08.2023 and numbered 23-36-676-231.*

[3] *Decision dated 02.03.2023 and numbered 23-12/187-63.*

[4] *Decision dated 23.02.2023 and numbered 23-10/175-43.*

Competition & Data Protection: More Cooperation and Information Sharing On the Way

On 26 October 2023, the TCA announced that the "Cooperation and Information Sharing Protocol" with the Turkish Personal Data Protection Authority ("Authority") was signed in order to ensure an active and effective regulatory environment. The TCA stated that processing of personal data increasingly by big data technologies may raise significant concerns in terms of competition and protection of personal data.

Within the scope of this protocol, two authorities have agreed on carrying out work for active cooperation such as:

• To carry out joint work in developing areas that are within the scope of the responsibility of both authorities, and which may cause irreparable harm if not intervened quickly and effectively,

• To increase awareness among users in terms of protecting personal data and competition, especially in digital markets and publish reports in cooperation in order to give a common message to undertakings regarding practices that concern both fields of law,

• To organize joint presentation and discussion programs within the scope of the Authority's "Wednesday Seminars" and/or the TCA's "Thursday Conferences",

• To organize trainings where relevant authorities share their expertise and experience in their fields of duty, and

• To discuss common issues in national and/or international events organized and/or attended by the relevant authorities and support these events on issues within the authorities' own fields.

The CJEU Has a Say on Sports Governance

On 21 December 2023, the Court of Justice of the EU ("CJEU") delivered three important judgements that may have a significant impact on the sports governance and application of competition law to sports, i.e., the European Super League (C-333/21), the International Skating Union (C-124/21 P), and Royal Antwerp Football Club (C-680/21). The main (preliminary) takeaways from those cases are:

• Sports, as well as the organization of competitions as economic activity may have certain specific features, but they are not exempt from the application of the EU competition rules.
• Sport governing bodies shall have the ability to adopt rules authorizing the sport events of third parties.
• Assuming the sport governing body in a dominant position, such rules must be subject to certain conditions namely transparency and non-discrimination, with objective and precise substantive criteria and detailed procedural rules. According to the CJEU in the Super League case, the FIFA/UEFA was allowed to adopt rules on the prior approval of and participation in third-party competitions; however, those rules were against competition law as they lacked transparency and were viewed as not objective, discriminatory, and disproportionate.
• Rules on prior authorization of competitions may restrict competition by object. According to the CJEU in the International Skating Union case, this is particularly the case when the organization of the competitions fails to be subject to the transparent, objective, non-discriminatory, and proportionate framework.
• Rules on home-grown players could infringe on competition law and the principle of the free movement of workers in the EU.
• Eligibility rules shall be subject to effective judicial review, in addition to the possibility to complain to the EC.

Although the practical application of these important rulings has yet to be seen, it is certain that both the competition and regulatory authorities will be scrutinizing the rules of sports governing bodies more closely.

Absolute Online Sale Bans: Rolex Fined in France

Absolute online sale bans cost Rolex 91,600,000. On 19 December 2023, the French Competition Authority fined Rolex for prohibiting its authorized retailers from selling its watches online (for more than 10 years). It has been clear at least since the CJEU's judgment in Pierre Fabre (2011) and Coty (2017) that the whole "maintaining aura of luxury" argument does not justify absolute online sale bans.

"Aura of luxury"/Coty justification did not work here as the ban was absolute and (hence) disproportionate. The French Competition Authority compared Rolex with other luxury brands that have been faced with the similar difficulty of preserving their brand reputation and fighting with counterfeiting and parallel trade, but nevertheless do allow the online sales.

The main takeaway: suppliers, you are free to organize your distribution network as you see fit, however it must not give rise to a restriction of competition. If online sale bans are necessary, at least make sure those are not absolute (e.g., only limited to sales on third party platforms), and be ready to prove your products are covered by the luxury brand image justification.

Close Monitoring of OpenAI's Partnership with Microsoft: Is there a Notifiable Merger?

Microsoft's rising control over OpenAI's board of directors led to discussions that the Microsoft and OpenAI's partnership may be viewed as a merger that should be notified to the Competition Authorities.

According to OpenAI's recent statement, Microsoft also will have a non-voting observer seat on the non-profit board of directors that controls OpenAI. Currently, Microsoft is OpenAI's most important investor and has a 49% share in the company. The fact that Microsoft has a non-voting observer seat on the board suggests that it will be even more influential in OpenAI's internal affairs. Therefore, discussions have started that the partnership between Microsoft and OpenAI should be considered as a control change.

The partnership between Microsoft and OpenAI also has been on the radar of competition authorities. The UK Competition and Markets Authority ("CMA"), the European Commission ("Commission" or "EC"), and Germany's Bundeskartellamt are seeking jurisdiction for possible merger control. In light of the recent events, the CMA has started to assess whether or not the partnership in question is a merger. To be considered a merger and notifiable under the EUMR, it must involve a change of control on a lasting basis.

Bundeskartellamt already examined the partnership between Microsoft and OpenAI this year and concluded that there is no obligation to notify. However, Bundeskartellamt stated that if Microsoft increases its influence over OpenAI in the future, there would be a need to conduct a re-examination.

Highlights of a Euro-Denominated Bonds Trading Cartel

On 27 November 2023 the Commission decided on the cartel allegations regarding the Euro-denominated SSA bonds (Supra-Sovereign, Foreign Sovereign, Sub-Sovereign/Agency bonds) and Government Guaranteed bonds traded in the European Economic Area ("EEA"). The Commission fined Rabobank around EUR 26.6 million whereas Deutsche Bank was not fined because of the leniency application.

"Between 2006 and 2016, Deutsche Bank and Rabobank, through certain traders, exchanged commercially sensitive information about their certain Euro-denominated bonds, such as (i) price, (ii) volume, (iii) current and future strategies, (iv) counterparty identities, and (v) requirements to buy or sell bonds. Traders adjusted their future trading and pricing strategies based on this sensitive information exchange.

In the investigation, it was also concluded that in addition to Bloomberg emails, instant messages, and online chatrooms, these two banks also coordinated on Bloomberg AllQ (all quotes for bonds) screens, a dealer-to-client electronic trading platform. It is seen that these two banks warned each other when the other bank's indicative price on screen was considered to be too low or too high.

The CJEU on A Non-Compete Clause and Constituting a Restriction by Object

On 26 October 2023, the CJEU ruled that a non-compete agreement between an electricity provider and a food retailer constituted horizontal cooperation and amounted to a restriction by object since it found that the conclusion of such an agreement was a strong indication that the parties were potential competitors.

In 2012, EDP Energias, a Portuguese electricity distributor, and Modelo Continente, a retail food distributor, entered into an association agreement in which they committed to providing discounts to their shared customers and not to enter each other's market or enter into similar discount agreements with each other's competitors. In 2017, the Portuguese Competition Authority ("AdC") decided that the agreement breached competition law, since the association agreement had the object of market-sharing, in the form of a non-compete clause, in the markets for the supply of electricity and natural gas and the retail distribution of food, all three of which were located in Portugal. Accordingly, the AdC characterized the non-compete clause in that agreement as horizontal cooperation and a restriction by object.

Upon referral by the Portuguese Appeal Court, the CJEU highlighted that the case law requires the existence of real and concrete possibilities that demonstrate the undertaking will join the relevant market in terms of assessing potential competition. Furthermore, the Court said the structure of the market as well as the economic and legal context within the undertaking operates should be taken into account in the assessment. Although the Court stressed that subjective evidence (e.g., a mere wish or desire of the undertaking) cannot constitute independent, decisive or indispensable evidence demonstrating potential competition, it concluded that "there is nothing to prevent such a subjective element from being taken into account to support consistent objective evidence." Accordingly, the CJEU concluded that agreeing to a non-compete clause is a strong indication of potential competition since the parties would not have been involved in such an agreement if they did not see themselves as potential rivals.

The CJEU concluded that a non-compete clause consisting, especially within the context of a commercial association agreement, of prohibiting one of the parties to that agreement from entering the national market for the supply of electricity—where the other party is a major player —during the final stages of the liberalization of that market, constitutes an agreement with the object of preventing, restricting or distorting competition.

[5] *ECJ, Autoridade da Concorrência and EDP, Case C-331/21*

Illumina/GRAIL: The EC Adopted a Restorative Measure

After its prohibition of the acquisition transaction, on 12 October 2023, the EC announced that it had adopted a restorative measure mandating Illumina to divest cancer detection test producer GRAIL and revert to the situation prevailing before the completion of the acquisition.

On 6 September 2022, the EC prohibited Illumina's acquisition of GRAIL for approximately USD 8 billion due to concerns that the merger would stifle innovation and diminish options in the emerging market dedicated to blood-based early cancer detection tests. Illumina and GRAIL had unlawfully finalized the takeover while the Commission's in-depth investigation was ongoing, thereby violating EU merger control regulations. In July 2023, the Commission imposed fines on both undertakings for implementing their proposed transaction without obtaining prior approval from the EC.

With its decision dated 12 October 2023, the EC introduced restorative measures requiring Illumina to divest Grail to reinstate the pre-transaction status. The EC issued the following directives: (i) divestment measures requiring Illumina to unwind the transaction with GRAIL, and (ii) transitional measures with which Illumina and GRAIL need to comply until Illumina has dissolved the transaction.

As a result of this restorative measure, Illumina is obliged to submit a concrete divestment plan for the disposal of GRAIL to the EC for approval. This plan must guarantee the restoration of GRAIL's independence from Illumina, ensuring that the divested entity remains as viable and competitive as it was before the transaction. Additionally, the EC has implemented temporary measures to maintain the separation of Illumina and GRAIL until the divestiture is complete.

Pharmaceutical Companies Fined in a Cartel Settlement Decision

On 19 October 2023 the EC determined that the pharmaceutical companies had engaged in a cartel pertaining to a pharmaceutical ingredient and imposed a combined fine of EUR 13.4 million. The EC also initiated an investigation against Alchem, which did not settle.

The EC imposed fines totaling EUR 13.4 million on Alkaloids of Australia, Alkaloids Corporation, Boehringer, Linnea, and Transo-Pharm for their involvement in a cartel, related to a pharmaceutical ingredient used in the production of the antispasmodic drug Buscopan and its generic versions.

C2 PHARMA, on the other hand, received complete immunity from fines for having disclosed the existence of the cartel, thus avoiding a fine of approximately EUR 0.8 million. All six undertakings settled with the EC. The EC initiated a further investigation against Alchem, which did not settle. This is a landmark decision as it represents the first time the EC has imposed fines on a cartel in the pharmaceutical sector, particularly in connection with an active pharmaceutical ingredient.

"According to the Template": Helping Gatekeepers to Navigate under the DMA

During October-December 2023, the EC published a number of templates for the gatekeepers to use in order to comply with their obligations under the Digital Markets Act ("DMA"). Among them are:

• Template on the compliance report under the DMA pursuant to Article 11 DMA. The designated gatekeepers are required to submit compliance reports under the DMA within six months from designation and update them at least once per year. The compliance reports must include in a detailed and transparent manner all relevant information needed by the EC to assess the effective compliance of designated gatekeepers with the DMA. They must cover all core platform services listed in the relevant designation decision. Following the submission of compliance reports the EC will then publish a non-confidential summary of each compliance report.

• Template on specification dialogue. It is related to the reasoned request for a specification process pursuant to Article 8(3) DMA, according to which a gatekeeper may request the EC to engage in a process to determine whether the measures that that gatekeeper intends to implement or has implemented are effective in achieving the objective of the relevant obligation in the specific circumstances of the gatekeeper. The EC shall have discretion in deciding whether to engage in such a process, respecting the principles of equal treatment, proportionality and good administration. In its request, the gatekeeper shall provide a reasoned submission to explain the measures that it intends to implement or has implemented.

• Template on suspension request. It is related to the submission of a reasoned request pursuant to Article 9 DMA, according to which a gatekeeper may request that a specific obligation for a core platform service listed in the designation decision be suspended by demonstrating that compliance with such obligation would endanger, due to exceptional circumstances beyond the gatekeeper's control, the economic viability of its operation in the EU.

• Template on exemption request under Article 10 DMA. According to Article 10 DMA a gatekeeper may request to be exempted, in whole or in part, from a specific obligation in relation to a core platform service listed in the designation, where such exemption is justified on grounds of public health or public security.

• Template relating to the obligation to inform about a concentration pursuant to Article 14 DMA. The gatekeepers are to inform the EC "of any intended concentration within the meaning of Article 3 of Regulation (EC) No 139/2004, where the merging entities or the target of concentration provide core platform services or any other services in the digital sector or enable the collection of data."

• Template on consumer profiling report pursuant to Article 15 DMA. Within six months after a gatekeeper's designation, the gatekeeper is required to submit to the EC an independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services. The audited description shall be reviewed and updated at least on an annual basis.

The templates provide details on the scope of information to be provided pursuant to specific situations. They aim to ensure the effective compliance by the gatekeepers with the DMA obligations.

The WTO on Türkiye's Additional Duties for the USA

On 19 December 2023, the World Trade Organization ("WTO") stated in the dispute panel that Türkiye's additional duties imposed on the USA were "inconsistent" with the WTO policy and should be removed.

Previously, the Trump administration initiated a "Section 232" national security investigation into steel and aluminium imports. As a result of that, the U.S. imposed a 25% duty on steel imports and a 10% duty on aluminium imports in March 2018 for Türkiye. Recently, the U.S. acted to remove these additional duties of Türkiye and initiated dispute settlement proceedings. The U.S. also has decided to take this approach to its own retaliatory measures against the EU, Canada, Russia, and other countries.

According to the report of the Panel, Türkiye's additional duties had been imposed in retaliation for U.S. steel and aluminium tariffs and Türkiye's approach contradicts the WTO policy. Panels are the quasi-judicial bodies, in charge of adjudicating disputes between WTO Members in the first instance, they make recommendations for implementation by the respondent. It is the Appellate Body that is the second and final stage in the adjudicatory part of the dispute settlement system.

New Regulation on Electric Vehicle Imports

The new Communiqué No. 2023/22 on the Import of Certain Electric Vehicles ("Communiqué") aimed to protect consumers in electric car sales has entered into force on 29 November 2023. New rules have been introduced for the sale of electric vehicles that do not originate from the EU and countries with which Free Trade Agreements have been signed.

According to the Communiqué, the import of electric cars that are not covered by the EU and Free Trade Agreements is subject to the requirement of obtaining a 'permission certificate' from the Ministry of Industry and Technology. Accordingly, 8703.80.10.00.11, 8703.80.10.00.19 Customs Tariff Statistics Position (GTIP) electric cars in the import of those who do not originate from the EU and the country where the FTA is signed, the permission document from the Ministry of Industry and Technology has been made compulsory.

According to the Communiqué, for the cars to be imported, at least 20 authorized service stations will be established in 7 geographical regions and a Turkish call center with at least 40 personnel will be required, the persons who will be responsible for the purchase, sale, maintenance and repair of electric vehicles will have a qualification certificate by TSE or Vocational Qualification Authority, the authorized representative of their manufacturer in Türkiye, as well as a written commitment that the procedures to be carried out regarding the monitoring, control and inspection of battery systems are accepted by importers.

Revitalized Discussions on Trade and Environment at WTO

On 16 November 2023, the Committee on Trade and Environment ("CTE") of the WTO assessed proposals to revitalize discussions on climate change and sustainable development.

During the meetings of the CTE held on 13, 14 and 16 November, WTO Members discussed enhancing the operation of the CTE. In this context, the CTE reviewed proposals put forward by various Members, encompassing topics such as transparency and experience-sharing, the role of technology transfer to address climate change as well as several proposals on trade-related environmental measures. The meeting was a significant step in preparations for the 13th Ministerial Conference of the WTO as well as the 28th Conference of the Parties to the United Nations Framework Convention on Climate Change ("COP28").

During the meetings, special emphasis was placed on the transition to clean energy. Members presented recommendations on how trade could bolster the energy transition, ranging from the reduction of tariffs and non-tariff barriers on environmental goods to ensuring better data on greenhouse gas emissions and providing trade-related support and capacity-building. The availability of financing and the cost of capital were highlighted among the main challenges associated with the energy transition, particularly in developing countries with limited resources.

Members engaged in discussions on a range of topics related to the European Union Green Deal and the Global Biofuels Alliance, Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade, the Trade and Environmental Sustainability Structured Discussions, the Fossil Fuels Subsidy Reform initiative, and negotiations on the Agreement on Climate Change, Trade and Sustainability. The next meeting of the CTE will be held in April 2024.

The 7th Trade Policy Review of Türkiye Conducted

The 7th trade policy review of Türkiye, aimed at improving the transparency of the rules-based system, was conducted at the WTO in November 2023.

The aim of the Trade Policy Review Mechanism ("TPRM") is to enhance adherence to WTO rules, disciplines, and commitments made under the agreements of the WTO, and hence to the smoother functioning of the multilateral trading system, through improved transparency in the trade policies and practices. In the context of the TPRM, each Member undergoes a review process where other Members evaluate the policies and practices of the Member in question. The 7th Trade Policy Review of Türkiye took place in November.

During the review, 42 delegations provided assessments since Türkiye's last review in 2016, a period marked by natural disasters and severe economic and geopolitical turbulence. Members acknowledged the significant rise in Türkiye's trade-to-GDP ratio, underscoring its role as a crucial hub in global supply chains. This was attributed to its strategic location, providing close access to major markets, including the EU. Several Members highlighted the supportive role of ongoing national strategies such as the 11th Development Plan, the 2021-23 Economic Reform Package, the 2021-23 Foreign Direct Investment Strategy, and the 2023 Exports Strategy. Members also noted the persistent challenges for Türkiye in addressing macroeconomic imbalances, particularly inflation.

Several Members commended Türkiye for the positive developments in its trade regime, which included customs reforms, efforts to facilitate trade, and amendments to intellectual property legislation. Nevertheless, some Members voiced concerns about the number and duration of Türkiye's trade remedy measures, the introduction of a digital services tax, the trade-restrictive impact of import surveillance measures, increased domestic preferences under public procurement rules, enforcement shortcomings in intellectual property right protection, lengthy customs clearance processes, and certain SPS requirements. Several Members also drew attention to the significant increase in Türkiye's applied Most Favoured Nation (MFN) tariff rate since its previous Review with over 30 tariff lines appearing to exceed its bound commitments. The topics of discussion also included Türkiye's free trade agreement and the general system of preferences scheme.

Overall, the Members appreciated Türkiye's commitment to the rules-based system and expressed their concerns regarding certain policies and practices of Türkiye.

Agreement on Fisheries Subsidies Approved

The President approved the WTO Agreement on Fisheries Subsidies signed at the 12th Ministerial Conference of the WTO through the issuance of Presidential Decree numbered 7791 on 18 November 2023 ("Decree").

The agreement on Fisheries Subsidies, adopted on 17 June 2022 by the Members of the WTO, marks a major step forward for ocean sustainability by prohibiting harmful fisheries subsidies, which are a key factor in the widespread depletion of the world's fish stocks. The Agreement represents a move forward for the membership as it is the first WTO agreement to focus on the environment, the first multilateral agreement on ocean sustainability, and only the second agreement reached at the WTO since its inception in 1995.

With the decree signed by the president approving the agreement and following the ratification of the Grand National Assembly of Türkiye, Türkiye will be a party to the Agreement on Fisheries Subsidies, which will have an important impact on the sustainability of marine fish stocks and fisheries. The Agreement on Fisheries Subsidies aims to (i) curb subsidies granted to illegal, unreported, and unregulated fishing activities; (ii) prohibit subsidies to fishing on overfished stocks; and (iii) prohibits subsidies to fishing on the unregulated high seas.

Recommendations for the Protection of Privacy in Mobile Applications

On 22 December 2023 the Turkish Personal Data Protection Board (Kişisel Verileri Koruma Kurumu - "KVKK") published a guide on Recommendations for the Protection of Privacy in Mobile Applications ("Ğuide").

The Guide aims to provide general recommendations for data subjects and data controllers in terms of personal data processing activities carried out through mobile applications used on smartphones and tablets. The recommendations include downloading mobile apps from trusted platforms, checking the accuracy of the app name, and avoiding apps of unknown origin.

It was stated that users should be encouraged to use multi-factor authentication methods, if possible, users should be encouraged to create strong passwords when accessing mobile applications, passwords should be changed periodically, and reuse of previously used passwords should be prevented when creating new passwords.

It is recommended that systems to verify the age of users be established and that processing activities for children be carried out following a separate policy and procedure, especially in terms of applications that are known to be directed at children or widely used by children.

The Turkish Constitutional Court Found the Administrative Fine of the Personal Data Protection Board Unjustified

On 15 December 2023, the Constitutional Court found that the deficiencies in the proceedings against the administrative fine imposed by the KVKK on a global hotel chain ("Applicant") violated the Applicant's right to property. The Constitutional Court concluded that the KVKK breached its obligations to ensure data security and decided the retrial to remove the consequences of the violation of rights.

The data breach on a global scale, which is the subject of the Constitutional Court's decision, occurred on 08.09.2018 when the Applicant received a warning from the in-house security tool in 2018 regarding the suspicious transaction in the guest reservation database of the accommodation company that taken over by the Applicant on 08 September 2018 in 2016 and found unauthorized access to the database. As a result of its investigation, the Applicant determined that third parties had unauthorized access to the company's network where the database had been kept since July 2014 and that 500 million customers' data had been copied due to the breach.

In the investigation of a data breach notification, the applicant stated that the breach occurred in 2016 before the taken-over of the accommodation company and asserted that the taken-over accommodation company was the data controller at the time of the breach. Therefore, it can't be considered as the data controller. The KVKK did not assess this claim and decided to impose an administrative fine of TRY 1,450,000 for not taking the necessary measures to ensure data security and for not complying with the obligation to notify the breach as soon as possible.

The applicant appealed against the administrative fine. Within the scope of the appeal, the applicant stated that;
• he was not subject to administrative fines,
• the Personal Data Protection Law and The KVKK's decision on the 72-hour notification obligation entered into force after the date of the act,
• the administrative fine was not duly notified, did not contain sufficient justification, was not proportionate and violated the property right.

The Constitutional Court stated that the imposition of an administrative fine led to a decrease in the Applicant's assets and therefore it is clear that the relevant fine constitutes property for the Applicant. The Constitutional Court found that the interference was lawful and had a public interest purpose, but the Applicant's allegations against the decision were not assessed sufficiently thus procedural safeguards regarding the protection of the property right within the scope of a fair trial were not fulfilled. In this context, it was decided that the applicant's property right had been violated.

Welcoming the New EU Data Act

On 27 November 2023, a new regulation regarding fair access to and use of data namely the Data Act is the second main piece of legislation after the Data Governance Act of the European strategy for data. The Data Act will enter into force the twentieth day after this publication.

Briefly, the new Data Act allows manufacturers and service providers to access, reuse and share with third parties' data generated through the use of their products and services regardless of whether the data is from an individual or a company. The Commission aims with this new regulation to (i) make the data more accessible to all, (ii) establish a competitive and fair data market, and (iii) to encourage data-driven innovation.

The innovations brought by the new regulation include the following:
• Enabling the public sector bodies in exceptional circumstances to access and use data held by the private sector,
• Right to access and share data for businesses and individuals that generated, obtained or collected from products, connected devices and related digital services by obligating entities to make available these data to the consumers,
• Introducing measures for data-sharing contracts between parties,
• Preventing illegal data transfer and improving the reuse of data across different sectors by developing interoperability standards.

In addition to these, the Commission stated that to ensure the implementation and enforcement of the Data Act at the national level, member states will have a chance to contact with the coordinating authority namely the 'data coordinator.'

"Cookie Rule" Guidelines with the Emergence of New Tracking Techniques

On 15 November 2023, the European Data Protection Board adopted Guidelines on the technical scope of Article 5(3) of the e-Privacy Directive ("Guidelines"), which aim to clarify which technical operations, in particular new and emerging tracking techniques, fall within the scope of the e-Privacy Directive and to provide data controllers and individuals with greater legal certainty.

Article 5(3) of the e-Privacy Directive, also known as the "cookie rule," stipulates that European Union countries shall ensure that the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user is only allowed on the condition that the subscriber or user concerned is provided with clear and comprehensive information in accordance with Directive 95/46/EC. This includes details about the purposes of the processing and the right to refuse such processing by the data controller.

The New Guidelines comprehensively explain and analyse the key notions referred to in this provision, such as 'information,' 'terminal equipment of a subscriber or user,' 'electronic communications network,' 'gaining access,' and 'stored information/storage,' as well as a several practical use cases involving common tracking techniques.

Obtaining Consent Before Cash Points is Unlawful, Unless...

On 11 November 2023, the Personal Data Protection Authority ("DPA" or "KVKK") stated that SMSs sent for commercial communication purposes before the checkout point in in-store shopping do not comply with data protection law unless the obligation to inform the data subject is properly served.

In a public announcement, the KVKK emphasized that personal data cannot be processed without the explicit consent of the data subject, as regulated under Law No. 6698 on the Protection of Personal Data. According to this law, explicit consent is "consent regarding a specific subject, based on information and expressed freely." Explicit consent requires individuals to be informed about the subject and the consequences of their consent in a specific and clear manner. Additionally, they must be aware that their consent is given voluntarily. When explicit consent cannot be obtained, it is emphasized that a violation of the law will occur during the processing of personal data.

To ensure compliance with the law during the processing of personal data, KVKK emphasized the following issues to be considered:

• The purpose and consequences of the SMSs to be sent must be clearly and specifically explained both before the test message is sent and in the content of the SMS;

• Explicit consent must be obtained separately for different transactions (such as approval of the membership agreement, permission to process personal data, approval of commercial electronic messages);

• Obtaining explicit consent and fulfilment of the duty to inform must be fulfilled separately; and

• Explicit consent should not be presented as a mandatory element for the completion of the shopping and explicit consent should be requested after the completion of the transaction.

Companies Fined in the UK for Unsolicited Commercial Messages and Calls

On 2 November 2023, the Information Commissioner's Office ("ICO") announced that it had fined three companies for illegal direct marketing under the Privacy and Electronic Communications Regulations ("PECR").

MCP Online LTD was fined EUR 55,000 for using a public electronic communications service to make 20,939 unsolicited marketing calls about pensions between 1 January 2022 and 28 September 2022, contrary to Regulation 21 of the PECR.

Digivo Media Ltd incurred a EUR 50,000 fine for sending text messages without valid consent. The company dispatched more than 415,000 text messages containing marketing content encouraging recipients to visit the company's website between 24 March 2021 and 7 September 2021.

Argentum Data Solutions was fined EUR 65,000 following an investigation by the ICO. The company allowed its lines to be used by third parties to send more than 2.3 million direct marketing text messages. These messages promoted services, including car finance compensation claims and housing repairs, all done without obtaining valid consent.

Ensuring Lawful Monitoring in the Workplace in the UK

On 3 October 2023 the UK's personal data protection authority, the Information Commissioner's Office ("ICO") published guidance to help employers comply with data protection laws with regard to monitoring their employees.

The ICO highlighted that with remote working, many employers are looking to continue monitoring their employees. The ICO stated that monitoring might mean tracking calls, messages, and keystrokes; taking screenshots, webcam footage, or audio recordings; or using special monitoring software to track the employees' activities. For an organization that aims to monitor its employees, the guidance determines the necessary steps to ensure lawful monitoring. Some of the steps are as follows:

• Giving the employees information about the nature, extent, and reasons for monitoring;
• Clearly defining the purpose and using the least intrusive ways to achieve the monitoring;
• Having legal grounds such as the legal obligation for the data processing of the employees;
• Explaining any monitoring activities to the employees in an easy-to-understand format;
• Only keeping the information that is relevant to its purpose;
• Carrying out a Data Protection Impact Assessment within the meaning of the GDPR for any monitoring which has the potential to cause a high risk to the rights of workers; and
• Making the personal information collected through monitoring available to employees if they issue a Subject Access Request.

Lesson Learned from the H&M Case: Make It Easy for Consumers to Avoid Marketing

On 17 October 2023, the Swedish Authority for Privacy Protection ("IMY") imposed an administrative fine on Hennes & Mauritz GBC AB ("H&M") for making it difficult for consumers to avoid marketing.

On 19 October 2023, the IMY published its decision in which it imposed a fine of EUR 28.5 thousand on H&M. The IMY had received six complaints from individuals who had objected to receiving direct marketing from H&M but had continued to receive direct marketing from the company. The IMY stated that H&M had failed to handle requests from individuals who did not want to receive marketing from them. Although these complaints had come from different locations, since H&M is located in Sweden, the IMY handled the case.

The authority stated that according to the General Data Protection Regulation ("GDPR"), individuals in charge of personal data must, without undue delay and within one month after a request has been received, take measures in connection with the request and provide information about measures taken. The IMY stated that H&M had violated the GDPR by not ceasing to handle the complainants' personal data for direct marketing without undue delay, despite the complainants objecting to this. The decision also stated that H&M lacked adequate systems and procedures to facilitate individuals who complained to exercise their right to object to direct marketing. As a result, the IMY issued a fine of EUR 28.5 thousand against H&M for the violation of the GDPR.

Settlement of RPM Cases in the Small Household Appliances Sector

by Mustafa Ayna, Özlem Başıböyük Coşkun and Selim Turan

1. Introduction

The industries that directly impact consumers' lives, such as the small household appliances sector, have become subject to the TCA's special attention these days. We have witnessed several investigations (both ongoing and concluded) into the undertakings operating in the sector. The main competition law issues in the relevant cases have primarily been about the restriction on online sales and resale price maintenance.

Here we would like to focus on the analysis of a full-fledged investigation ("investigation") against Korkmaz Mutfak Eşyaları San. ve Tic. A.Ş. ("Korkmaz"), Gençler Ev Araç ve Gereçleri Pazarlama Tic. A.Ş. ("Gençler") and Punto Dayanıklı Tüketim Malları İth. İhr. Tic. Ltd. Şti. ("Punto"). These companies operate in the small household appliances and kitchen tools sectors. The purpose of the investigation was to determine whether these undertakings had violated Article 4 of Law No. 4054 on the Protection of Competition ("Competition Law") via maintaining their resellers' resale prices and Korkmaz's adopting customer restrictions to its resellers. The investigation was concluded through the settlement procedure. The Decision is of significance as it includes explanatory examples regarding the resale price maintenance in the small household appliances sector, as well as the settlement procedure.

The TCA found that Korkmaz, Gençler, and Punto had violated Article 4 of the Competition Law through their practices classified as resale price maintenance; however, Korkmaz's actions, targeted to implement customer restriction, did not constitute a separate violation but were of the nature of subsidiary practices of "resale price maintenance." Therefore, the TCA levied administrative fines on all the parties calculated in accordance with the relevant provisions of the Competition Law by classifying the said violation under "other violations." A reduction of 25% was applied to the parties as a result of the settlement procedure.

2. RPM online and offline confirmed: Focus on sanctions

In the Decision, the TCA first explained the commercial relationship between the undertakings that are parties to the investigation. As a supplier, Korkmaz conducted wholesale and retail sales activities by (i) two distributors named Gençler and Punto, (ii) Korkmaz's dealers through its regional managers, and (iii) Korkmaz's own sales points called "Korkmazstore" under a franchise model. Based on the documents submitted by the complainant and gathered during the on-site inspections, the TCA determined that:

- Korkmaz, Gençler, Punto, and their regional managers intervened in the resale prices of their dealers;
- these interventions generally were aimed at raising the low retail price level; and
- in the event that these interventions are ineffective, the relevant dealer is subjected to various sanctions.

As a result of the examinations carried out at the parties to the investigation, the TCA concluded that Korkmaz and its distributors intervened in the prices set by their dealers, in particular in their online sales. In this respect, the TCA stated that Korkmaz, especially, had monitored the prices of its dealers' internet sales on various online marketplaces and warned those who sold below the prices they had determined.

As stated in the Decision, Korkmaz's intervention in the prices of resellers and subjecting them to certain sanctions mostly due to its disturbance stemmed from the fact that resellers sell at lower prices over the internet. Therefore, Korkmaz monitored and intervened in the prices of the online sales of its dealers. In this regard, some of the findings (from WhatsApp messages and e-mail correspondences) obtained during the on-site inspections that show Korkmaz's aim to maintain its resellers' prices were as follows:

• "(…) broke the prices. He will not work anymore. It is even forbidden to discuss this issue with (…)."
• "Everyone should check the customer prices and those that don't comply should receive serious warnings. All kinds of sanctions will be applied, from product locking to account closure."

• "Everyone intervenes, these products are closed to the dealer that broke the prices for three months."
Taking into account these findings, the TCA concluded that various sanctions had been applied to dealers that had disregarded Korkmaz's price directives, such as cancellation of their dealerships, not selling them products, and not allowing them to benefit from campaigns. In addition, Korkmaz gave instructions to its distributors to apply these sanctions to the dealers if necessary. Furthermore, the TCA stated that the distributors also had been threatened with such sanctions if they failed to meet their dealers' prices at the stipulated levels.

3. Online sale bans and customer restrictions
The Decision also evaluates that some of Korkmaz's actions may be considered online sales bans and customer restrictions. For example, the TCA stated that Korkmaz had required its dealers to obtain an authorization certificate to sell on the Internet and ensured that only those dealers who did not "break price" could obtain this authorization certificate. In addition, Korkmaz had imposed bans on wholesale sales under the contracts it had concluded with its dealers. However, the Decision stated that this prohibition had been implemented by the dealers to prevent price distortion. Therefore, both practices had been evaluated within the scope of violation of a resale price maintenance. Furthermore, the Decision states that Korkmaz had engaged in conduct constituting resale price maintenance in terms of offline sales, too.

The contracts concluded by Korkmaz with its distributors and dealers included provisions that directly determined the resale prices of the resellers. As per the relevant contract provisions, the dealers and distributors were prohibited from selling at retail prices other than those determined by Korkmaz. In addition, the parties agreed that the dealers could not sell at different price levels on the internet. The contract also stipulated that certain sanctions such as penal clauses would be imposed on the resellers in case of non-application of the said provisions.

Consequently, the TCA determined that Korkmaz had violated the Competition Law by (i) inserting provisions in the agreements concluded with its resellers and (ii) establishing a maximum discount rate, accompanied by threats of penalties such as product locking or agreement termination if the resellers did not comply with Korkmaz's specified prices.

The Decision also states that Korkmaz's distributors, Punto and Gençler, were also responsible for the said violation. This

was justified by the fact that these undertakings had acted as intermediaries in the maintenance of the resale prices of their affiliated re-sellers in line with Korkmaz's request.

4. Settlement procedure in trend: 25% reduction for the parties
Subsequent to the evaluations regarding the violations of the parties under investigation, the TCA declared its findings and decisions regarding the calculation of fines to be imposed on the said parties. In this regard, the TCA stated that Korkmaz, Punto, and Gençler had applied for settlement while the investigation was ongoing. The TCA later stated that as a result of the settlement procedure, a reduction of 25% was applied to the parties in the range of administrative fines levied on them.

It is noteworthy that the TCA did not find any mitigating factors regarding Korkmaz, while it did for Punto and Gençler. The TCA justified that as these companies derive their entire turnover from the sale of Korkmaz products, it is critical for them to act in line with Korkmaz's instructions to sustain their economic activities. The imposition of sanctions on Korkmaz's distributors who did not follow Korkmaz's instructions demonstrated the dependence of these undertakings on Korkmaz; therefore, a mitigating factor reduction was made in the fines imposed on Punto and Gençler.

5. Conclusion
The TCA has started a series of investigations into industries that directly impact consumers' lives. One of these industries is the household appliances sector. Several recent investigations have been launched against the undertakings operating therein. The relevant decisions mostly have been concerned with the restriction on online sales and resale price maintenance allegations as in the Decision regarding Korkmaz, Punto, and Gençler.

The Decision is of significance as including explanatory examples regarding the violation of resale price maintenance in the small household appliances sector. The comprehensive evaluation of the implementations of Korkmaz and its distributors against their dealers is taken into account as enlightening guidance for the member of the said sector. Furthermore, the TCA's acceptance of the applications for a settlement procedure by all parties to the investigation and reduction of their fines were reduced by the maximum rate shows that the applicability and popularity of the settlement procedure are on the rise.

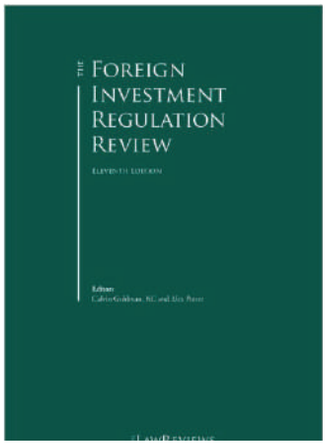
[First published by Concurrences on May 22, 2023]

ACTECON's latest publications (https://www.actecon.com)

Please follow the links to read more:
https://www.actecon.com/en/news-articles
https://www.actecon.com/en/publications

Filo ve Rent A Car Magazine
November-December 2023

The Foreign Investment Regulation Review, 11th Edition



Çimento İşveren Magazine
November 2023

Events

Enterprise GC Türkiye by The Legal 500

ACTECON is proud to be among the sponsors of Enterprise GC Türkiye by The Legal 500 (Legalease) held at InterContinental Istanbul on 12-13 December 2023.

At this event, we hosted a panel titled "Turkish Competition Law Flashback 2023" focusing on the competition law developments of Türkiye.

Our panel addressed the Turkish Competition Authority's recent investigations across various sectors and notable legislative initiatives, including hot topics such as investigations into human resources practices and the recent compliance tools and practices for an enhanced corporate competition policy. We also touched upon the anticipated DMA-like amendments to the Competition Law.

Our panel was chaired by Dr. M. Fevzi Toksoy and featured Bahadir Balki, Assistant Professor and Jean Monnet Chair Zeynep Ayata, as well as Migros Ticaret A.Ş.'s Group Head of Legal and Compliance Özlem Tavaslıoğlu.

We would like to thank our speakers for their insightful contributions. Also - a big thank you to the entire The Legal 500 (Legalease) team, especially David Goulthorpe and Barış Agun for their efforts in carefully organizing such an amazing event.

EALG Euro-American Lawyers Group

The EALG Euro-American Lawyers Group's semi-annual meeting took place in Istanbul in October 2023.

Our Managing Partner Dr. M. Fevzi Toksoy was a guest speaker where he presented "Antitrust Policies – Discussions on Purpose, Enforcement, and Compliance – Example of Turkey".

Many thanks to Barış Tan (Member of the Management Board at EALG) for the invitation and his hospitality.

Delighted to take our appreciation plaque from Caroline De Scheemaecker (Partner at MDS Legal Compass)

ACC EUROPE Mentorship Programme

ACTECON is delighted to have contributed to The ACC Europe – Association of Corporate Counsel's mentorship programme for in-house lawyers.

ACTECON has a close relationship with The ACC Europe – Association of Corporate Counsel through the mentorship programme in which our Managing Partner Bahadir Balki serves as a mentor to in-house counsels.

Bahadir Balki, Başak Arslan (Associate at Cleary Gottlieb Steen & Hamilton LLP) and Serdar Tunçbilek (General Counsel at ABB) discussed the essential elements and necessary practices for an effective competition compliance as well as the recent developments in the field.

Many thanks to Müge Bulat Çetinkaya (Legal Counsel at Borusan) for the invitation.

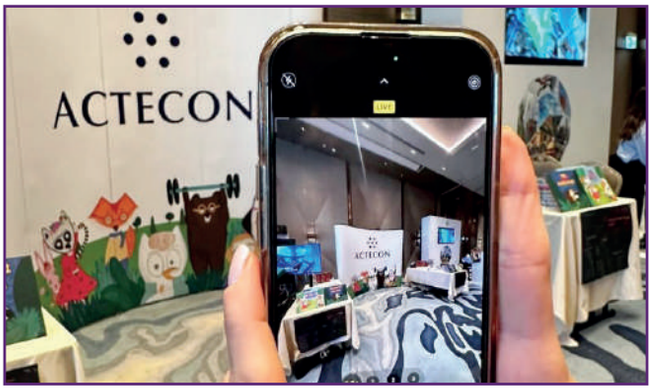
TEID- 10th INTERNATIONAL ETHICS SUMMIT

Another year, another excellent summit!

Thanks Ethics and Reputation Society - Etik ve İtibar Derneği (TEİD) for the 10th International Ethics Summit held on 4th of October 2023.

It was extremely insightful in terms of business ethics, competition, ESG, sustainability, digital ethics, and compliance. ACTECON is delighted for the opportunity to support the summit of the main sponsor.

Thank you for all visiting us at our stand. We look forward to seeing you again.



20 Years Dedicated to Competition

ACTECON

Çamlıca Köşkü - Tekkeci Sokak No:3-5 Arnavutköy - Beşiktaş 34345 İstanbul - Türkiye
+90 (212) 211 50 11
+90 (212) 211 32 22
info@actecon.com www.actecon.com

ACTECON is an advisory firm combining competition law, international trade remedies and regulatory affairs. We offer effective strategies from a law & economics perspective, ensuring that strategic business objectives, practices, and economic activities comply with competition law, international trade rules and regulations.