The Output

Selected Essays 2018

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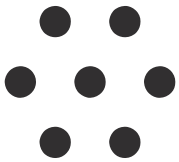

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The Output®

Selected Essays 2018

The Output® Selected Essays provide regular update on competition law, international trade and regulation developments with a particular focus on the Republic of Turkey and practice of the Turkish Competition Authority, as well as the European Commission. The Output® cannot be regarded as a provision of expert advice and should not be used as a substitute for it. Expert advice regarding any specific competition, regulatory & international trade matters may be obtained by directly contacting ACTECON.

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FOREWORD

2018 was a special year for ACTECON as we celebrated our 15th anniversary. It was challenging and interesting on the fronts of competition, international trade, and regulations; and filled with social corporate activities.

The Turkish Competition Authority ("TCA") experienced one of its busiest years in the face of volatile market conditions and rising consumer complaints mainly from increasing prices.

2018 also witnessed a "first" in Turkish competition law practice. It marked the first time Turkey was made the "hold-up jurisdiction" for a multinational megamerger (Essilor/Luxottica; the largest global merger in 2018) as well as being the only jurisdiction in the world to request structural commitments in the very same transaction. It was an honour for ACTECON to represent Essilor before the TCA in Essilor/Luxottica merger.

Another point to be emphasized is that the TCA followed the EC's footsteps and imposed a fine on Google for abusing its dominant position in Android whilst also initiating an investigation concerning an alleged abuse of its dominant position to foreclose online comparison-shopping services. Moreover, the TCA issued a landmark decision and fined an online platform for "excessive pricing" in markets where the relevant platform was far from being a monopoly (sahibinden.com).

Eventually, the strict trade policy approaches pursued by various countries and the "trade war" triggered by the U.S. contributed to the initiation of a plethora of investigations by the Turkish Ministry of Trade. Similarly, the Data Protection Authority dealt with many issues to provide clarification to the enforcement of recently enacted data protection law, whereas companies active in Turkey sought the compliance programmes in that regard.

In this booklet, we have compiled a series of short articles written by ACTECON team members providing insights into the various competition law and international trade issues that arose in 2018 in Turkey and the EU. We hope that this booklet will constitute a snapshot of competition law, international trade perspective, and data protection law in 2018.

Sincerely,

ACTECON
December 2018

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CHAPTER 1 : COMPETITION

1.1. General Topics

1.2. Anti-Competitive Practices

1.3. Concentration Control

1.4. Abuse of Dominance

CHAPTER 2 : INTERNATIONAL TRADE

CHAPTER 3 : REGULATIONS

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CHAPTER 1

COMPETITION

1.1.1. Competition Law in Turkey: The Next 20 Years

Fevzi Toksoy

It has been 20 years since Turkey introduced competition law, and with it the Turkish Competition Authority (TCA). During these past two decades, Turkey has experienced for the first time an institution that is supra-sectoral, independent, and granted broad legal authority. In addition, although it is an administrative agency, the Competition Authority has always been positioned as an extension of the judiciary. Indeed, today the Competition Authority is seen as a quasi-judicial agency that can launch investigations on its own authority as well as acting on complaints received. Given that the TCA has the authority to impose fines up to 10 percent of a company's annual turnover, its potential to affect the market is clear.

To determine the impact of the Competition Authority over the past 20 years, it is necessary to assess both the legal framework governing competition in the Turkish market and the TCA's implementation of it. If we compare competition in the market to a sports match, then competition law represents the rules of the game, while the Competition Authority is the referee, defending the rules to ensure a fair game.

From the perspective of what the TCA was established to do, it can be said that the Competition Authority's application of the legal framework is above average standards in Turkey. For two decades, the TCA has opposed cartels and anti-competitive behavior by dominant players, as well as analyzed the impact of proposed mergers. Thus, the TCA has produced a successful body of work in terms of both law and practice. The Competition Board, which is positioned as a decision-making structure within the TCA, has made thousands of decisions that have affected the market during the past 20 years.

The secondary task of the TCA is advocacy. In this regard, the TCA has the authority to issue advisory opinions about privatizations, proposed legislation, and practices by other government agencies that may discourage competition. The TCA has succeeded evidently in implementing this advocacy function.

Where did the rules of competition come from? How did they enter Turkey's agenda?

All competing entities should conduct their economic activities fairly. The ideal result of fair competition in every economic activity is that companies offer better products and services at lower cost to consumers. Unfortunately, fair competition does not guarantee maximum profitability or market share, which are the main objectives of every company operating in a market economy. Because these are their objectives, companies may try to restrict competition. In other words, they may resort to rigging the game in order to reduce or eliminate the uncertainties of a competitive environment. To prevent companies from yielding to this temptation, competition laws have been adopted all around the world. In their simplest form, these laws contain two main rules: first, you may not conspire with your competitors to eliminate competition; and second, you may not abuse your power in the market.

These two rules were first introduced in their simplest form in the United States in 1890. At that time, giant conglomerates known as trusts controlled whole sectors of the economy, such as oil, steel, railroads, and sugar. Standard Oil Company and Trust, run by John D. Rockefeller, controlled 90-95 percent of the production, processing, marketing, and transportation of oil in the United States. Although the economic impact of trusts on society was not fully known, their political influence became evident: believing it was their right, trusts began to interfere with the rules of the game.

Responding to public demand to "bust the trusts," Ohio Senator John Sherman introduced antitrust legislation that aimed to break the political influence of the concentration of capital. The Sherman Antitrust Act was America's first competition law, and still retains its original essence and validity. It bans trusts, monopolies, price fixing, and other activities that restrain trade or commerce. For example, when the U.S. government sued Microsoft in the late 1990s, it used the Sherman Act, by then over 100 years old.

In the belief that competition must be regulated to achieve a healthy economy, the rules of the game have been rewritten according to the modern economy. After the Second World War, these rules were exported to continental Europe, where they were accepted as a cornerstone of the European Union single market.
With Turkey's EU adventure in the early 1960s, these two rules entered Turkey's agenda concretely. Competition rules, which had been a low priority for Turkey, jumped to

first priority during the Customs Union process in the 1990s, with the driving force of integration with the EU and the development of our industry. Finally, with the enactment of the competition law in 1994 and the establishment of the Competition Authority, which began working in 1997, these two rules became applicable in Turkey.

The discussion about the purpose of competition rules

Attempts to define the purpose of competition rules, which emerged as a derivative of the rules regulating the relationship between capital and politics, have been made from different perspectives during the past century. Although the view is widely accepted that the main goal of antitrust law is to protect consumers, the majority hold that consumer welfare is a consequence rather than an objective. From the perspective of industrial policy, the discussion has included objectives such as protecting small business and promoting strong national champions. More recently, however, the impact of globalisation, the convergence in the structure of capital, and its tendency to concentrate has shifted the axis of competition rules. This trend can be seen clearly, especially in digital economies. With a business model that transcends (and usually avoids) regulations in areas such as transportation, accommodation, and social networks, mega-economies have begun to form that are beyond the reach of competition law and national mechanisms such as tax and professional regulations. These structures, unlike traditional multinational companies, have been implemented by a new kind of management and institutionalization that is central, but with a worldwide spread of agents and consumers.

Today, with its application confined by national boundaries or economic blocs, traditional competition law cannot keep pace with such a cross-border expansion of capital. The fact that Facebook has become a target of investigations in the U.S. Congress shows the political result of its uncontrolled growth, much like the case of Standard Oil in the early 1900s. While Standard Oil developed before U.S. antitrust laws existed, in the case of Facebook, the authorities chose not to apply competition policies while the company grew to unrivalled status. Also as in the case of Standard Oil, the authorities only began to react after the company's political influence created discomfort.

Although there was relatively little mention of antitrust rules during five hours of hearings about Facebook in the U.S. Senate, the real issue is the lack of enforcement.

This indicates that the competition rules that were created to stop companies like Standard Oil from gaining too much power cannot prevent the same mistake from happening again. In this regard, either the misapplication of competition rules (or a preference for not applying them) or the inadequacy of the existing competition rules is a point for further discussion. In my opinion, national application of competition rules is insufficient to meet the challenges of the new global economic order created by the development of technology. In other words, things have gotten out of control.

It is easy to see that the world is gaining a new economic movement. The new products and services emerging in especially developed societies are able to catch up with classical industrial production methods quickly and outpace them. While doing this, they are able to spread rapidly throughout the world, not limited by national borders and regardless of the development of states. Even the owners of that capital can be blindsided by how quickly capital accumulates.

As the simplest example, the competitive pressure on the conventional auto industry created by Tesla resulted from consecutive studies in the field of electric vehicles (and came perhaps much earlier than planned). It is clear that some developments, such as Industry 4.0, artificial intelligence, and blockchain, affect both production processes and consumer expectations. Inevitably, this situation raises questions about the utility of the classical competition law approach based on consumer welfare.

With all these developments, as an interesting contrast, the 1998 global crisis triggered political trends that revived nationalism and protectionism. Today, the economic-political situation created by trade wars in the world leads us to question the purpose of competition law from another perspective. Do the increasing protectionist trends of the last five years imprison consumers in an artificial and costly competitive environment in the name of creating national competitive advantage? For example, while the over-protective safeguards imposed by the United States on imports of iron, steel, and aluminum (which are just the tip of the iceberg) may protect domestic industries, are they providing a competition-free environment to the consolidated domestic giants in these industries? Is the consumer welfare-oriented purpose of competition laws evolving into a political power orientation indexed to national interest, despite the consumer?

Or let's take the Brexit perspective. Will the effect of the new competitive environment created by Brexit, which can be defined as a consumer choice, have a positive impact on consumer welfare or lead to disappointment? Of course we will see; however, it raises another question, to add to the list of questions above: can consumers make the right political decisions about their own welfare?

In its 20-year experience of applying competition law, Turkey has been able to internalize competition rules in a certain part of the business world, due to the fines that have been imposed on large companies. However, the concept of fair competition has not spread from there and become part of the common social fabric. Why? Competition rules have been applied in world markets for 100 years: How does their two decades of application in Turkey contribute to realizing their basic objective?

It is necessary to consider the answer to these questions deeply and comprehensively. It may also be useful to revisit the discussion about the purpose of competition rules, which so far has been conducted from the consumer perspective, to examine the issue from the Turkish perspective. I suggest that intensive but one-dimensional implementation of competition rules has led to a rooted perception that they are only relevant to companies. This, and the Competition Authority's rather narrow application of the competition rules, obeys the letter of the law, but not its spirit. It undermines the true purpose of competition rules and risks isolating Turkey's practice of competition law.

Whether we adopted competition rules in Turkey because of the pressure of the EU process or they entered Turkey's agenda inevitably as a result of the economic conjuncture of the period, especially in terms of the place of foreign capital in the confidence index, we have a 20-year practice of competition law. Now it is necessary to design what Turkey should expect for the next 20 years. Otherwise, our competition law practice will be carried out in an isolated and self-proclaimed system, like an aquarium.

As mentioned above, the competition authority has given a successful practice test. I consider this success a good start obtained at the end of 20 years. The next objective should be to enhance the role of the Competition Authority in the national economy and thereby ensure that it becomes a reference institution indexed to Turkey's industrial policy.

In order to achieve this goal, I think it is necessary to focus on three macro areas in which quick and concrete progress can be made. First, the place of competition rules in Turkey's innovation policy should be determined. In the wave of digital transformation within the economy, there is only one reality that does not change: innovation emerges as a result of fair competition.

In the past year, the Competition Authority has attached special importance to the digital economy. It has strived to make the right decisions in this field. These efforts should constitute encouragement of entrepreneurship that can pave the way for entry into innovative markets. That is, in addition to the incentive systems presented to support entrepreneurship, barriers to market entry must also be lifted by the rapid application of competition law. In other words, a fast-acting Competition Authority will expedite entries into the market.

Another issue to be considered is that competition law practices must be coordinated with a country's industrial policy in a way that balances the country's ultimate objectives for competitiveness and consumer welfare. How determination in the fight against cartels or behavior by a domestic industry that has been strengthened by doping in the domestic market as a result of trade wars impact competition and consumer welfare should be evaluated in this context. Otherwise, in keeping with the analogy above, it would not be possible to regulate competition among the fish that have been taken from the ocean and put into an aquarium. Competition rules are not meant only for products that can enter the region where those laws are applicable. A number of factors, such as the position of that region in world trade flows, the free movement of goods and services, and whether technical barriers are linked rationally to industrial policy, influence the welfare of consumers in that region. The Competition Board should clarify the limit of its discretionary power with concrete justification in a way that respects consumer welfare.

Finally, let's ask the following question: Are different agencies that should determine the country's industrial policy aware of the power of competition rules? Regarding this, let's clarify the third assignment of the Competition Authority. The government should use competition rules more effectively. In particular, it is inevitable that the Competition Authority will play a more active role in promulgating and abolishing regulations that restrict competition unnecessarily. As I mentioned, competition rules

in our country are still perceived as superficial. It is also a fact that this perception cannot be changed by the actions of the Competition Authority alone. However, it is the duty of the Competition Authority to ensure that the competition game is internalized throughout the government and see that regulations are designed to include the concept of fair competition from the beginning. From this perspective, I am confident that public institutions will benefit from such coordination.

Competition rules should be known by many different elements of society in Turkey. However, if we are to discuss the next 20 years, it is inevitable that the Competition Authority will design a new road map. The concept of fair competition permeating all segments of society is the fairest arbiter of who should carry out economic activities. As such, the Competition Authority should make decisions quickly to pave the way for entrepreneurs, support innovation in particular, address the adverse effects of trade wars on consumers by considering consumer welfare in competition analysis, and finally, explain itself to the public in a way that stands firm against any competition-distorting regulations of the government. By adding these objectives to the success of its activity over the past 20 years, the Competition Authority will fulfill its ultimate purpose

1.1.2. Can the Turkish Competition Authority Investigate Foreign Companies Located Outside Turkey? Yes, in Theory; Not Quite, in Practice

Baran Can Yıldırım and Mehmet Salan

It is without dispute that the Turkish Competition Authority ("**TCA**") has, at least according to its laws and regulations, the power to investigate and fine companies outside Turkey if the practices of the companies are considered to affect Turkish markets[1]. The TCA, however, has so far not been able to exercise this jurisdiction consistently and effectively primarily due to deficiencies in the procedures related to the service of certain necessary documents on foreign companies located outside Turkey. These deficiencies are considered to be caused by lack of international agreements between Turkey and the countries in which the investigated companies are located as well as lack of established local practice and regulations in Turkey.

The focus of this article will be on these procedural deficiencies in light of the TCA's decisions in the *Glencore Istanbul*[2]*, Glencore International*[3]*, Anadolu Cam/Yioula*[4]*, Johnson & Johnson*[5]*, Sun Express/Condor*[6] *and Block Train*[7] matters, in which the TCA failed either to serve the notification of its investigations on the foreign companies or to affect such serve without significant and meaningful delays.

As such, we will discuss in the following, first, the law governing the service of the notifications to foreign companies; second, the methods used by the TCA for serving foreign companies; third, the facts of the subject decisions; and last, our suggestions for possible solutions.

What is the applicable law on notifications to foreign companies?

The local law governing the fundamentals of notification and the method of service is Turkish Notification Law No. 7201 ("**Notification Law**"). Article 25 of the Notification Law regulates notifications to be served in foreign countries. Pursuant to this article, the documents subject to the law are to be sent directly to the Turkish Embassy or Consulate, or through the Ministry of Foreign Affairs[8]. Finally, the Turkish Embassy or

Consulate affects service as provided for in the local law of the country in question by means of the relevant authority responsible for the service in that country.

Article 25 of the Notification Law is to be applied in the absence of an international agreement governing service of documents. The documents subject to service by the TCA, however, are administrative documents in nature and Turkey is not a party to any international agreement that covers the service of administrative documents. Therefore, the Notification Law appears to be the only statutory authority to be used in assessing the efficacy of the services of the TCA's documents. Having said that, the following international conventions should be noted in this article as the TCA has attempted and failed to serve its administrative documents according to these international conventions: (**i**) The Hague Convention on Civil Procedure (1954), and (**ii**) the Additional Treaty on Legal Proceedings to Hague Convention (1988).

The following section provides a list of methods used by the TCA when serving official documents such as the Investigation Notice and Investigation Reports on the recipients.

Which methods have been used by the TCA when notifying foreign companies?

As a preliminary matter, under Article 43 of Act No. 4054 on the Protection of Competition ("**Competition Law**"), the TCA is required to serve its investigation notice on the parties concerned within 15 days of its decision initiatingthe investigation, requesting their first written defenses. Further, pursuant to Article 45 of the Competition Law, the TCA is required to serve its final investigation report on the parties concerned and request their second written defences[9]. Indeed, carrying out the investigation in the absence of these notifications violates the concerned parties' due process rights to a defense under fundamental principles of Turkish law[10].

As such, the TCA, when notifying foreign companies, has (**i**) tried to serve the notification on the Turkish subsidiary, or the Turkish liaison office[11] of the concerned foreign company, if any; (**ii**) requested either through the Ministry of Foreign Affairs under the Notification Law or by directly sending the notification to the relevant Turkish Embassy or Consulate in the country in which the subject company is located; (**iii**) requested that the Ministry of Justice serve the notification in accordance with the International Conventions discussed above; or (**iv**) served the notification directly

through registered post by the Turkish Postal Service ("**PTT**").

Surprisingly enough, the last method used by the TCA, that is, the use of the PTT, has turned out to be the most effective method of service used so far, although a method not provided for under the Notification Law[12].

The following sections will discuss the TCA decisions dealing with notification issues in which the above-mentioned notification methods were used.

The history of attempts by the Turkish authorities to notify foreign companies

The TCA, in Glencore Istanbul, initiated a preliminary investigation in 2003 against companies exporting coal to Turkish markets, the Austrian Krutrade, the Swiss Mir Trade, and the Swiss Glencore International. The preliminary investigation became a full-fledged one against Mir Trade, Krutrade, and Glencore International's Turkish subsidiaries. The TCA later concluded that Glencore International also had made its own direct sales to Turkey, leading to a separate investigation against Glencore International was initiated in 2005.

Regarding service, the Turkish authorities used a variety of methods, revealing the dilemma it found itself in given the gaps in the applicable laws discussed above. To start with, the Austrian Krutrade was served with the investigation notice without any trouble by service on its Turkish liaison office as the liaison office accepted the service on behalf of Krutrade without objection. As for the Swiss Mir Trade, the TCA, pursuant to Article 25 of the Notification Law, requested the Ministry of Foreign Affairs send the notification to the Turkish Embassy in Bern, where the company is located.

In the meantime, the TCA attempted to serve the investigation notification on Glencore International through its Turkish subsidiary, Glencore Istanbul. Glencore Istanbul, however, refused to accept service of the notification on behalf of its parent company. As a result, the TCA requested that the Ministry of Foreign Affairs send the notification to the Turkish Embassy in Bern, the procedure it had followed with respect to the Swiss Mir Trade. The Turkish Embassy in Bern failed, after months of effort, to locate Mir Trade[13].

The Ministry of Foreign Affairs eventually suggested the notification be served through the Turkish Ministry of Justice in accordance with the international conventions discussed above.

In the meantime, while the TCA was trying to solve its notification problems in *Glencore Istanbul,* the *Yioula* matter was in the investigation phase, encompassing among others aGreek glass packaging company Yioula. The TCA had already requested that the Ministry of Justice send its investigation notification to Yioula pursuant to the international conventions. The Ministry of Justice, however, rejected the requests, correctly observing that the scope of the international conventions did not cover "*administrative, social and financial documents*[14]." For that reason, the TCA chose not to involve the Ministry of Justice in Glencore Istanbul. The TCA after a couple of months discovered that Mir Trade had established a Turkish liaison office, on which the investigation report was served accordingly.

As a result, neither the investigation notice nor the subsequent investigation report was served on Glencore International or the Greek Yiolua in the respective investigations, whereas Mir Trade was served only with the investigation report. Further, the TCA was unable to serve the investigation report on Krutrade as its liaison office had been closed in the meantime. Although Krutrade and Glencore International were found by the TCA to have violated the Competition Law through anti-competitive practices in the Turkish market, the TCA was unable to complete its investigation and a final decision was not rendered on the respective companies given the TCA's inability to fulfill its procedural obligation to affect both its investigation notice and investigation report[15]. With regards to Yioula, the TCA determined that the practices of the investigated companies did not restrict competition in the Turkish markets. Accordingly, the failure of the service to Yioula did not affect the outcome of the decision.

In the case of *Johnson & Johnson*, the TCA initiated an investigation into, among others, Johnson & Johnson Medical Limited, located in the UK. It served its investigation notice on the Turkish liaison office of Ethicon Limited, a UK subsidiary of Johnson & Johnson. Johnson & Johnson participated in the proceedings, but objected to the efficacy of the service made on its subsidiary's Turkish liaison office on the grounds that a liaison office, pursuant to the Competition Law, was not an "*undertaking*" and thus not subject to that law[16]. The TCA rejected the objection, arguing that liaison office's

nature, whether an undertaking or not, was not relevant with regard to the adequacy of service. Further, the TCA took the position that the liaison office operated on Johnson & Johnson's behalf in Turkey, and can thus be properly served on Johson & Johnson's behalf[17]. Considering the liaison office in question was the liaison office of Ethicon Limited, and not of Johnson & Johnson, it appears the TCA acted in contradiction, at least on its face, of its previous practice in *Glencore Istanbul*, where the investigation notice served on a foreign company's subsidiary in Turkey had been deemed defective. Therefore, Johnson & Johnson's objection may have been successful had it been based on the claim that the service on its subsidiary was inconsistent with the TCA's previous practices.

In the Sun Express/Condor case, the TCA, after receiving a leniency application[18], initiated an investigation in 2010 into two airlines, the German Condor and Turkish Sun Express, for alleged anti-competitive practices with respect to their flights between Turkey and Germany. Even though the Ministry of Justice previously had rejected the TCA's request in Yioula, the TCA again tried to submit its Investigation Notice to Condor through the Ministry of Justice. Not surprisingly, the response of the Ministry of Justice was the same; that is, the international conventions' scope did not cover "administrative, social and financial documents." The TCA then requested that the Ministry of Foreign Affairs send the investigation notice to the Turkish Embassy in Berlin. The Turkish Embassy reported that the relevant authority responsible to serve the notification on the recipient in Berlin had not informed it as to the status of the service.

After failing in its previous two attempts to affect service, the TCA, by its own initiative, sent the notification to Condor by registered mail through the PTT, and the PTT served the document successfully on Condor. Upon the service by mail of the Investigation Notice, Condor submitted its defenses to the TCA. The TCA was able to move forward to decision, imposing administrative fines on Condor for anti-competitive practices under the Competition Law.

In Block Train, the TCA, also after receiving a leniency application, initiated an investigation in 2014 against, among others, the Swiss K+N Switzerland, the Greek K+N Greece, and the Hungarian GYSEV, all of which operate in the rail freight forwarding services market. The TCA directly requested the Turkish Consulates in Zurich, Athens-

Piraeus, and the Turkish Embassy in Budapest to serve the investigation notice on the respective foreign companies. Afterwards, the Consulates and the Embassy requested the relevant authorities to affect service as provided for in the local law of the countries in question, which was accomplished with respect to GYSEV and K+N Greece. The Turkish Consulate in Zurich, however, rejected the TCA's request, claiming erroneously that the investigation notice should be served through the Ministry of Justice pursuant to the international conventions, a procedure that contradicts with the practice of the Ministry of Justice and the express language of those conventions. No doubt frustrated, the TCA, as it did with regard to Condor, simply sent the notification to K+N Switzerland by registered mail through the PTT and the notification was served shortly thereafter. The TCA was able to proceed with the investigation and render its decision, determining in this case that the practices in question did not affect Turkish markets.

Which method is correct and what else could be done?

The applicable law is clear that administrative documents to be served in a foreign country must be sent directly to the Turkish Embassy or Consulate or through the Ministry of Foreign Affairs. Finally, the Turkish Embassy or Consulate affects service as provided for in the local law of the country in question by means of the relevant authority responsible for the service in that country.

Accordingly, the opinion of the Ministry of the Foreign Affairs, expressed in the Glencore Istanbul and Glencore International matters, and expressed by the Turkish Consulate in Zurich in the Block Train matter, that is, that the TCA is to serve its documents through the Ministry of Justice, would seem to have no legal basis. Had Turkey had an international agreement with the subject countries as to the service of the administrative documents as such,then the opinion would have been accurate.

In addition, the TCA's attempts, albeit arguably successful, to serve the documents by regular registered post through the PTT for companies located outside Turkey, is not a method provided for in the Notification Law. It would seem K+L Switzerland and Condor had the right to refuse the notification served through the regular registered post, but instead apparently choose to waive that right by making an appearance and participated in the proceedings. In other words, the TCA would not have been deemed to have fulfilled its notification obligations,and would not have the jurisdiction to render

an enforceable decision, had the foreign companies simply refused to participate in the proceedings due to the inadequacy of the service. As shown by the matters discussed above, there exists no established practice for notifying foreign companies as required by Articles 43 and 45 of the Turkish Competition Law. It should be noted that this is observed to be due to deficiencies in the law beyond the scope of this competition law and control of the TCA.

Unsuccessful attempts to notify foreign companies lead to loss of significant amounts of time and resources. Investigation periods need to be extended and investigations end up taking significantly longer than usual. Further, it should be noted that although the foreign companies in the abovementioned decisions were all located in Europe, where geographically and logistically speaking Turkish authorities have relatively easy access, the TCA still often failed to affect the necessary service.

Turkey, to ensure it has the ability to protect itself from unfair competition by the companies located outside Turkey, needs to negotiate and execute international agreements governing the service of key administrative documents such as notices of the initiation of investigations and reports thereof. In this context, Decision No. 1/95 of the EC-Turkey Association Council[19] explores the nature of the cooperation between the European Community, now the European Union, and Turkey in matters related to competition law. Article 43 of this decision states that Turkey or the Community, as the case may be, may request the other party's competition authority to initiate appropriate enforcement actions if anti-competitive activities affecting the requesting party's markets are believed to be carried out in the territory of the requesting party. Although the Association Council Decision does not cover notifications and the competition authorities of the member states have no authority to notify foreign companies located in their jurisdiction on behalf of another member state's competition authority, the Decision may serve as a roadmap for such agreements, according to which further agreements as to the service of documents by European and EU competition authorities can be executed between Turkey and at leastthe EU member states.

Footnotes

1 Act No: 4504 on the Protection of Competition, Article 2.

2 TCA's 02.09.2010 dated and 10-57/1141-430 numbered decision.

3 TCA's 11.09.2006 dated and 06-62/848-241 numbered decision.

4 TCA's 28.02.2007 dated and 07-17/155-50 numbered decision.
5 TCA's 07.05.2007 dated and 07-38/410-158 numbered decision.
6 TCA's 27.10.2011 dated and 11-54/1431-507 numbered decision.
7 TCA's 16.12.2015 dated and 15-44/740-267 numbered decision.
8 The Ministry of Foreign Affairs, on 7 October 2011, notified by letter to, among others, the TCA that, effective immediately, the documents to be served in a foreign country are to be directly sent to the concerned Turkish Embassy or Consulate, which then affects service as provided for in the local law of the country in question.
9 Pursuant to same Article, the TCA is also required to serve its additional report on the parties, which is prepared upon the parties' second written defenses; and request the parties' response to the additional report. Such requirement will not be discussed in this Article as the decisions herein did not involve any notification as to the additional report.
10 Constitution of the Republic of Turkey, Art. 36; European Convention on Human Rights, Art. 6, which Turkey is a party to.
11 Establishment of a liaison office of a foreign company is provided for under the Turkish Foreign Direct Investment Law for the purposes of, among others, communicating with and providing information to the associated company.
12 Article 25 of the Notification Law provides only that such documents are required to be sent to the relevant Turkish Embassy or Consulate; there is no mention of service using the PTT as an alternative for the companies located outside Turkey.
13 It is worth noting that in line with a suggestion by the Ministry of Foreign Affairs, formal cooperation requests were lodged with Swiss and Austrian competition authorities and the European Commission, all of which were rejected. Given the issues covered in these requests were significantly broader than those covered the notifications, those requests will not be covered in depth under this Article. The cooperation requests lodged with the foreign competition authorities includes, among others, initiating investigations against the companies concerned and forwarding the evidences found in these companies' premises to the TCA.
14 TCA's Glencore Istanbul decision, para. 330.
15 TCA's Glencore Istanbul decision, para. 2660 and Glencore International decision, para 240.
16 Scope of the Competition Law is stipulated under Article 2, and covers only undertakings. An undertaking is defined as "natural and legal persons who produce, market and sell goods or services in the market, and units which can decide

independently and do constitute an economic whole" according to Article 3.

17 TCA's Johnson&Johnson decision, p. 32.

18 A leniency application is a tool to encourage whistle-blowing that, if made and accepted, offers a member of a cartel (an association of companies whose purpose is found to be the maintenance of high prices and otherwise the restriction of competition) the chance of total immunity from fines.

19 EC-Turkey Association Council was established in 1963 and aimed at securing Turkey's full membership in the EEC through the establishment in three phases of a customs union which would serve as an instrument to bring about integration between the EEC and Turkey.

1.1.3. The EC's Initiative on the Improvement of Platform-to-Business Relations and the Role of Competition Law

Barış Yüksel, Mustafa Ayna, and Hasan Güden

Online platforms play a prominent role in innovation and influence growth. Furthermore, online platforms offer unique opportunities to businesses to reach customers on a global scale and serve as an interface between those customers and businesses. Yet it is also the case that as platforms become increasingly powerful, businesses may no longer be able to freely negotiate with these platforms and may be forced to accept some onerous terms.

Given the importance of that context, the European Commission ("**Commission**") adopted an initiative on 25 October 2017 that identifies harmful trading practices in platform-to-business ("**P2B**") relations and proposes measures intending to improve business users' rights vis-à-vis online platforms.

Below, the potentially harmful practices of online platforms and the solution proposals put forward to tackle those practices are addressed. Following these, a brief evaluation as to the role of competition law with respect to the significant market power held by some platforms is put forward.

1. Harmful Trading Practices

The dependence of businesses on online platforms, combined with the significant negotiation power of the latter could lead to unfair outcomes in P2B relations. According to the Commission's findings, the harmful trading practices to which certain online platforms resort are as follows:

- the frequent and unannounced unilateral modification of terms and conditions, without enabling businesses to negotiate;
- the removal of businesses' products and services from e-commerce websites and/or social media accounts or even the suspension of their accounts without granting them the opportunity to oppose;
- The lack of transparency in online platforms' practices (especially within the

framework of rankings and advertising placement);
- The positive discrimination made in favor of the online platforms' own products and services or the discrimination made between suppliers and sellers;
- The inability of businesses to transmit data or even to access them[1];
- The lack of effective remedy to which businesses may resort to against the aforementioned problems[2].

2. The Solution Proposals

The Commission put forward three packages of measures in order to tackle the said commercially harmful practices. Those packages could be achieved through industry intervention and/or EU rules:

a. Industry Intervention Triggered by EU Soft-Law

The EU can incentivize, via non-binding rules, transparency, efficient relief, and a better monitoring of online platforms. The action of industry could apply in the following circumstances: the monitoring of the ecosystems of online platforms; the increasing of the awareness of online platforms' users about the existing legal, commercial, and technical means of handling harmful trading practices; the promotion of voluntary standards (including contractual terms and conditions) in favor of businesses; and the introduction of fairness principles within the framework of P2B relations.

Furthermore, industry also could undertake, in certain sectors, the structural or legal separation of online platforms' intermediary activities from their secondary services, such as payment services.

b. Industry Intervention and EU Legislation Combined

Under this proposal, the Commission suggests three options.

First, the Commission proposes to make it compulsory via EU legislation for online platforms to provide an effective remedy to businesses and to incentivize, via EU non-binding measures, online platforms to act in the circumstances mentioned above.

Second, the EU legislation could introduce a minimum transparency obligation, complemented with EU soft-law and industry-led intervention.

Third, the EU legislation could, according to the Commission, establish a new and independent dispute settlement mechanism and stipulate principles on transparency and fairness that then could be codified by industry (this codification might take the form of codes of conduct or of standards).

Eventually, in addition to the foregoing, the EU legislation simply could prohibit certain harmful trading practices.

c. Detailed EU Legislation

The Commission proposes, in this context, that EU legislation regulates the platform ecosystems in a detailed manner. In the Commission's view, such legislation would provide solutions to issues particular to P2B relations by establishing detailed rules on remedy mechanisms. Iın addition, a detailed EU legislation would regulate areas such as transparency, information provision, data access or use, access to justice, or discrimination.

3. What about Competition Law

The aim and the reasoning of the solution proposals are similar to those of consumer protection regulations. Both constitute balancing mechanisms that aim to curb the excessive negotiation power of one party to ensure that the weaker party is not forced to accept unfair terms against its will. In a way, such rules might fundamentally serve to accommodate the freedom of contract in modern economic relations where significant asymmetries can arise between the negotiation powers and capabilities of parties.

Aside from that, the solution proposals are also similar to consumer protection regulations for being "general" principles that could be applied to all P2B relations. Yet, such general principles are not well equipped to solve certain problems that are much more specific. For example, although the consumer protection regulations are quite useful when dealing with transactions between consumers and average businesses, this is not the case for addressing problems that may arise due to the excessive market power of some specific businesses. In such cases, the only safeguard of an efficient and

competitive marketplace and of consumer welfare is competition law. The same is also true for P2B relations. Although these solution proposals may pave the way for more fairness in P2B relations in general, it is crucial that competition law be relied on to remedy abusive practices of platforms that possess significant market power.

In order to do so, it is necessary to develop tools that would allow competition authorities to define the relevant markets in which platforms operate and to assess the market power of the platforms properly. Furthermore, it is also critical to understand the nature of vertical relations between platforms and businesses. The latest developments in the EU (the Google decision of the Commission[3], the Booking.com decisions of various member states, and the Facebook proceedings initiated by the Bundeskartellamt[4]) as well as in Turkey (the Booking.com[5] and Yemeksepeti.com[6] decisions of the Turkish Competition Board and the ongoing Google Investigation[7]) show that P2B relations are and will continue to be a major issue for competition authorities.

Footnotes

1. For example, some businesses cannot access the information of clients they deal with through online platforms and this situation creates an obstacle to shifting to another platform or implementing targeted marketing practices.

2. This is principally explained by the difficulty of legal recourse in case the online platforms are located outside the EU and the fear of commercial retaliation stemming from the afore-mentioned dependency on online platforms.

3. Case AT.39740 dated 27 June 2017.

4. https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html.

5. TCA's decision dated 09 June 2016 and numbered 16-20/347-156.

6. TCA's decision dated 05 January 2017 and numbered 17-01/12-4.

7. http://www.rekabet.gov.tr/tr/Guncel/google-inc-google-international-llc-ve-g8ef7d2af0fef4a1790782172a7003a38.

1.1.4. Whatsapp Conversations under the Scrutiny of the Turkish Competition Authority

Ertuğrul Can Canbolat and Baran Can Yildirim

As per Law No. 4054 on the Protection of Competition ("**Competition Law**"), the Turkish Competition Authority ("**TCA**") has the right to realize on-the-spot inspections (i.e., raids) in exercising its duties including, among others, carrying out preliminary inquiries and investigations to reveal competition violations. In this regard, Article 15 of the Competition Law draws the borders of this right and states that the TCA is entitled to:

- "examine the books, any paperwork and documents of undertakings and associations of undertakings, and take their copies if needed";
- "request written or oral statement on particular issues";
- "perform on-site examination of any assets of undertakings."

As broad as the scope of the right may seem, the TCA has until very recently been hesitant to inspect Whatsapp conversations.

In this very recent preliminary inquiry1 ("**Orthodontic Products Decision**"), the TCA examined whether undertakings located in Ankara dealing with the sales of orthodontic products violated Competition Law by way of price fixing.

The TCA, within the scope of the preliminary inquiry, has conducted raids on the premises of nine undertakings allegedly involved in these price fixing practices. The findings of the raids revealed that the TCA has inspected the employees' Whatsapp conversations on the company computers linked to the company GSM lines, probably thanks to the Whatsapp's features that enable the user to use the application over a browser-based platform or over a computer software. Another possibility is that the Whatsapp conversation logs were stored on the company computers. As far as understood from the decision, the TCA did not inspect the Whatsapp conversations on the employees' mobile phones.

Although it is known that the TCA has been inspecting the computers of employees as an established practice, the inspection of Whatsapp conversations is a first-time (known) practice by the TCA.

In conclusion, the TCA has found that the companies concerned did not carry out price fixing practices and thus did not violate the Competition Law. Regardless of the result, the Orthodontic Products Decision is an important case for the TCA's upcoming raids and their compatibility with the law.

Considering the recent decisive and determined practices of the TCA regarding imposing fines on undertakings for hindering inspections[2], the Orthodontic Products Decision suggests that the undertakings may be fined if their employees refuse to let the TCA inspect their Whatsapp conversations so long as the Whatsapp conversations are realized through the company GSM line and the inspection is carried out on the company computer.

There is no doubt that there is a clash of rights between the TCA's right to inspect employees' Whatsapp conversations and employees right to privacy. In this regard, it is considered that the TCA is to act in a very careful manner in inspecting the Whatsapp conversations, which may be directly related to the employees' right to privacy as protected under the Turkish Constitution.

Footnotes

1. The TCA's 29.03.2018 dated and 18-09/157-77 numbered Decision.

2. Within the last years, the TCA imposed fines on four undertakings for not submitting to the inspection, amounting to a record of more than TL3 million in total (18.01.2018 – 18-03/34-21; 21.12.2017 – 17-42/669-297; 03.07.2017 – 17-20/318-140).

1.1.5. Substantive and Procedural Issues of Cement Sector Investigations in Turkey

Hanna Stakheyeva and Ertugrul Canbolat

I. Substantive and procedural issues of sector inquiries in Turkey

"[...] every system of competition law will deal with cartels and the first thing for any new competition regulator is to go out and find the cement cartel. [...] it is always there, somewhere [..]". This statement by R. Whish (2001) illustrates the reality of the competition authorities' approach to the cement market in various jurisdictions, including Turkey. It has become a prejudgement mostly because in sectors "*where standardized products are produced and/or sold [...], the parameters to agree are generally issues about price and sale; therefore, cartels are more frequent.*[1]" However, at the same time, we should not forget that the cement sector is characterised by an oligopolistic structure; hence, even if the undertakings compete with each other, it is not realistic to observe price trends that are expected from a fully competitive market structure. This situation is accepted in the economic theory.

Nevertheless, the cement sector has always attracted the attention of the competition authorities worldwide. Back in 1994, the European Commission fined 42 companies for partitioning the cement market among themselves and various information exchanges (the fine was reduced by the Court of Justice from EUR 248 million to EUR108 million). In 2003, Bundeskartellamt (the German Competition Authority) fined six cement companies EUR660 million for colluding and setting production quotas. In 2008-2009, the European Commisison conducted inspections of several leading cement companies on suspicion of forming a cartel[2] (although following the investigation, it decided to close the case due to lack of evidence). In 2009, the Office of Competition and Consumer Protection of Poland imposed a fine of EUR99 million on seven cement producers[3].

In Turkey, the cement sector has been under the supervision of the TCA since the

[1] OECD Roundtable on Promoting Compliance with Competition Law - Note by the Delegation of Turkey, Directorate for Financial and Enterprise Affairs Competition Committee, DAF/COMP/WD(2011)36, 2011, p. 16. Retrieved from: http://www.rekabet.gov.tr/File/?path=ROOT%2f1%2fImages%2fHaber%2f71_Compliance_Turkey.pdf (20.01.2017).

[2] Commission welcomes General Court judgments in cement cartel case confirming its investigatory powers. Press Realese, Brussels, 14.03.2014. Retrieved from: http://europa.eu/rapid/press-release_MEMO-14-192_en.htm (20.01.2017).

[3] Commission opens antitrust proceedings against a number of cement manufacturers. Press Release, IP/10/1696, Brusssels, 10.12.2010. Retrieved from: http://europa.eu/rapid/press-release_IP-10-1696_en.htm?locale=en (20.01.2017).

establishment of the body in 1997[4]. In fact, the first investigation of the TCA was on the cement market (Çelen and Gunalp, 2010). The cement sector is considered one of the most profitable and at the same time most troublesome sectors in Turkey[5]. This explains the increased attention and competition enforcement efforts of the TCA in the form of investigations, fines, as well as sector inquiries. The latest cement sector inquiry was finalized in December 2016. The main substantive and procedural issues arising from the Report are analysed in the below sections.

2. Main findings of the Cement Sector Report

The TCA decided to initiate a sector inquiry and to conduct both descriptive and statistical analyses of the cement market in 2014, considering the importance of the cement industry for the construction[6] and economy of Turkey and numerous competition issues in this sector. Following two years of research and analysis of the cement market, the Cement Sector Report was published on the TCA's website[7].

The Cement Sector Report includes economic analysis of several issues regarding the Turkish cement sector, such as demand-price, efficiency-price, and cost-price comparisons, as well as market allocation and profit maximization in relation to possible anti-competitive indicators. The Cement Sector Report may be regarded as providing "guidelines" to the TCA's future approach regarding the cement market.

The overall focus of the Cement Sector Report is on the structure and pricing policies of the cement market. Considering that cement is a homogeneous product, customers' choice between cement producers depends primarily on price. The cement industry is notorious worldwide for certain anti-competitive practices and coordination. Cartels, as the most serious anti-competitive practice in the cement sector, are considered to be effective when on a limited scale, i.e., in a local or regional market that is dominated by a few cement plants. Due to the fact that cartels are costly to operate particularly on a large scale, there are other practices with the help of which the companies may potentially coordinate their behaviours, i.e., with the help of (1) a point-based system by which the market price is set by the leading company according to the base mill price, and other smaller competitiors become price-takers; (2) vertical integration by way of buying the concrete producing companies; (3) information exchanges, etc. (Dumez and Jeunemaître, 2000).

[4] The Turkish Competition Law was adopted in 1994, the Turkish Competition Authority was established in 1997, when the Turkish Competition Law started to be effective.

[5] This is one of the reasons why the privatization in Turkey began with the cement sector in 1989 (Demek, 1994, p. 18). Retrieved from: http://seyhan.library.boun.edu.tr/record=b1154512-S5 (25.01.2017).

[6] Cement being one of the fundamental inputs in the construction sector.

[7] Cement Sector Report, 2016. Retrieved from: https://www.rekabet.gov.tr/Dosya/sektor-raporlari/12-cimento-sektor-raporu-pdf

Price increases in the cement sector are very common. According to the Cement Sector Report, price increases for cement in Turkey starting from 2013 have been prominently above the inflation rate. While this may raise certain competition law concerns, at the same time price increase alone cannot be considered as a per se violation of competition rules. A case-by-case examination is necessary to understand whether the pricing could be explained by economic reasons, such as cost, demand structure, or growth. Interestingly, the Cement Sector Report concludes that there is no direct correlation between price and either demand structure, concentration in the cement market, or cost.

2.2. Cement as a local consumption product

Cement tends to be a local consumption product due to high transportation cost [around 10-15 percent of the total value added, with trucks being the prevailing means of transportation (Dernek, 1998)]. Hence, local producers have a considerable advantage in their local market (Dernek, 1998). The same views have been expressed by Dumez and Jeunemaître (2000):

> *Each plant can be seen as at the centre of a "natural" market, the boundaries of which are determined by the relationship between production costs (which fall strongly as the size of plant and its rate of utilisation increase), and transportation costs (which rise with distance). A cement producer is secure from competition within his natural market as the price he will normally quote, given the combination of production and transportation costs, is lower than that which can be quoted by distant competitors.*

It is clear that cement producers normally sell within their geographical areaand they do not tend to change the boundaries of their own market even when economic conditions change. In our opinion, this could be regarded as the natural business strategy of cement producers, which may be explained by the peculiarities of the cement sector (capital-intensive industry, regional market, high transportation cost, and local competition).

2.3. No correlation between demand and demand structure: questioning the market seasonality argument

The TCA states that the cement market is characterised by a periodic/seasonal demand

structure that normally decreases in September/October and increases in March/April[8], reflecting the business cycle of the construction industry and country's climate. This issue has been addressed by the TCA in previous decisions. For instance, in Decision No. 13-07/65-34, as of 24 January 2013, the TCA confirmed that the following circumstances are frequently encountered in the cement sector: seasonal demand for cement, increase in prices associated with escalating demand during the spring-summer months, decrease in prices due to the fall in demand during winter months, and similarities in the price movements of different cement producers.

At the same time, in spite of the seasonal structure, the TCA also has observed in its decisions that prices do not always correlate with demand patterns. As a general trend, the price does not always decrease in low-demand periods. An increase in price also would not have an impact on demand for cement, since there is no substitute for it in a short run at least (Dumez and Jeunemaître, 2000). In other words, an increase in price takes place independently from demand tendencies. For instance, the TCA in Decision No. 12-17/499-140, dated 6 April 2012, found that cement price movements were not related to the market structure and refused the seasonality defenses of the parties concerned. Therefore, considering that there is no unquestionable relation between the cement prices and seasonal demand, in the TCA's opinion, any price increase defence strategies based on the seasonality of the cement market are unlikely to be accepted in the future without any other sufficient economic infrastructure and convincing information or evidence.

2.4. No clear correlation between price and market concentration levels

Another important finding of the Report in relation to prices is that no clear positive or negative correlation between price and concentration in the cement market has been observed by the TCA[9]. Prices are at a close level in both highly and less concentrated regional markets. The Report concluded that market shares of undertakings are rather low at the national level, but at the same time, certain undertakings have a greater market power in certain cities. The concentration levels differ depending on the city (and the number of companies making sales there). The higher the number of undertakings, the more price differences in a city may be observed.

[8] TCA - Cement Sector Report, Section II.E.I, p. 28, para. 1.
[9] TCA – Cement Secor Report, Section III.B.II.I, Table 29, p. 78.

2.5. No correlation between price and cost

The TCA carried out its analyses regarding the relation between prices and costs in both short-term and long-term perspective (by using various methods such as autoregressive distributed lag, cointegration and error correction models, Engle-Granger). In the end, no close correlation between cement price and cost was found. Cement production is normally characterized by significant economies of scale, meaning the average cost may be reduced by increasing output (Dernek, 1998). When output does increase, however, changes in costs are not really reflected in price movements. In other words, if the company manages to reduce its cost of cement production, prices normally will not decrease relatively, according to the TCA's findings.

It has not been possible to determine a positive relation between costs and prices as expected in economics and theory. It has been observed that the concerned relation is mostly a negative one, meaning that in the event where the costs for the production of the cement decline, the prices do not always decrease, but rather may increase.

2.6. Bulk vs. packaged cement: price similarities

The Report also evaluates cement as a product and notes that bulk cement is sold more (accounting for a minimum of 60 percent of cement sales per year[10]) than packaged cement[11]. Packaged cement is mostly sold through dealers while bulk cement is mostly sold to ready-mixed concrete facilities. In other words, concerning bulk cement, dealers constitute a significant customer share (28 percent), although the ready-mixed concrete plants represent the primary customer group. On the other hand, dealers lead in the field of packaged cement, with a share of 87 percent[12].

This may be explained by the fact that the cement sector demonstrates the characteristics of an oligopolistic market structure. Even if the undertakings compete with each other, it is not realistic to observe price trends that are expected from the fully competitive market structure. This situation is accepted in the economic theory. On the other hand, in cases where prices are determined through an agreement or concerted practices (by the competing undertakings), the price level will be higher than the level arising from the oligopolistic competition. The competition law, particularly

[10] This is valid for the cement products under Codes 14 and 24.sector.
[11] TCA – Cement Sector Report, Section III.B.II.III, p.102.
[12] TCA – Cement Sector Report, Section III.B.II.IV, p. 103-104, Chart 34 and 35.

in Article 4 of the Turkish Competition Law (hereinafter, TCL), prohibits this. That said, the determination of prices by the competing undertakings (without the existence of any agreements or concerted practices) below the competitive levels just because of oligopolistic interdependence and rational choices is known and accepted in both theory and commercial life. This shall not be considered as a violation from the perpective of competition law.

The Report provides data on 404 simulations made in the course of five years (2010-2014) and in 81 provinces in relation to calculation of prices, which arise in cases where the production and sales units show oligopolistic competition (Bertrand game) and profit maximisation behaviours (either wholly or partially together)[13]. In the light of the findings, the Report states that the common course of behaviour in the cement sector is the "*joint profit maximisation*[14]," in terms of the provinces and years. Therefore, it is possible to argue that the observed price levels in the cement sector during recent years generally (except some observation points) were determined above the levels expected from oligopolistic competition in terms of the economic analysis. On the other hand, it does not necessarily confirm the existence of anticompetitive practices between the undertakings; rather it may be a result of rational choices of the cement companies in the circumstances of an oligopolistic market.

The Report emphasizes that the cement market is rather difficult for new players to enter due to certain economic and legal entry barriers. The TCA concluded that the cement sector in Turkey bears anti-competitive characteristics. The product and market structure of the cement sector facilitate the implementation of anticompetitive practice and collusion. The TCA has not taken any action as a result of the Report yet. However, it may be anticipated that the economic activities of the cement companies in Turkey will continue to be under a special scrutiny of the TCA in order to improve competition.

[13] In terms of the observations made for the cases where only one unit operates currently, the monopolistic course of behaviour has been included into the simulations. The prices obtained as a result of the simulations and actually observed average prices in the concerned province/year have been compared and the closest course of behaviours/actions to the reality has been established. Considering the simulation performances of the closest scenarios to the reality and the proximity ratios between calculated and real prices, it has been evaluated in three categories (five percent or below, between five percent and ten percent, and between ten percent and 15 percent). Accordingly, in 277 observation points from 404, the difference between the calculated prices for the closest scenarios to the reality and observed prices is 15 percent or below. In 234 of these 277 observations, the joint profit maximisation behaviour reveals a result with 15 percent or much lower proximity on average. Taking lower proximity levels into account, it is seen that the wholly or partially joint pricing behaviour in the cement sector generates results to the observed prices in reality at a significant rate.

[14] TCA, Cement Sector Report, Section III.D, p. 131.

3. Procedural issues of sector inquiries directed at cement manufacturers: right to request information versus duty to provide information

Both antitrust investiations and sector inquiries aim at increasing competition in the market. At the same time, both may result in the cement market becoming more transparent and paradoxically more suitable for collusion. As noted by Çelen and Gunalp (2010), "most of the studies that have addressed this question have reached the startling conclusion that antitrust enforcement does not lead to lower prices." "Indeed, antitrust investigations do not lead to the decrease in prices, but rather serve as a preventive mechanism for future violations – as a disincentive, discouraging factor for the companies to collude considering the level fines." In fact, the findings of Çelen and Gunalp's research emphasize that the investigations conducted by the TCA have made the cement market more competitive.

While we share this opinion, it also should be stated that there are certain issues that require clarifications and improvements, such as the duration of the investigation procedure (which is rather long - normally the TCA takes the decision within two years), the powers of the TCA to request extensive information/documents from the parties, and the appeal procedure to the court of first instance/the Council of State. Let us focus of the issue of the TCA's powers to request information (which could also be used as one of the procedural grounds for appeal of the decision) and its comparative analysis with those that the European Commission enjoys.
Request for information shall be regarded as a (preliminary) investigative measure, part of the investigation procedure/sector inquiry enabling the competition authorities to obtain information/documentation and verify the actual existence and scope of a specific factual and legal situation in the market[15].

3.2. Legal grounds for information requests

The TCA uses its investigatory powers through request for information and on-the-spot inspections[16]. The TCA, under Article 14 of the Turkish Competition Law, may request any information it deems necessary from all public and private institutions and organizations, undertakings and associations of undertakings; while officials of these

[15] ECJ judgment of 18.10.1989, Case C-374/87 Orkem v Commission, ECLI:EU:C:1989:387, para. 21.

[16] Besides the requests for information, in order to gather information or documents for the purposes of investigation, the TCA may conduct on-the-spot inspections. Within this scope, the TCA may perform examinations/searches at the premises of undertakings and associations of undertakings where it deems necessary. The legal basis authorizing the TCA in terms of on-the-spot inspections is Article 15 of the Turkish Competition Law. In cases where undertakings do not cooperate with the TCA, it is highly likely that administrative fines would be inevitable for them.

authorities, undertakings and associations of undertakings are obliged to provide the requested information within the period determined by the TCA[17].

In the EU, under Regulation 1/2003, there are two obligations for both the authority and the undertakings concerned. The first is an obligation to state reasons. The European Commission, in requesting information via its formal decision, must specify legal basis and purpose of such request, as well as fix the time limit for the companies to respond to the request[18] and obligation to provide the requested information[19].

The European Commission may request information when when a relationship between the information and alleged behaviours exists[20], while companies are required to provide all information requested by the Commission[21]. In case of ignoring formal requests for information, the companies concerned may face penalties of up to one percent of the total turnover in the proceeding year[22]. Additionally, periodic penalty payments[23] may be imposed of up to five percent of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision (in order to compel them to supply complete and correct information, as requested by the European Commission's decision under Article 18(3) of Regulation 1/2003).

3.3. Limitations to (scope of) information requests

Both the TCA and the European Commission are vested with broad powers to request information and determine the periods for the response. The main question that arises here is how to protect the companies/individuals against the disproportionate intervention by the competition authorities, i.e., what the limits to the competition authority's power to request information are. Normally, a measure is disproportionate when it is taken in the absence of facts "*capable of justifying the interference with the*

[17] http://www.rekabet.gov.tr/en-US/Pages/Act-No-4054 (25.01.2017).

[18] Art. 18(3) of Regulation 1/2003. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.

[19] AIn addition, recital 23 in the preamble to Regulation 1/2003 states: "The Commission should be empowered throughout the Community to require such information to be supplied as is necessary to detect any agreement, decision or concerted practice prohibited by [Article 101 TFEU] or any abuse of a dominant position prohibited by [Article 102 TFEU]. When complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement."

[20] CoJ judgment of 19.05.1994, Case C-36/92 P SEP v Commission, ECLI:EU:C:1994:205, para. 21.

[21] Art. 18(1) of Regulation 1/2003.

[22] Art. 23 of Regulation1/2003 states that "The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1 percent of the total turnover in the preceding business year where, intentionally or negligently: (a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2); (b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit..."

[23] Art. 24 of Regulation 1/2003.

fundamental rights of an undertaking,"[24] and when it constitutes an excessive interference with those rights[25].

In its recent cement cartel judgements (Case C-247/14 P Heidelberg Cement v Commission[26], C-248/14 P Schwenk Zement v Commission[27], C-267/14 P Buzzi Unicem v Commission[28], C-268/14 P Italmobiliare v Commission[29]), the Court of Justice (CoJ) set aside the 2014 rulings of the General Court (GC) where the GC upheld the statement that it was for the European Commission to decide what information it considered necessary to request in the process of antitrust investigations and deciding whether the infringement took place. The CoJ supported the position of the applicants and limited the powers of the European Commission to request extensive information/documents in its formal requests for information.

These cement cartel judgements arose from the 2011 formal requests for information of the European Commission addressed to several cement companies suspected in participating in the cement cartel. The companies were requested to provide extraordinary quantities and very diverse types of data within a relatively short period of time (a questionnaire itself was 67 pages long, in relation to the economic activities of companies in 12 EU member states for a period of more than a decade; financial documents; information that was already publicly available, etc.). Moreover, they were asked to provide that data in a very specific and strict format that required a significant amount of additional work since the parties had to perform numerous, complex, and burdensome operations involving formatting/re-formatting of that data, which in principle should have been carried out by the European Commission[30].

Seven companies brought an action before the GC to cancel the European Commission's decision. Following the GC's judgement not in their favour, certain companies appealed to the CoJ. In March 2016, the CoJ delivered its judgement supporting the companies' position and setting aside the GC's judgments by stating that the GC "erred in law in finding that the Commission decisions were adequately reasoned[31]." Interestingly, by the time of the judgment, the European Commission had decided to

[24] CoJ judgment of 22.10.2002, Case C 94/00 RoquetteFrères, ECLI: EU:C:2002:603, para. 55; ECJ judgment of 17.10.1989, Joined cases C-97/87 to 99/87 Dow Chemical Ibérica and Others v Commission, ECLI:EU:C:1989:380, para. 52.
[25] C-94/00 Roquette Frères, para. 76 and 80.
[26] CoJ judgment of 10.03.2016, Case C-247/14 P Heidelberg Cement v Commission, ECLI:EU:C:2016:149.
[27] CoJ judgment of 10.03.2016, Case C-248/14 P Schwenk Zement v Commission, ECLI:EU:C:2016:150.
[28] CoJ judgment of 10.03.2016, Case C-267/14 P Buzzi Unicem v Comission, ECLI:EU:C:2016:151.
[29] CoJ judgment of 10.03.2016, C-268/14 P Italmobiliare v Commission, ECLI:EU:C:2016:152.
[30] Opinion of Advocate General Wahl, delivered on 15.10.2015, Case C 247/14 P HeidelbergCement AG v European Commission, para. 119, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=169761&doclang=EN#Footref76 (3.03.2017).
[31] Case C-247/14 P, Heidelberg Cement v Commission, para. 40.

close its investigation due to a lack of evidence of the existence of the cement cartel. Nevertheless, the judgments are of great importance for the future of the procedural aspects on the investigatory powers of the competition authorities.

From the judgments, it is clear that the main mistake made by the European Commission was insufficiently explaining the reasons for requesting that information (why such burdensome information was necessary for the investigation). Hence, it is not that the European Commission could not ask for extensive/detailed information, but rather that it cannot do so without providing sufficient reasons (proving necessity) for that.

In assessing the necessity of the request against the level of detail/clarity of the European Commission's statement of reasons, the CoJ relied on the proportionality test (Frenz, 2016, p. 1289) involving two main variables, (1) the quantity and complexity of the information requested, and (2) the actual capacity of the parties to provide that information.

> *The quantity and complexity of the information requested depends, obviously, on many variables: the seriousness of the suspected infringement, the nature of the involvement of the undertaking concerned, the importance of the evidence sought, the amount and type of useful information which the Commission believes to be in the possession of the undertaking in question*[32].

In other words, the European Commission should have indicated the purpose of the request for information with "*sufficient precision*[33]" in order to determine the necessity of information for the purposes of the investigation.

Consequently, the CoJ ruled that the European Commission's statement of reasons was "[…] excessively succinct, vague and generic – and in some respect, ambiguous. Such types of statement of reasons do not fulfil the requirements of the obligation to state reasons as laid down in Art. 18(3) of Regulation 1/2003[34]." In addition, another important conclusion to the benfit of the undertakings subject to investigation is that the Competition Authority should not require "exceptional efforts" from the undertaking. "After all, it is not an undertaking's role to perform the tasks of the Commission, and that

[32] Opinion of Advocate General Wahl, 15.10.2015, Case C 247/14 P Heidelberg Cement v Commission, para. 129.
[33] Case C-247/14 P Heidelberg Cement, para. 24.
[34] Case C-247/14 P Heidelberg Cement, para. 39.

holds true irrespective of the size of that undertaking and the means at its disposal[35]."

As regards to the Turkish Competition Law, it does not contain any specific boundaries to the powers of the TCA regarding its investigation tools and scope of information requests in particular. Nevertheless, the TCA's powers are not limitless. Ratio legis of the Turkish Competition Law shall be regarded as the first boundary to the investigatory powers of the TCA. Correspondingly, the TCA is obliged to use its investigatory powers in order to ensure compliance with provisions of the TCL, namely Articles 4, 6, and 7 thereof. The right to privacy, which is explicitly envisaged by the Constitution of the Republic of Turkey, shall be regarded as the second boundary to the investigatory powers of the TCA. Accordingly, the TCA is not able to expand its investigatory powers to the information, documents and other data, which actually belong to employees of undertakings under investigation and therefore bear a personal character, hence falling under the scope of personal data protection regime. In addition to these two possible limitations to the powers of the TCA to request information, it is anticipated that following the court judgments in cartel cases in the EU, the TCA's discretion in deciding on the scope of information requested and setting the periods for response will be further clarified.

Indeed, the analysed developments in relation to the obligation to state reasons in information requests are crucial for undertakings subject to antitrust investigations for the purposes of enabling them to understand the reasons for the particular action so that they can exercise their rights to defence in a proper way. As confirmed by the CoJ, the obligation to state specific reasons is "*a fundamental requirement, designed not merely to show that the request for information is justified but also to enable the undertakings concerned to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence*[36]." Hence, the more burdensome the request, the higher the burden of proof on the competition authority as to why the response to the request is necessary. It is expected that the judgments will have impact on the powers of competition authorities in third countries' jurisdictions that have undertaken certain obligations in terms of harmonizing their legislation with the EU standards, e.g., Turkey.

II. Most common competition law violations in cement sector: Major cases in Turkey

[35] Opinion of Advocate General Wahl in Case C 247/14 P Heidelberg Cement, para. 133.
[36] Case C-247/14 P Heidelberg Cement, para. 19. See also: joined cases 97/87 to 99/87 Dow Chemical Ibérica and Others v Commission, para. 26; C-94/00 Roquette Frères, para. 47; CoJ judgment of 25.06.2014, Case C-37/13 P Nexans and Nexans France v Commission, ECLI:EU:C:2014:2030, para. 34; CoJ judgment of 18.06.2015, Case C-583/13 P Deutsche Bahn and Others v Commission, ECLI:EU:C:2015:404, para. 56.

1. 1997-1999 investigations

As already discussed, the TCA has been investigating the cement sector in Turkey since its establishment in 1997 in order to induce a more competitive environment. Today, although cement producers are more cautious about their practices and competition law compliance, the cement market still remains under the scrutiny of the TCA. Price fixing and market sharing have been among the most common competition law violations detected by the TCA in the cement sector. This has been confirmed by the Report findings[37] and the TCA's decisions, the highlights of which are provided below.

One of the first investigations conducted by the TCA was in relation to five companies in the Aegean region[38] (Dernek, 1998) of Turkey. In its Decision No. 99-30/276-166(a), dated 17 June 1999, the TCA concluded that the cement manufacturers acted in breach of competition law by way of setting their sales prices and partitioning the market geographically. As a result, the TCA imposed a fine on the companies.

At the same time, the TCA launched another investigation into 22 companies operating in the Central Anatolia, Marmara, and Mediterranean regions of Turkey to determine whether they concluded an anti-competitive agreement or/and abused their dominance. The investigation was completed by Decision No. 02-06/51-24, dated 1 February 2002, imposing a fine on 18 companies found acting in violation of competition law by way of price fixing and market sharing.

2. 2003-2004 investigations

In 2003, cement companies from the Aegean region (the same as in the 1997 investigation) came again under the scrutiny of the TCA. They were found guilty and fined again for price fixing, with TCA Decision No. 04-77/1108-277, dated 2 December 2004.

It should be mentioned that the decision was appealed to the court (Council of State). TCA Decision No. 99-30/276-166(a) was appealled to and annulled by the Council of State due to the fact that the text/explanation of the dissenting vote mentioned in the decision was missing. Subsequently, the TCA appealed the latter decision of the Council

[37] TCA – Cement Sector Report, Section I, p. *5*, para. 3.
[38] Turkey is traditionally divided into seven geographic/economic regions: Marmara, Aegian, Mediterranean, Black Sea, Central A., Eastern A., and S. Eastern A.

of State; however, the TCA's application was rejected and the annulment decision became final. It should be mentioned that in the course of the review of the decision by the Council of State, the TCA in order to avoid the annulment of its decision due to the mentioned procedural deficiency, issued the same decision with the addition of the text of the dissenting vote. Nevertheless, the Council of State annulled the mentioned decision and the TCA subsequently had to adopt a separate Decision, No. 05-57/850-230, dated 13 September 2005. This decision was again appealed by four out of the five companies to the Council of State and annulled – again on procedural grounds – for a lack of the majority of the TCA's Board members in the process of taking the decision. Subsequently, the TCA rendered Decision No. 07-62/740-268, dated 26 July 2007, and imposed fines on the undertakings.

As regards TCA Decision No. 02-06/51-24, it also was annulled by the Council of State upon the appeal application of the investigated undertakings. Subsequently, the TCA rendered its final decision and imposed various fines on investigated undertakings[39].

TCA Decision 04-77/1109-278, dated 2 December 2004, was also set aside by the Council of State due to the participation in the decision taking process of a TCA Board member who previously had been involved in the investigation process. Afterwards, the TCA rendered its final Decision No. 06-77/992-287, dated 19 October 2006.

Therefore, the 1999, 2002 and 2004 decisions were appealed and set aside by the court on the grounsd of procedural deficiencies. The decisions were subsequently reassessed by the TCA, but without changing substance and hence the amount of fines[40] for the parties concerned.

3. 2012-2014 investigations

In April 2012, with Decision No. 12-17/499-140, the TCA decided to launch an investigation into 10 cement companies that allegedly were operating in violation of Article 4 of the Turkish Competition Law. The TCA decided that the investigated undertakings had engaged in price-fixing upon a meeting arranged by the marketing executives of the mentioned undertakings and thus had infringed Article 4 of Law No. 4054. Following the investigation, the TCA in its Decision No. 14-07 /138-M, dated

[39] TCA Decision No 06-29/354-86, dated 24 April 2006.
[40] According to Article 17(6) of Law of Turkey No. 5326 (Misdemeanor Law) in case the administrative fine is paid prior to applying for any legal remedies/appeal, the undertaking concerned shall be entitled to a ¼ discount. Such advance payment is without prejudice to the right to apply for legal remedy.

19 February 2014, determined that the mentioned companies were indeed acting in violation of Article 4 of the Turkish Competition Law and imposed a fine on them.

TCA Decision No. 14-07/138-M was appealed to and set aside by the court. Later, upon this cancellation, the same applicants requested investigation again, but this time the investigation was conducted only in relation to two companies. It was determined that these two companies had been severely penalized and the amount of fine was reduced. Six undertakings were fined with an amount corresponding to 2 percent of their turnover in financial year 2011 and four undertakings were fined with an amount corresponding to 3 percent of their turnover in financial year 2011.

Unlike in the EU, there has not been any precedent of appeal of the TCA's decision on the grounds of extensive information requests yet; although most of the appeals in Turkey are related to the procedural deficiencies and decision-making powers of the TCA.

4. 2014-2016 investigations

4.1. No violation found

In October 2014, the TCA received a complaint against cement producers alleging that the undertakings were involved into price-fixing, shared customers, and forced their dealers to behave in accordance with customer allocation. A preliminary report of the experts was prepared on 14 November 2014. Subsequently the TCA Board initiated a pre-investigation into the cement producers, involving on-the-spot inspections and document collection.

Taking into account the characteristics of allegations, specifications of cement and the TCA's precedents, the Board defined the relevant product market as "*bagged and bulk grey cement market.*" The sales activities of the investigated undertakings geographically overlapped in Balıkesir, Bursa, and Yalova.

The TCA assessed the practices in light of Article 4 of the Turkish Competition Law. Considering the documents obtained within on-the-spot inspections and their assessments, the TCA Board stated that it could not find sufficient evidence concerning the involvement of the investigated undertakings in the anti-competitive agreement. In addition, according to the Board's findings, it was quite possible for such price

increases to have taken place within the period in question without any collusion among competitors. Furthermore, the TCA stated that during the on-the-spot inspections, on the contrary to the allegations of the complainants, it had obtained documents indicating customers had purchased cement from different producers within the same period. Finally, the TCA by majority vote decided[41] not to launch an investigation into the undertakings.

Another complaint to the TCA against cement producers was registered on 25 February 2015. According to allegations, the undertakings subject to investigation increased their prices every other week, allocated customers within the relevant market (defined by the TCA as the "*grey cement market*"), and one of the undertakings (Votorantim) was the one providing the basis for making the aforementioned practices happen. The preliminary report of the experts was prepared on 20 March 2015. Subsequently, on 2 April 2015, the TCA Board initiated a pre-investigation into the cement producers.

In the course of investigation, the TCA did not find anything that could be considered solid evidence revealing the alleged collusion under Article 4 of the Turkish Competition Law. On the contrary, the Board found documents demonstrating the existence of competition within the relevant market. As for the increase in price, the Board stipulated that in order to assert whether the increase in price had arisen from an agreement between competitors, the relevant allegation had to be supported with sufficient evidence, but no such evidence was discovered during the investigation in question. As regards the allocation of customers between investigated cement producers, according to the findings of the TCA Board, the investigated undertakings always made sales to different customers, except one. That said, in the course of on-the-spot inspections, the Board did not obtain any evidence demonstrating such allocation.

Subsequently, the Board concluded that there was no information or document showing the existence of either an agreement or a concerted practice, and by a majority vote decided[42] not to launch an investigation into the mentioned undertakings.

These cases demonstrate that despite having a reputation as being a "*problematic sector*," some behaviour of cement producers and developments in the cement market in Turkey may be justified by economic reasons.

[41] TCA's Decision of 22.01.2015 No 15-04/51-24.
[42] TCA's Decision of 9.07.2015 No 15-29/434-127.

4.2. Allegations confirmed

The TCA launched an investigation into six cement-producing companies in June 2014 upon complaints received from the Ministry of Customs of Turkey and Trade, the Alanya Chamber of Commerce and Industry, and the Manisa governorship[43]. Interestingly, four out of the six investigated cement producers were the same companies that had been investigated and fined in 1999 and 2004.

The TCA examined the quantities and price dynamics for the bulk cement in the Aegean region of Turkey, where the cement companies sell their products. In addition to that, the TCA conducted inspections at the investigated companies and examined documents in three different periods: January-March 2013 (the cement market was found to be of a competitive structure), between January-March 2013, and October-December 2014. During the October-December 2014 period, the documents discovered confirmed communications among the parties, including discussions on future sales strategies for 2014, information exchanges on stock amounts, variable costs, etc. In addition, according to the minutes of the meeting found, the parties participated in two meetings in order to discuss export-related topics. The final period under investigationn comprised October-December 2014[44].

Therefore, the TCA found sufficient evidence to conclude that the meetings and information exchanges between the parties were enough to establish a relationship that could influence their market behaviour and result in similar conduct, thereby preventing and/or restricting competition in the cement market. The TCA compared this period with the normal market conditions (January 2009-2013) and determined that following January 2013, average prices had increased by approximately 83 percent within 21 months, while the unit production cost had gone up approximately 16 percent only). The profit rates of the companies under investigation reflected the price increases significantly over costs increases. Therefore, the price increases could not be explained by reasonable economic justifications[45].

As a result of the investigation, TCA Decision No. 16-02/44-14, dated 14.01.2016, determined that the mentioned cement producing companies between January-March

[43] Seven of the applicants claimed privacy.

[44] Competition Bulletin, TCA, No. 61m July 2016, External Relations, Training and Competition Advocacy Department (retrieved from: Competition Bulletin, TCA, No 61m July 2016, External Relations, Training and Competition Advocacy Department (retrieved from: http://www.rekabet.gov.tr/File/?path=ROOT%2f1%2fDocuments%2fB%C3%BClten%2fCompetition+Bulletin+No+61+- +July+2016.pdf (25.03.2017).

[45] Competition Bulletin, TCA, No. 61, July 2016, External Relations, Training and Competition Advocacy Department.

2013 and October-December 2014 had been engaged in anticompetitive concerted practices under Article 4 Turkish Competition Law. In particular, they had (i) allocated the markets/customers based on the location of cement plants; (ii) prevented dealers from selling other brands of cement, and (iii) increased their prices more than what would have been necessary under normal economic conditions and interrelation between the cost/supply and demand. The TCA imposed fines on the companies.

The above-described investigations conducted by the TCA over the period of 1999-2016 prove that horizontal price fixing, customer and market allocations (in the ready-mixed concrete market mostly) are among the most common competition law issues detected by the TCA in the cement sector in Turkey. The same companies are often subject to repeated investigations and fines. This demonstrates that fines do not always serve as an effective deterrence tool for competition law violations.

III. Conclusion

The cement sector inquiry and the Cement Sector Report outline the main substantive issues related to competition in the cement sector in Turkey. Horizontal price fixing, customer and market allocation, and the abuse of dominant position in the ready-mixed concrete market are among the most common competition law issues detected by the TCA in the cement sector in Turkey.

The Cement Sector Report places particular emphasis on price increases and market partitioning. It concludes that there is no direct correlation between the price increases and economic parameters of the market, i.e., demand, cost of production, season, and overall level of efficiency. Irrespective of increased efficiency levels, the prices would not go down. In other words, despite efficiency, the producers continue to apply high prices. There is also no unquestionable relation between the cement prices and seasonal demand. Any price increase defence strategies based on the seasonality of the cement market is unlikely to be accepted by the TCA in the future without any other convincing information/evidence.

The common behavior in the cement sector is "*joint profit maximization*," i.e., prices observed in the cement market are above the level that may be expected under the oligopolistic competition normally. However, it does not necessarily confirm the existence of anticompetitive practices; rather it may be a result of rational choices of the

cement companies in the circumstances of an oligopolistic market. As for the market partitioning or allocation, the TCA found that most of the cement used in the rural areas is obtained from local facilities, i.e., where it is produced. The market shares of the cement producers are rather symmetric throughout Turkey. It may be anticipated that the economic activities of the cement companies in Turkey will remain under a special scrutiny of the TCA in order to deal with current and potential competition problems and improve the competition climate in the cement market.

As for procedural issues, considering the recent cement cartel judgements in the EU limiting the power of the European Commission to request unnecessary burdensome information, it is expected that the respective impact will be felt in Turkey as well. The key issue here is that the more burdensome the request, the higher the burden of proof on the Competition Authority (statement of reasons) as to why the response to the request is necessary. Another important conclusion to the benfit of the undertakings subject to investigation is that the Competition Authority should not require "*exceptional efforts*" from the undertaking; in other words, it is not the undertaking's role to perform the tasks of the competition authority.

Investigations conducted by the TCA over the period of 1999-2016 prove that the same companies are often subject to repeat investigations and fines. This demonstrates that fines do not always serve as an effective deterrence tool for competition law violations. The TCA decisions are normally appealled to and set aside by the court on the grounds of the procedural deficiencies and decision-making powers of the TCA. The decisions are subsequently reassessed by the TCA, but without changing substance and hence the amount of fines for the parties concerned. Unlike in the EU, there has not yet been any precedent of appeal of the TCA's decision on the grounds of extensive information requests.

Finally, in spite of having the reputation of a "problematic sector," the behaviour of cement producers and developments in the cement market in Turkey may still be justified by economic reasons and the oligopolistic structure of the market. Even if the undertakings compete with each other, it is not realistic to anticipate price trends that would be present under a fully competitive market structure. Hence, there should be no prejudgments that the cement sector is anticompetitive per se. However, a thorough analysis is required on a case-by-case basis.

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1.2.1. Standard of Proof in Concerted Practices Redefined: The Turkish Competition Authority's USD 4.5 Million Fine Annulled by the Administrative Court

Bahadır Balkı and Barış Yüksel

The Turkish Competition Authority ("**TCA**") found that six cement producers operating in the Aegean Region of Turkey had entered into a concerted practice to allocate certain geographical regions amongst themselves and to collectively raise the prices of cement products during the time period starting from January-March 2013 and ending in October-December 2014[1].

The relevant decision of the TCA was significant because the TCA was not able to find evidence of any contact between the said undertakings with respect to market allocation or collective price increase and relied on economic data. The TCA mainly compared the market structure in the said period with the preceding and succeeding periods and concluded that the market structure was similar to those markets where competition is restricted. The TCA claimed that the economic evidence was sufficient to trigger the "*presumption of concerted practice*," which shifts the burden of proof to the investigated parties as per the Act No. 4054 on the Protection of Competition. Once the burden of proof is shifted, the parties must rebut the presumption of concerted practice by showing that the alleged unusual market conditions stem from external factors such as an increase in demand or in the costs of raw materials.

The investigated parties submitted various defenses in order to show that the market conditions in the period subject to investigation were a result of natural market forces rather than their anti-competitive behaviors. GOLTAS Cement, which was one of the investigated parties and was represented by ACTECON, along with some other legal and economic arguments, set forth that its price increase of 42 percent in the relevant period was much below the price increases of competitors and also justified by the 28 percent increase in its costs and the 29 percent increase in demand. Yet, the TCA rejected that defense merely by claiming that these may not be regarded as reasonable justifications in the case at hand.

GOLTAS Cement, represented by ACTECON's partner Bahadir Balkı, appealed the

decision and on 2 February 2018, the 10th Administrative Court of Ankara annulled the imposition of an administrative fine of TL14.5 million (approximately USD4 million and EUR 3.5 million) on GOLTAS Cement based on the premise that GOLTAS Cement had indeed rebutted the presumption of concerted practice. The 10th Administrative Court pointed out that the 42 percent increase in GOLTAS Cement's prices were far below the market average of 83 percent and that the 14 percent difference between the 28 percent increase in the costs of GOLTAS Cement and its price increase was justified by the 29 percent increase in demand. The Court held that the TCA may no longer claim the existence of a concerted practice in light of the economic evidence submitted by GOLTAS Cement.

Although the decision of the 10th Administrative Court is not final as it is subject to further judicial review in higher administrative courts, this is a landmark decision that will fundamentally change the way in which the TCA establishes concerted practice. The TCA's approach of amalgamating its claims concerning all the investigated parties rather than conducting individualized economic assessments in concerted practice cases had long been criticized. Yet, this is the first decision where an administrative court annulled an administrative fine on the ground that the required standard of proof had not been met.

The implications of this decision are yet to be seen, but it sends a clear message to the TCA that it must separately assess the behaviors of each investigated party by taking into consideration the specific economic circumstances. So far, the administrative courts in Turkey have been reluctant to delve into the issue of standard of proof as well as any other issues concerning the defensive safeguards associated with the general right to a fair trial. This may be a milestone in the judicial review of TCA's decisions in general since this decision is the only one in 20 years of enforcement that the administrative courts, considering the essence of the case (mainly the standard of proof), have annulled a TCA decision imposing monetary fine. The decision of the 10th Administrative Court may have opened a Pandora's box.

Footnote

1. TCA Aegean Cement Producers Decision, dated 14.01.2016 and numbered 16-02/44-14.

1.2.2. The White Appliances Sector in the Turkish Competition Authority's Spotlight

Ayberk Kurt and Mehmet Salan

Upon the application made by an anonymous party to the Turkish Competition Authority ("TCA") on October 21, 2017, the TCA initiated a preliminary investigation in order to determine whether Article 4 of the Law on the Protection of the Competition ("Competition Law") had been violated by Arçelik Pazarlama A.Ş. ("ARÇELİK"), Vestel Ticaret A.Ş. ("VESTEL") and BSH Ev Aletleri Sanayi ve Ticaret A.Ş.[1] ("BSH") through exchanges of competition-sensitive information. As a result of the preliminary investigation, the TCA resolved to initiate a full-fledged investigation[2] into ARÇELİK and VESTEL. The TCA also decided not to include BSH into the investigation, since the preliminary investigation had determined that BSH had not violated the Competition Law through exchanges of competition-sensitive information.[3]

Lately, the white appliances sector has been under the TCA's spotlight. As will be recalled, the TCA recently conducted a preliminary investigation into BSH and examined whether BSH had violated the Competition Law by imposing restrictions on its distributors' online sales. After its preliminary investigation, the TCA concluded that the initiation of a full-fledged investigation was not yet necessary, recommended that the block exemption previously granted to BSH's Exclusive Distribution Agreement that made with its distributors be revoked, and the Exclusive Distribution Agreement be amended in order to comply with the competition rules.[4]

In its current examination, the TCA focused on white appliances, air conditioners, televisions, and small house appliances. However, the TCA has not made a definite market definition within the present case with the view that it will not have a decisive effect on the result, in line with the TCA's previous decisions regarding competition sensitive information exchanges.

With regard to the evaluations made regarding the durable consumer goods market, Turkey is the second largest white appliances producer following China, which produces the half of worlds total white appliances production. Additionally, Turkey

exports 75 percent of its total white appliances production of 25 million units to over 150 countries. It is also determined by the TCA that the reduction made in the Special Consumption Tax (SCT) applied in the durable consumer goods market between February and September 2017 caused a significant increase in demand for white appliances and electrical home appliances.

It is stated in the decision that the case handlers found internal correspondences showing that BSH had collected information concerning its competitors' future practices/campaigns through its regional representatives and distributors. Pursuant to the Guidelines on Horizontal Cooperation Agreements, the exchange of competition-sensitive information among competitors such as future strategies, future prices, outputs or sale amounts is considered to be in violation of the Competition Law since they generally aim to fix prices or supplies.[5] Nevertheless, as there was no finding indicating that BSH had exchanged competition sensitive information directly with its competitors, and in light of the evidence showing that BSH had reached information regarding its competitors through its regional representatives and distributors, the TCA concluded that there was no need to initiate a full-fledged investigation into BSH.

The decision is of significant importance as the TCA once again confirmed that collecting information concerning competitors directly from the market can not be deemed as anti-competitive. Furthermore, the decision also provides that it is essential for undertakings to have strong awareness in terms of the Competition Law and that the source of competitor-related information collected from the market should always be indicated in internal correspondences.

Footnotes

1. BSH is currently operating in the durable consumer goods market via its brands Bosch, Siemens, Gaggenau, and Profilo.
2. TCA's decision dated 08.02.2018 and numbered 18-04/49-M.
3. TCA's decision dated 08.02.2018 and numbered 18-04/49-26.
4. TCA's decision dated 22.08.2017 and numbered 17-27/454-195.
5. Guidelines on Horizontal Cooperation Agreements para 57.

1.2.3. Resale Price Maintenance: Following the Effect

Ayberk Kurt

By publishing its reasoned decision[1] on the preliminary inquiry against Duru Bulgur Gıda San. ve Tic. A.Ş. ("**DURU**"), the Turkish Competition Authority ("**TCA**") added a new decision that includes effect analysis of resale price maintenance ("**RPM**") practices. Although, Article 4(1)(a) of Block Exemption Communiqué No. 2002/2 on Vertical Agreements provides that RPM practices not benefit from block exemption and the TCA used to evaluate RPM as a per se violation, in its recent decisions, the TCA subjected RPM practices to a rule of reason analysis and assessed the effects of such practices. In these decisions,[2] the TCA analysed the effects of RPM by considering several factors, such as market structure, competition level, and effect on consumers.

The TCA initiated an ex-officio preliminary inquiry against DURU, which is active in the production and wholesale of dry foods including bulgur, legumes, and rice in order to determine whether Article 4 of the Competition Law was violated by DURU via RPM practices. It is interesting to note that the preliminary inquiry was initiated based on a document obtained by the TCA during an on-spot inspection within the scope of another preliminary inquiry against a retailer association.

The majority of documents obtained during the preliminary inquiry stage were related to price negotiations between DURU and retailers on shelf prices (12 documents) and the communication between the parties regarding activities and inserts (15 documents), while the remaining documents include DURU's warnings to retailers to fix their shelf prices. In this context, the TCA found that retailers and DURU communicated with each other in order to determine shelf prices, especially during campaigns and discounts periods.

In its assessment on RPM, the TCA focused on the following:

- whether the market had a competitive structure,
- the degree of competition between brands,

- the concentration level of the market,
- the market power of the concerned undertaking and its competitors,
- whether buyer power was present or not,
- buyers' compliance with recommended sales price, and
- whether an inspection and/or sanction mechanism was established by the supplier

First, the TCA addressed the sector's general character and competitive structure. Accordingly, the TCA established that there were more than 100 large and small players in the grains and legumes market in Turkey. Further, it was seen that the HHI was below 1000 (it is assumed that markets with HHI below 1000 are competitive). From the retailer perspective, the TCA stated that especially discount stores and retail chains were able to exert competitive pressure on the suppliers as they had significant buyer power and that the suppliers were not able to dictate their terms on them. The TCA stated that the anti-competitive effects of RPM are more visible in concentrated markets. The TCA noted that although DURU may be considered a strong player in some geographical areas, it was seen that retailers in such areas followed the prices of their competitors and did not allow DURU to force them to charge higher prices. Given the significant buyer power and high competitive pressure of discount stores and retail chains, the overall effects of DURU's RPM practices were effectively neutralized.

Second, the TCA made a comparison between the prices of DURU products and those of other brands. The TCA determined that although DURU products were generally more expensive than the other brands, there were certain brands that had the same price levels as DURU.

The TCA further examined whether the possible negative effects of RPM were actually realized. Within this scope, price increases that can be regarded as the most significant negative impact were evaluated. In this context, it was seen that DURU closely monitored the shelf prices of retailers and had a tendency to intervene. However, the documents obtained during the on-spot inspections showed that retailers negotiated with DURU based on other retailers' prices and that the retailers were more likely to follow each other's prices and sell DURU products at cheaper prices than those foreseen by DURU.

Finally, the TCA examined the sales agreements between DURU and retailers and determined that there was no provision that justified RPM in the agreements.

In light of the foregoing, the TCA decided not to initiate a full-fledged investigation into DURU. On the other hand, since there was concrete evidence of DURU's intervention in the prices of the retailers, the TCA decided to issue an opinion pursuant to the Article 9(3) of the Competition Law (which is parallel to the European Union Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty), stating that the RPM practices of DURU must be terminated.

By issuing this decision, the TCA clearly showed that it had consolidated its position on conducting an effect-based analysis in RPM cases. Consequently, in the near future, it is highly probable that the TCA will deal with large-scale RPM cases by using the same effect-based approach.

Footnotes

1. TCA Duru Decision dated 08.03.2018 and numbered 18-07/112-59.

2. TCA Çilek Decision dated 20.08.2014 and numbered 14-29/597-263; Dogati Decision dated 22.11.2014 and numbered 14-42/764-340; Yataş Decision dated 27.09.2017 and numbered 17-30/487-211.

1.2.4. EC Resale Price Maintenance in Online Sales Has a Broader Effect

Ertuğrul Can Canbolat, Baran Can Yıldırım and Öykü Erdil

The European Commission ("**Commission**") issued a series of penalties and eventually imposed more than EUR111 million fine on four well known consumer electronics companies, namely Asus, Denon & Marantz, Philips, and Pioneer as the concerned undertakings were involved in the imposition of "fixed or minimum resale prices maintenance (RPM)" on their online retailers, which violated EU competition rules. These undertakings engaged in the concerned practices mainly by restricting online retailers to set their own retail price for products such as hi-fi products, notebooks, and kitchen appliances. The Commission established that resale price maintenance in online sales had a broader effect than the effect on the direct relationship between the supplier, retailer, and consumer as the price algorithm software the online retailers used matches the retailers' price with the one of the competitors, which spread the effect among many online retailers.

Although this decision was issued by the Commission, it is also likely to influence the Turkish Competition Authority ("**TCA**"), which closely monitors the developments in the European Union as the Turkish competition legislation is quite similar to the one of acquis. Therefore, this article will first discuss briefly the background of the mentioned EU decision, and then will evaluate similar matters dealt with by the TCA.

Background of the Case

As highlighted in the Commission's Digital Single Strategy Publication (May 2017), resale-price-related restrictions are the most extensive restrictions of competition in the e-commerce market within the European Union. This publication also revealed the increased use of automatic software by big retailers that enables a retailer to monitor its competitors' prices and to adapt its prices in accordance.

Asus, Denon & Marantz, Philips, and Pioneer intervened in the prices of online retailers who were willing to sell their products at a lower price. The manufacturers put pressure

on online retailers to keep the prices set out by the manufacturers themselves; the online retailers who did not comply with this request were subject to serious threats and sanctions, such as blocking the supply. Since big online retailers generally use pricing algorithms that monitor and adapt the retail prices to the competitors' prices, the impact of the four manufacturers' anticompetitive behaviour was broader. Within this scope, the said behaviour affected many consumers who bought electronics online.

The anticompetitive behaviours of the concerned undertakings were determined as follows:

- Asus monitored and intervened in the resale prices of retailers in Germany and France for specific computer hardware as well as electronic products such as notebooks and displays from 2011 to 2014.
- Denon & Marantz was involved in resale price maintenance in Germany and the Netherlands of audio and video consumer products like headphones and speakers from 2011 to 2015.
- Philips was involved in resale price maintenance in France concerning consumer electronics products such as vacuum cleaners, electric toothbrushes, coffee machines, hair driers, trimmers, kitchen appliances, and home cinema and video systems from 2011 to 2013.
- Pioneer limited the retailers' capacity to sell cross-border to consumers to sustain different resale prices in different Member States from 2011 to 2013 within 12 Member states (namely Germany, France, Italy, the United Kingdom, Spain, Portugal, Sweden, Finland, Denmark, Belgium, the Netherlands, and Norway).

As a result, the largest fine was imposed on Asusin the amount of EUR 63.5 million. Similarly, Philips received a EUR 29.8 million fine, Pioneer EUR 10.1 million, and Denon & Marantz EUR 7.7 million. The fines total EUR 111 million. In this regard, it should also be noted that thanks to their cooperation, the concerned companies were granted reductions intheir fines between 40 percent (Asus, Philips, and Denon & Marantz) and 50 percent (Pioneer).

The TCA's Possible Approach to Resale Price Maintenance in Online Sales

The TCA has yet to have an opportunity to evaluate resale price maintenance practices in online sales. However, it is likely that the TCA will follow the Commission's practice and take into account the broader effect of such practices on consumers due to price

algorithm software.

This inference is based not merely on the similarity between the competition law legislation of Turkey and the one of acquis. Indeed, before the publication of the current Guidelines on Vertical Agreements ("**Guidelines**") of the TCA in March 2018, the competition law legislation of Turkey lacked guidelines and provisions for restrictions regarding online sales. However, the TCA in its Yatsan Decision in 2010 evaluated whether an absolute restriction on online sales may be allowed. In doing so, the provisions laid out in the EC's Guidelines on Vertical Restraints, which are very similar to the current Guidelines of the TCA, were taken into consideration. Moreover, in its *Antis Kozmetik Decision*, the TCA examined a request of individual exemption to an online sales ban that dealt with a situation similar to the famous Pierre Fabre Decision of the French Competition Authority.

As a separate note, it's worth mentioning that the TCA in a recent decision has changed its approach towards resale price maintenance practices. Previously, the TCA had considered resale price maintenance practices as per se violations. However, in its recent decisions, the TCA has followed a rule of reason analysis and thus a more effect-based analysis, which requires an evaluation of the effect of an RPM practice.
In this regard, the penalties imposed to Asus, Denon & Marantz, Philips, and Pioneer due to their "*fixed or minimum resale prices*" practices for their online retailers are likely to affect the TCA's current position regarding the e-commerce market in the near future. We shall wait and see how the TCA's new legal framework will be set.

1.2.5. Leniency is Becoming Part of the Turkish Competition Law Culture

Barış Yüksel, Mustafa Ayna and Gökçe Kuranel

In Turkey, although the Leniency Regulation has been in force since the beginning of 2009, the number of leniency applications has always been very low, especially when compared to Europe and countries in the Far East. There are many different speculations as to the reasons of this low number of leniency applications. Some have argued that leniency is alien to Turkish culture and that we should never expect a significant increase in the number of such applications as these applications may only be made by multinationals operating in Turkey and not by the Turkish companies themselves. A recent decision of the Turkish Competition Authority ("**TCA**") regarding an anti-competitive collusion between the self-employed engineers in the Burdur province of Turkey may prove these claims to be wrong.[1]

In 2016, the TCA initiated a preliminary inquiry to examine whether mechanical engineers and engineering companies in Burdur had created a common funding pool among themselves to share their income, thereby violating Article 4 of Law No. 4054 on the Protection of Competition ("**Competition Law**"). During the course of the on-spot inspections conducted by the TCA's case, when handlers in the preliminary inquiry stage informed the companies of their right to make such an application, one of the engineering companies, Kocapınar Engineering ("**Kocapınar**") applied for leniency.

As a result of its investigation, the TCA decided that the self-employed engineers in Burdur had violated the Competition Law and imposed monetary fines on all the parties of the anti-competitive agreement aside from the leniency applicant. The TCA granted full immunity to Kocapınar, stipulating that it had met the conditions specified in the Leniency Regulation. It is important to note that the conditions for benefiting from a full immunity via an application made after the initiation of the preliminary inquiry is considerably strict as full immunity is granted only if at the time of the submission the TCA does not have sufficient evidence to prove the violation.

The fact that the TCA granted full immunity to Kocapınar shows that the TCA currently interprets the conditions required for granting full immunity as laxly as possible. This decision may send a strong signal to undertakings that the TCA welcomes leniency applications and that it will protect the interests of the leniency applicants as much as possible to encourage further applications. The TCA also proved its commitment to encouraging leniency applications in a recent corporate loans decision where it granted full immunity to the leniency applicant although it held that the violation in question was not a cartel, but an information exchange by referring to the provision of the Competition Law rather than the Leniency Regulation.[2] This was also a landmark decision that significantly removed the legal uncertainties faced by undertakings due to the difficulty of determining whether certain anti-competitive horizontal collusions constitute cartels or not.

Although a dramatic increase in the number of leniency applications has not yet been observed, the fact that even a self-employed engineer in Burdur may choose to benefit from a leniency application if given the opportunity shows that the current situation probably does not have anything to do with culture and that there is significant room for improvement. We believe that the current approach of the TCA has the potential to make leniency a part of Turkish competition law culture and as a result this may grant the TCA one of the best tools in dealing with cartels, which are known to be the most harmful violations and are difficult to detect.

Footnotes

1. TCA decision dated 14.12.2017 and numbered 17-41/640-279.

2. TCA decision dated 28.11.2017 and numbered 17-39/636-276.

1.2.6. Silence Does Not Mean Consent to a Concerted Practice: The TCA's V-Turizm Decision Reversed on Meritorious Grounds

Barış Yüksel, Cansı Çatak, and Gökçe Kuranel

Taking Turkey's 20-year experience with competition law practice into account, 2018 made history with developments in the administrative judicial review of decisions by the Turkish Competition Authority's ("**TCA**"). Since 1998, no decision by the TCA whereby administrative fines were imposed based on Articles 4 (prohibiting anti-competitive agreements) and 6 (prohibiting abuse of dominance) of the Competition Law had been reversed by the Administrative Courts on meritorious grounds. This changed in the first six months of 2018. The first such decision was the Goltas Cement decision of the Ankara 10th Administrative Court, which is explained in detail in a separate article.[1] This was followed by the V Turizm decision of the Ankara 11th Administrative Court. The relevant decision of the TCA and that of the Administrative Court are discussed below.

The TCA investigated whether V Turizm, which is a tour operator, had agreed with three of its competitors (Alkan Grup Turizm, Antalya Pegas Otelcilik Turizm, and Odeon Turizm) to jointly force hotels in Antalya not to accept tourists brought by IATI Turizm from Russia. In light of its findings, the TCA decided that all four companies had violated Article 4 of the Competition Law. It is important to note that the TCA took into consideration the fact that V Turizm had always been in the receiving position of the e-mail communications that were used to prove the existence of the violation, but held that this merely constituted a mitigating factor and did not absolve V Turizm of all responsibility.

The TCA emphasized that concerted practices do not have a formal format. Per the TCA, undertakings that do not explicitly reject such e-mails may not claim that they are not a party to an agreement. In other words, the TCA is of the opinion that "*silence means consent*" when anti-competitive communications are considered.

Following this decision, V Turizm filed a lawsuit in the Administrative Court for the cancelation of administrative fines based on the following arguments:

- there were no e-mails sent to any hotels, stores, or social activity sites from V Turizm;
- there were no statements in the interview of the TCA with relevant players to indicate that V Turizm had applied any pressure;
- appearing in the "*cc*" section on e-mails does not mean V Turizm had any will in this direction; and
- V Turizm and other companies within the scope of the investigation did not have sufficient power to discriminate against competitors.

In this process, the Administrative Court examined all the evidence on the basis of the file and found that there was insufficient evidence to prove that V Turizm had been in agreement with the other companies subject to the investigation to prevent their competitors' activities in the market. The Administrative Court stated that most of the evidence within the scope of the investigation was in the form of unilateral declarations sent via e-mail by companies other than V Turizm, and that V Turizm was not in direct contact with its competitors. In addition, it was stated that there was no other concrete evidence against V Turizm such as an e-mail sent to hotels by V Turizm requesting them not to accept customers coming from Russia via IATI Turizm.

The Administrative Court emphasized that the complainant had increased its market share and income every year since 2013 and held that this contradicted its claim that it was being excluded from the market via an anti-competitive agreement between its competitors.

After these evaluations, the TCA's decision was reversed on the grounds that there was not sufficient evidence to show that V Turizm had sought to restrict competition by entering into an agreement with the other three companies under investigation. The decision of the Administrative Court will serve as guidance for future competition law enforcement, especially in relation to proof standards.

Footnotes

1. http://www.mondaq.com/turkey/x/680998/Antitrust+Competition/The+Standard+Of+Proof+In+Concerted+Practices+Redefined+Turkish+Competition+Authoritys+USD+45+Million+Fine+Annulled+By+The+Administrative+Court.

1.2.7. The TCA Orders Translation Federations to Stop Publishing Price Lists in Turkey

Ertuğrul Can Canbolat, Baran Can Yıldırım and Öykü Erdil

The Turkish Competition Authority ("**TCA**") issued a warning to the Certified Translation Federation ("**TURÇEF**") and the Federation of International Translators and Translation Agencies ("**TUÇEF**") by means of a decision dated 3 May 2018 to stop the publication of recommended price lists. The decision reveals that the practices of the industrial associations remain on top of its priorities and the TCA maintains its conservative approach toward such practices of associations consisting of competing companies. Further, this decision also highlights the TCA's persistence in exercising its power to an opinion letter for the termination of an infringement despite the consistent annulment decisions of the administrative courts disagreeing with such an approach.

The TCA's findings

On March 15, the TCA initiated a preliminary investigation upon the allegation of a real person that TURÇEF and TUÇEF regularly announce price lists. In order to make a proper evaluation, the TCA carried out an on-spot inspection on the premises of TUÇEF, internviewed the presidents of both associations, and served requests for information to several translation companies. During the on-spot inspection, the TCA was unable to obtain any document revealing a violation of the competition rules and the information gathered from the investigated parties and the translation companies presented that those price lists were only recommended and not imposed.

In this regard, it should be noted that the translation business is not a regulated market in Turkey and there is no legislation that sets out factors to be considered in determining translation fees. According to TUÇEF's president, the aim of such price list is to inform the industry as well as the courts about market value. None of the translation companies was obliged to comply with such lists or was sanctioned due to their non-compliance. The translation companies to which the TCA served requests for information provided similar explanations.

Moreover, questions regarding the existence of a black list revealed that the price lists are meant to minimize cases of unjust treatment and unethical practices of the translation

companies upon complaints by members (at least three of them) or consumers (at least five of them). However, there was no such disclosure.

Finally, the TCA evaluated the invoice amounts of the different companies for translation and the number of translated characters.

Accordingly, the TCA determined:

- TUÇEF's and TURÇEF's power to publish price lists stems from their own charters;
- the price lists are recommended, and the translation companies are not obliged to comply with the price lists; and
- the fees charged by the translation companies were lower than the prices in the concerned lists and varied significantly.

Nonetheless, the TCA concluded in line with its previous decision regarding the similar matters that even if (i) the lists include recommended prices, (ii) the companies are not obliged to comply, and (iii) there is not any sanction for non-compliance, such practices contain the risk of leading to a violation. Although the concerned price lists do not actually cause price collusion, they potentially may restrict competition in the market. Therefore, the TCA decided to send an opinion letter for the termination of the investigated practices and for the removal of the clauses in the charters regarding the preparation of price lists. Additionally, the investigated parties were required to show within 90 days following the service of the reasoned decision that they had taken the abovementioned actions.

Conclusion

Notwithstanding the fact that the TCA did not impose a fine in the concerned case, such decision may be annulled according to the established case law, upon an annulment request. Moreover, this decision should be also considered as a warning to all associations with price list practices and attract the attention of their members. Therefore, the discussions and decisions during the association meetings must be limited to matters that do not lead to the restriction of competition. Association meetings must be held with a pre-communicated written agenda that complies with the competition rules. Finally, in case a discussion occurs about competition-sensitive matters, members should clearly express that they are not willing to participate in any anti-competitive behaviour or agreement and then they are to leave the meeting after making formal record of such expression.

1.2.8. The Turkish Competition Authority Brings Halt to Credit Card Information Storage Services Provided by Subsidiary of Well-Established Banks

Barış Yüksel, Fırat Eğrilmez and Gökçe Kuranel

Bankalararası Kart Merkezi A.Ş. ("**BKM**") is a corporation and association of undertakings founded by 13 banks. Non-shareholding members such as banks and payment and electronic money institutions are also among the members of BKM. BKM is permitted to operate as a payment system operator under Law No. 6493 and activities of BKM other than system operations are subject to the permission of Central Bank of Republic of Turkey ("**TCMB**") pursuant to the Regulation regarding Activities of Payment and Security Conformity Systems. BKM's activities include authentication, swap and settlement, online payment solutions, digital wallet services, and credit card information storage.

In 2017, BKM filed an individual exemption request to the Turkish Competition Authority ("**TCA**") to obtain an individual exemption request for credit card information storage services, a service that would be provided through a system that is integrated with the member banks.

The relevant services remove the necessity of member businesses to receive or store the credit card information of their customers, since the service provider acts as an agent that keeps the card information during the payment transaction and provides encrypted card information for repetitive transactions that will be made by a given customer without requiring the customer to submit her credit card information in each and every transaction. These services significantly reduce the risk stemming from the storing of sensitive credit card information for the businesses that receive recurring payments and create cost-advantages for banks by removing the necessity that they comply with the Payment Card Industry Data Security Standards ("**PCI DSS**"). From the customers' point of view, these services render payments by credit card easier and more secure and thus have a potential to increase the number of transactions made by credit card.

The TCA granted a one-year individual exemption in light of the available data, expressing that although the overall efficiencies and consumer welfare seem to be increased by the business model so as to exceed their negative impacts on competition, the dynamic nature of the market as well as the expected developments would necessitate close monitoring.[1] One of the main reasons why the TCA considered that a quick re-evaluation might be necessary was that the Banking Regulation and Supervision Authority ("**BRSA**") had recently introduced a draft Communiqué[2] setting forth a new requirement for businesses to store the credit card information of their customers through a third-party service provider. Although the draft Communiqué was not in force when the decision was issued, it was expected to reshape the existing market-entry conditions. Furthermore, the TCA concluded that monitoring the outcomes of the exempted business model for a year was necessary since it might hamper competition in a way to foreclose the market to the competitors of BKM, due to the fact that BKM was formed by the banks with whom the prospective competitors of BKM would have to cooperate and that these banks may be disincentivized to help third parties that compete with BKM.

Following the one-year term for the exemption, BKM made a successive application to the TCA for the extension of the term of the individual exemption and amended the terms of its services as follows:[3]

- The services provided by BKM will be open for all businesses including undertakings active in the card payment industry, via the abolition of the rules limiting the scope of the buyers to the businesses that accept recurrent payments;
- BKM's customers will be able to make the credit card payment services they purchased available for third-parties' use;
- BKM's services will be available for different sales channels such as call centres, internet and agencies;
- BKM's services will be compatible with the new generation payment rules.

Per the assessment made by the TCA, the relevant services generate substantial efficiency gains, such as increased customer trust for card payment services and increased success in the collection rate. Although the TCA admits that these services are definitely efficiency enhancing and have positive effects on consumer welfare, it further states that the subject matter of the individual exemption analysis is not whether these services should be provided at all, but whether these services should be provided by an

undertaking that is controlled by the banks. Hence, the TCA holds that an exemption should be granted if the provision of these services by BKM satisfies the required criteria (i.e., by creating significant efficiency gains as compared to the same services provided by third-parties while not foreclosing the relevant market).

To conduct this analysis, the TCA assessed how information storage services provided by BKM diverge from the services provided by its competitors and listed the differences as follows:

- As BKM is entirely controlled by the banks, credit card information is not shared with any third-party that is not directly associated with the banks when the services are provided by BKM,
- BKM can automatically obtain updated expiration dates of cards due to its integration with the banks' systems,
- When the services are provided by BKM, SMS's containing "*one-time-passwords*" (additional safeguards for increasing security) are directly sent by the banks due to BKM's integration with the banks' systems.

The TCA emphasized that the foregoing factors indicate that the main difference between BKM and its prospective competitors is the integration between the banks' data systems and BKM. The reason why BKM's system is integrated with that of banks is a former agreement made with BKM and the banks concerning digital wallet services provided under the name of "BKM Express."[4] The TCA then emphasized that the above listed features could be provided by any competitor of BKM if they were presented with the opportunity to create a similar system-integration.

Based on these evaluations, the TCA concluded that the efficiency gains were intrinsic to the services and that there was no causal link between these efficiency gains and the provision of the relevant services by BKM.

After holding that allowing BKM to provide these services would not create any additional efficiency gains, the TCA further evaluated how BKM's involvement affected competition in the credit card information storage services market. For the purposes of that assessment, the TCA focused on the one-year period when BKM benefited from the initial individual exemption.

The TCA first noted that the potential competitors of BKM comprises banks and non-bank payment service institutions ("**PSIs**"). The TCA stipulated that it is highly unlikely for the banks to emerge as independent competitors of BKM, with which they are associated, and it also made it clear that the available empirical evidence supported this premise.

With respect to the PSIs, the TCA emphasized that the PSIs need to integrate their systems with the banks to become viable competitors of BKM and that this would only be possible if the banks agree to provide such integration. Yet, the TCA noted, banks' relation with BKM discouraged them from doing so. Considering these issues, the TCA concluded that the mere presence of BKM in the market has placed the PSIs in a significant competitive disadvantage vis-a-vis BKM. The TCA's conclusion was also supported with evidence demonstrating that PSIs integration requests were usually rejected by the banks or that they were channeled to BKM. The TCA stipulated that a scenario whereby PCIs act as re-sellers of BKM could not be deemed as a competitive market and that it was crucial that PCIs are able to compete with the BKM at every level.

Consequently, the TCA decided not to extend the duration of the individual exemption granted to BKM and required BKM to cease its activities thereof in 90 days. Now, both BKM and its member banks are required to put an end to the ongoing storage services in due time and report this to the TCA to avoid competition law scrutiny. The TCA further held that the decision that granted BKM's so called "BKM Express" services (digital wallet services) an individual exemption should also be re-evaluated.

The recent decision is also significant in that it shows that an ex-ante individual exemption analysis made by the TCA based on assumptions may not reflect the market realities. In its initial decision, where a one-year individual exemption was granted, the TCA exaggerated the potential efficiency gains of allowing BKM to provide these services whereas it failed to identify potential negative outcomes. However, in the second decision, the TCA had the advantage of hindsight and it made use of actual market data to re-evaluate its initial position. The conclusion was that the TCA realized that its assumptions in the initial decision were too optimistic and that an ex-post analysis had proved them to be wrong. Still, it should be appreciated that the TCA did foresee this in the initial decision and minimized the negative impacts of a potential Type II error by limiting the duration of the individual exemption. We believe that it is

prudent for competition authorities to prefer Type II errors over Type I errors in case of uncertainty while keeping a close eye on further developments that may altogether remove these uncertainties.

Footnotes

1. The decision of the TCA dated 23.03.2017 and numbered 17-11/134-61.

2. The draft Communiqué has not been entered into force yet.

3. The decision of the TCA dated 12.06.2018 and numbered 18-19/337-167.

4. The decision of the TCA dated 23.09.2016 and numbered 16-31/525-236.

1.2.9. European Commission Opens In-Depth Investigation into Possible Collusion between German Car Manufacturers on Clean Emission Technology

Barış Yüksel, Mustafa Ayna and Emine Bilsin

On 18 September 2018, the European Commission ("**EC**") opened a full-fledged investigation regarding the possible collusion between the German car manufacturers BMW, Daimler, Volkswagen, Audi, and Porsche, known as the "Circle of Five." The EC will examine whether these manufacturers entered into illegal agreements concerning the technological development of passenger cars that may have denied consumers the opportunity to buy less polluting cars despite the technology being available to the manufacturers.

European emission regulations, which are commonly referred to as Euro I, II, III, IV, V, and VI, were originally introduced by Directive 88/777EEC and were followed by a number of amendments. The first EU standard, known as Euro I, was introduced in 1992. In 2013, Euro VI emission standard came into force by Regulation 595/2009. The aim of clean emission technology is to reduce the levels of harmful exhaust emissions and to make passenger cars less damaging to the environment.

In particular, the collusion that allegedly aims to limit the development and roll-out of certain emission control includes:

- Selective catalytic reduction ("**SCR**") systems to reduce harmful nitrogen oxides emissions from passenger cars with diesel engines; and
- Otto particulate filters ("**OPF**") to reduce harmful particulate matter emissions from passenger cars with petrol engines.

The EC will carry out a full-fledged investigation to assess whether BMW, Daimler, and VW (Volkswagen, Audi, Porsche) colluded to restrict competition on the development and roll-out of emission control systems for cars. The investigation primarily focuses on information illustrating that the companies participated in meetings during which they discussed collectively limiting technical development or preventing the roll-out of technical devices.

Although the current investigation deals only with certain emissions control systems, the EC notes that various other technical topics were discussed by the companies, including common quality requirements for car parts, common quality testing procedures or exchanges concerning their own car models that were already on the market, the maximum speed at which the roofs of convertible cars can open or close and at which the cruise control will work. However, the EC concluded that there is no sufficient indication to merit further investigation on the grounds that these discussions between the companies constituted anti-competitive conduct.
In addition, the EC notes that it has no indications so far showing that the companies coordinated with each other in relation to the use of illegal defeat devices to cheat regulatory testing.

It should be noted that anti-competitive agreements concerning emission standards compliance is not a new topic in EU competition law. In 2016, the EC imposed fines totaling EUR2.93 billion on four truck producers, which was the highest fine imposed on members of a cartel. The EC concluded that MAN, Volvo/Renault, Daimler, Iveco, and DAF were parties to an anti-competitive agreement that lasted 14 years in the market for the manufacturing of medium/heavy trucks. A year later, in 2017, the EC also fined Scania EUR880 million for participating in a trucks cartel, since Scania had decided not to settle this cartel case with the EC in 2016.

The EC had found that; (i) coordinating the timing for the introduction of emission technologies for medium and heavy trucks to comply with the European emissions standards (from Euro III through to the currently applicable Euro VI), and (ii) collectively determining how the costs for the emissions technologies required to meet the European emissions standards (from Euro III through to the currently applicable Euro VI) were to be passed on to customers were among the subjects of the anti-competitive agreement.

The EC emphasized the importance of the said decision as it reveals the need for a functioning competitive market to promote the development and dissemination of cost-efficient low-emission technologies, which is one of the elements of the upcoming European Strategy for low-emission mobility.

The recent investigation initiated against the Circle of Five and the exorbitant fine imposed on the truck manufacturers show that the EC is quite sensitive when it comes to competition concerning the implementation and progress of environmental technologies that are closely related to public welfare. This investigation should be a reminder that the competition authorities are concerned not only with sales activities and expect companies to act independently of their competitors in every aspect of their business from compliance to human resources.

1.2.10. Individual Exemption by the Turkish Competition Authority to the Cooperation between One of the Largest Retailers and Mobile App

Ertuğrul Can Canbolat, Baran Can Yıldırım and Öykü Erdil

The products and services surrounding mobile phones (e.g. mobile apps, browsers, search engines) have already proved to be a separate marketing tool for undertakings. This has triggered and created new challenges for competition law enforcement. Indeed, the competition authorities have had to deal with defining new relevant product markets and evaluating their market dynamics.

In line with this approach, the Turkish Competition Authority's ("TCA") newly published individual exemption decision may shed light on the evolution of the relevant product market definitions for mobile apps and the services they provide. The concerned decision is also important to illustrate the potential approach to be pursued by the TCA with regard to cooperation agreements between mobile application providers and retailers.

Background

The TCA recently evaluated whether a cooperation agreement between the following undertakings:

- Migros Ticaret A.Ş ("Migros"), the largest FMCG retailer in Turkey;
- Boyner Holding A.Ş ("Boyner"), a group that is active in luxury and fashion brand retail stores and owns famous local brands; and
- BNR Teklonoji A.Ş ("BNR"), a subsidiary of Boyner that is active in mobile shopping platforms and owns the mobile application called HOPİ being the subject of the cooperation agreement

falls under the scope of Article 4 of the Turkish Competition Law, which prohibits anti-competitive agreements, and whether the agreement may benefit from either block or individual exemption.)

The main findings of the TCA, which will be discussed below, are as follows:

- HOPİ mainly offers personalized shopping experiences for its customers in many industries such as apparel, technology, travel, and car rental. Thus, HOPİ provides member companies the ability to gain indirect and limited access to the HOPİ's customer portfolio database and to promote and sell their products, whereas the customers have the chance to be informed about campaigns based on their lifestyles and preferences.
- The relevant product market is defined as "*personalized marketing applications for smart phones*."
- Since the concerned agreement includes restrictive provisions such as data sharing, exclusivity, and most favored customer ("MFN") clauses, a negative clearance on the agreement could not be granted.
- HOPİ's market share in "personalized marketing applications for smart phones" on the turnover-basis exceed the threshold set out under the Block Exemption Communiqué on Vertical Agreements ("Communiqué No. 2002/2") (i.e., above 40 percent).

Finally, the TCA decided upon granting an individual exemption to the concerned agreement.

Aim of the Cooperation Agreement

The aforementioned agreement between Migros, Boyner, and BNR concerns a cooperation that also includes provisions embodying the sharing of data, exclusivity, and the MFN. The agreement mainly aims to facilitate the customers who download the HOPİ application to their mobile phones to have the chance to gain Paracık (coins) and spend these coins in shopping at any of the HOPİ member companies, including Migros. Additionally, this agreement enables the parties to realise joint promotions, campaigns, and advertisements, and to share the personal data of the customers in compliance with the relevant legislation.

In this context, Migros will select customer groups and inform HOPİ about the campaigns addressing those customer groups through the interface to be established between Migros and HOPİ, or HOPİ will share group and campaign suggestions. Campaigns approved by the parties will be announced to the attention of the relevant HOPİ customer groups.

Relevant Product Market: Broad vs Narrow

The TCA took into consideration the developments in European Union competition law (such as Google/Doubleclick, Microsoft/Yahoo, Telefonica UK/Vodafone UK/ Everything Everywhere/JV decisions of the European Commission) as well as academic discussions in regard to multi-sided and two-sided markets (including the evaluations of Damien Geradin and David S. Evans) and found that the mobile phones and services that they have to offer constitute a separate market. Accordingly, the TCA has defined the relevant product market as "*personalised marketing applications for smart phones*" instead of using a broader definition a broad market, i.e., "*mobile marketing services market*."

In this regard, the TCA has first highlighted the fact that the market in which HOPİ operates demonstrates the characteristics of a two-sided market in that(i) there exist two distinct groups of customers with different demands, (ii) the demands of customer groups and their benefits from the platform are connected or coordinated with each other, and (iii) an intermediary is necessary to internalize the benefits between those customer groups. Further, the TCA has referred to the different types of two-sided markets as well.

Secondly, the TCA has evaluated HOPİ as a platform that can be used only by downloading the concerned application to smartphones and that provides a code to enable customers to benefit from discounts. TCA has emphasized that as the consumers can benefit from the campaigns and promotion only through smartphones and tablets, the marketing activities of the undertakings through desktop and laptop computers do not place competitive pressure on HOPİ.

Another topic discussed by the TCA is whether a distinction could be made between online advertising activities (via digital tools such as social media, e-mail) and physical advertising activities (via non-digital tools such as news, magazines). In this regard, it appears that the TCA has attached a particular importance to the evaluations in the European Commission's previous decisions according to which the distinction between online or physical advertising activities, search or non-search online advertising activities, and static online or mobile advertising activities can be made.

Within this scope, the TCA has pointed out:

- the claim of the applicant regarding "mobile marketing services" market definition relies on the view that undertakings such as Google, Facebook, and Twitter are substitutable to HOPİ; nonetheless, these companies do not create actually or potentially competitive pressure on HOPİ;

- the broad or narrow definition of the relevant product market will significantly change HOPİ's market share in the defined relevant product market, which is of importance for the evaluation of block or individual exemption;

- the broad definition of the relevant product market would not ensure proper evaluation of the market dynamics;

- therefore, the relevant product market is defined as "personalized marketing applications for smart phones" rather than a broad market, i.e., "mobile marketing services market."

Block or Individual Exemption?

The TCA first evaluated that some of the provisions in the agreement as likely to be deemed as restrictive within the meaning of the competition rules and thus decided not to issue a negative clearance. Indeed, by the aforementioned agreement, HOPİ made itself bound not to include any company in its system whose activities and products are similar to those of Migros, for five years at most. Furthermore, the agreement sets forth an MFN clause according to which Migros will present an offer to HOPİ which is at least as good as those offered to HOPİ's competitors.

Additionally, the sharing of the customers' personal data provided under the agreement may create competitive advantages. In this regard, it should be noted that the substance of the data to be shared would have a direct effect on the success of campaigns. Accordingly, Migros will first use HOPİ's user database without any access to the customers' personal data and the target group will be selected by Migros through its access to the customers' HOPİ ID numbers, the member date and time of the customers, and the agreement version information. The TCA determined that

such sharing is a "must" for conducting joint campaigns. On the other hand, if Migros becomes a shareholder of HOPİ, the segmentation information of the common customers in the database (updated every six months) will be shared with HOPİ will have significant economic value and may create a competitive advantage to HOPİ.

It has been decided that a block exemption could not be granted for the concerned transaction because HOPİ's market share is above the 40 percent market share threshold on turnover basis. However, this determination of the TCA appears to be controversial as it includes market share analysis only on turnover basis and it depends on the information provided by Migros, which is even not active in the relevant product market.

Finally, the TCA concluded that the concerned agreement benefits from the individual exemption rule. According to the Turkish competition law, the conditions of individual exemption are as follows:

- ensures new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services;

- benefits the consumer with the above-mentioned;

- does not eliminate competition in a significant part of the relevant market; and

- does not limit competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b).

It also should be noted that the above two positive and two negative conditions must be met cumulatively in order for an individual exemption to be granted for any competition restriction.

With regard to the first condition, the TCA has particularly observed whether the concerned information exchange would result in strengthening the parties' market positions and whether it would bring any efficient gains. After having stated that the scope of the information exchange is a "must" for the functioning of the agreement, the TCA reached the conclusion that (i) the competitive advantage gained by HOPİ will boost the efficiency and effectiveness of HOPİ's personalized marketing activities, (ii)

the information exchange will lead to the design of more efficient cross-campaigns, and (iii) it will also reduce operational costs and increase the quality of service offered.

As for the benefit of consumer condition, the decision shows that the TCA has focused more on the MFN clause formed in favour of HOPİ. This may avoid any cost to be incurred by the consumers regarding the search for the best campaigns. Further, such systems may foster personalized services to be rendered, better prices, and campaigns to be benefited by the consumers.

Subsequently, the TCA highlighted the potential restrictive effect of the exclusivity on behalf of Migros during its evaluation of the third condition of the individual exemption, i.e., the possibility of eliminating competition in respect to a substantial part of the products in question. In this regard, it should be noted that this has been deemed an "*exclusive supply obligation*" of HOPİ that requires an analysis regarding the market share of Migros in the FMCG retailing market. On the other hand, this exclusivity may become two-sided only in case of the purchase of some of HOPİ's shares by Migros. Thanks to the dynamics and developing nature of the target-specific mobile marketing services market, such exclusivity also does not create any concerns in terms of the third condition and it would not cause the foreclosure of the market for Migros' competitors.

In this context, the TCA assessed the impact of the MFN clause as well. Accordingly, the main focus was the lack of restriction on HOPİ's right to provide services to other undertakings and significant part of Migros' activities will not be subject to the MFN clause. Additionally, such MFN clause would not result in a "price catalogue" or "price rigidity." As for the issue of whether the MFN clause leads to transparency and enables coordination, the TCA pointed out that (i) the campaign conditions are publicly available information, (ii) the scope of the MFN clause is limited and does not cover all campaigns, and (iii) it only relates to the periods of campaigns made by HOPİ.

Finally, the TCA was convinced that the concerned agreement does not limit competition more than what is compulsory. Within this scope, the TCA determined:

- the MFN clause stems from the requirement that the performance expected and the investment made should be proportionate in both the medium- and long-run;

- the MFN clause may reduce the transaction costs that may arise due to the costly and time-consuming nature of the periodical negotiation processes for campaigns;

- the exclusivity will increase the shopping turn rate;

- the cumulative segment information of Migros card owners to be shared with HOPİ in case Migros becomes one of HOPİ's shareholders has not occurred yet and there is not any limit on HOPİ's competitors to close similar cooperation agreements or to develop new business models that would enable them to offer better services to consumers; and

- the duration of the agreement is two years and will be automatically renewed for another year unless the parties serve a notice of termination. However, in any case, the total period will not exceed five years.

In light of the above, the TCA reached the conclusion that all of the conditions required for an individual exemption exist in the concerned case.

Lessons Learned From...

While analyzing the cooperation between Migros and HOPİ, the main issue revealed by the TCA relates to the difficulties that may be faced in defining the relevant markets due to the fast-growing technology markets. Despite the "so-called" positive result in the concerned case, particular attention should be given to such cases because any evaluation of the TCA may constitute the basis for forthcoming decisions. In this case, the TCA preferred to pursue a narrower approach and defined the relevant product market as "personalized marketing applications for smart phones" whereas the market share analysis and the evaluation regarding the restrictive clauses in the agreements may be questionable in other cases.

1.2.11. Traffic Insurance Policies under the Scrutiny of the TCA

Bahadır Balkı, Mustafa Ayna and Hasan Güden

Traffic insurance activities of almost the entire Turkish insurance industry were subject to two examinations of the Turkish Competition Authority ("TCA") in 2017.

The TCA first published on 3 July 2017 a preliminary inquiry decision regarding the traffic insurance activities of insurance companies following which no full-fledged investigation was launched. The TCA then concluded on 19 July 2017 an investigation concerning the traffic insurance policies of insurance companies that has led to no administrative fine against any insurance company. In both of the concerned decisions, the TCA examined more generally insurance companies' traffic insurance activities. Those decisions are important for the activities of the insurance sector given that 32 out of 34 companies (local and international) providing traffic insurance services have been subjected to investigation by the TCA.

1. The TCA's Preliminary Inquiry Decision[1]

The TCA conducted a preliminary inquiry into insurance companies operating in the motor vehicles compulsory third party liability insurance market based on the suspicion that insurance companies colluded when removing or changing their installment policies or bringing additional financial charges, thereby violating Article 4 of Law No. 4054 on the Protection of Competition ("Competition Law").

According to the allegations made within the framework of the preliminary inquiry, the insurance companies had agreed, after the publication of the Circular for Motor Vehicles Compulsory Third Party Liability Insurance ("Circular No. 2017/1") by the Republic of Turkey Prime Ministry Undersecretariat of Treasury ("Undersecretariat of Treasury"), on the following anti-competitive practices:

- removing the possibility of making installment payments, leaving as an only option payment in-full in cash or by credit card;

- avoiding making offers to agencies, or resorting to practices such as sending messages inciting the agencies not to provide insurance to certain persons;
- alleging technical problems as a pretext to block access to the interface on which offers are made;
- imposing additional conditions to conclude insurance contracts;
- bundling traffic insurance with other insurance policies such as home insurance or personal accident insurance.

Circular No. 2017/1 lays down limitations regarding traffic insurance premiums that are freely determined by insurance companies. Through the adoption of the said circular, the Undersecretariat of Treasury declared that (i) traffic insurance premiums should not exceed the premium ceiling determined for each vehicle type (passenger car, truck, commercial car, etc.); (ii) the implementation of maximum increase and minimum discount rates should be controlled; (iii) commission rates to be applied to insurance intermediaries (such as agencies and brokers) should not be below the determined rate; and (iv) sanctions will be imposed if these provisions are not applied by insurance companies.

As a result, the TCA found that insurance companies carried out similar practices of premium collection and policy issuance in order to reduce their increasing portfolio risks and to limit the number of offers in the market.

In line with the evidence gathered during on-spot inspections, however, the TCA established that the aforementioned practices are individually decided upon by insurance companies. According to the TCA, there were no concerted practices or agreements between insurance companies within the meaning of Article 4 of the Competition Law on the grounds that (i) the conclusion of a traffic insurance policy is an obligation for both insurance companies and consumers, (ii) companies may determine their behaviors in the market by taking competitors' behaviors into account, and (iii) companies' behaviors are based on a new economic rationale shaped by the regulation of Circular No. 2017/1.

2. The TCA's Investigation Decision

More important for the traffic insurance sector, considering its scope, this decision came at the end of an investigation conducted into the Insurance Association of Turkey

and 32 insurance companies active in the market of compulsory traffic insurance upon allegations of anti-competitive agreements or concerted practices in the form of price increases and allocation of markets.

According to the complaints lodged before the TCA in the framework of this investigation, (i) insurance companies had agreed to double or even triple traffic insurance premiums due to the adoption of a new regulation; (ii) trucks used in international transportation, which were not labelled as risky, had caused an increase in the premiums paid by risky vehicles' users; (iii) setting high traffic insurance premiums had encouraged consumers not to purchase insurance policies, thereby making it difficult for companies operating in the international transportation sector to compete with foreign registered vehicles; and (iv) some insurance companies had requested higher premiums to avoid issuance of insurance policies, or even did not make any offer despite their legal obligations to do so. Consequently, insurance companies were said to have been able to divide up the market between them.

It has been stressed that insurance companies operating in the traffic insurance sector calculate premiums in accordance with the provisions of Law No. 5684 on Insurance and generally accepted actuarial techniques. Within the framework of their calculation method, insurance companies take into account factors such as the region where the vehicle is registered, the vehicle type, the damage history of the vehicle, the driver's gender and age, the fuel type, the brand name, and the engine power.

Despite their leeway in the definition of terms and conditions of the services they provide having been restricted, insurance companies still are entitled to determine, in compliance with the legislation in force, the amount of security, the form of payment, and insurance policy issuance processes. Therefore, while insurance companies can only distinguish themselves on the basis of the quality of their services, this has little importance for consumers, who generally consider primarily the price of the services they require.

a. Claim regarding agreements on price increases

As far as the price increase allegation is concerned, the TCA considered that the observations shared by the concerned insurance companies, under the aegis of the Insurance Association of Turkey, on maximum gross premiums were not anti-

competitive given that they were limited to publicly available information and that the Association was empowered to amend the said premiums by taking into account inflation and modifications to the minimum wage.

In this context, the TCA also analyzed the concerned companies' internal correspondence and established that (i) companies collected information from the market through their agents and were only observing each other's behaviors; (ii) companies determined their price levels and assessed which categories of insurance and regions competitive premiums might be offered; (iii) exclusive discounts were granted to certain agencies and customers; (iv) companies raised their premiums to meet their profit expectations and generally tried to set their prices above the sector's average in order to avoid an excess of insurance policies issued compared to what has been planned; and (vi) companies requesting high premiums raised them whenever competitors increased their prices to remain non-competitive and thus to restrict their offer on the market.

Regarding costs increases, it appeared from the companies' internal correspondences, according to the TCA, that insurance companies had had to increase their provisions to deal with the increase in the minimum wage, regulatory changes, proceedings regarding diminution claims (in case of value loss), or exchange rate increases. This situation had led to losses, which had been linked by the insurance companies to premium miscalculations and to the competition situation of the market. The TCA then established that most of the losses incurred had been common for most of the companies in the sector, which underlay the decisions to increase premiums.

In addition to the evidence gathered during on-spot inspections, the TCA evaluated the priving policies of the insurance companies by taking into account their market shares, the relation between price and demand, and that between price and cost. As a result of those evaluations, the TCA established that the premiums increase was linked to the increase of costs elements that had occurred in the same period and that affected the setting of premiums.

b. Claim regarding market allocation

It was claimed that the offers of the insurance companies on a given type of vehicle had differed widely, and that some of them had made parallel or high offers, or even had avoided making offers.

In addition, another allegation under this claim was that despite the fact that trucks used in international transportation present a low-risk profile, the insurance companieshad charged high premiums to insure them with the aim of compensating the losses incurred with risky vehicles, and that this situation had made it difficult for companies operating in the international transportation sector to compete with foreign registered vehicles.

The TCA thus examined the concerned companies' market shares depending on vehicle type and on the number of policies issued for the "tow truck" type vehicles. The TCA then established that the market shares had evolved dynamically according to the number of this latter vehicle type. The TCA further determined that a substantial share of the market consisted of policies issued for cars and vans and that insurance policies concerning other types of vehicles only represented a narrow market share. Nevertheless, the TCA ruled that despite certain companies issuing more policies for certain types of vehicles, no indication of market allocation had been found.

Eventually, the TCA concluded that the concerned companies had not been involved in any anti-competitive practice and, accordingly, determined that no administrative fine should be levied.

Footnotes

1. Dated 03.07.2017 and numbered 17-20/324-144.

1.2.12. The Turkish Competition Authority Finds No Competition Law Violation in Media Barometer

Bahadır Balkı

The Turkish Competition Authority ("TCA") concluded an investigation into Diye Danışmanlık Eğitim ve Medya Hizmetleri Tic A.Ş.'s ("yurddaş + partners") Media Barometer services. It decided that Media Barometer, which is a media performance measurement service that includes a price comparison system for advertisers, does not violate Law No. 4054 of the Protection of Competition ("Competition Law").

With one preliminary investigation and one full-fledged investigation by the TCA and several judicial reviews by the administrative courts, Media Barometer has been under either the TCA's or judicial review since October 2014. During the process, the TCA declared that it would initiate a full-fledged investigation into the companies purchasing Media Barometer (i.e., advertisers) unless they stopped purchasing the said service from yurddaş + partners. The scope of these notifications is an example of a rare, if not a unique, practice of the TCA. In the end, Media Barometer was found to have been in compliance with the Competition Law from the very beginning.

Background Information

Pursuant to a complaint lodged by the Association of Television Broadcasters ("Association") in 2014, the TCA initiated a preliminary investigation to determine whether yurddaş + partners and advertisers were in violation of the Competition Law through Media Barometer.

In this preliminary investigation decision, the TCA defined the market in which the Media Barometer service was provided as "purchasing conditions comparison services market for advertisers." It was noted that advertisers included companies from various industries such as banking, automotive, food, and FMCG. Further, the TCA defined another market where the TV channels sold advertisement space to advertisers as "*TV channels' advertisement space buying market*." In this ecosystem, Media Barometer appears

as a service quite similar to those of global media auditing companies that measure the performances of media investments. It aims to improve the competitive strength of the brands and to clarify whether the activities conducted by advertisers' agencies are efficient. In short, Media Barometer serves the purpose of improvement of the accountability of the agencies' activities and purchasing conditions.

Within this scope, the preliminary investigation was to find out (i) whether companies purchasing Media Barometer had established a buying cartel to coordinate their buying prices in their commercial relationships with TV channels, and (ii) whether yurddaş + partners was complicit in this so-called buying cartel.

Following its preliminary investigation, the TCA found no evidence demonstrating the existence of a written or oral agreement between the advertisers that might fall in the scope of Article 4 of the Competition Law prohibiting agreements restricting competition. Nevertheless, the TCA further decided that Media Barometer might cause competition law concerns in the medium to long run. As a result, the TCA declared that it would initiate a full-fledged investigation (i) into companies purchasing Media Barometer (i.e. advertisers) unless they stopped purchasing the said service from yurddaş + partners, and (ii) against yurddaş + partners unless it stopped providing Media Barometer services ("Notifications"). However, the decision failed to state how Media Barometer might cause the said concerns. Considering the portion of the advertisement expenses of the advertisers that used Media Barometer within the total advertisement expenses, the TCA decided that it was not necessary to initiate a full-fledged investigation. Rather, it decided to send the said Notifications.

The TCA's controversial decision led to complex judicial reviews. Yurddaş + partners and the Association challenged the decision separately before the Administrative Courts of Ankara. In the lawsuit brought by yurddaş + partners, the Court found that the TCA had failed to demonstrate how Media Barometer was to affect the competition in the market. Therefore, the Court decided that Notifications had been based on speculative evolutions and annulled the TCA's decision. In the lawsuit brought by the Association, the Court decided that the TCA's decision was a result of contradictory grounds. The Court here stated that it was contradictory to find violation suspicion and at the same time decide not to initiate a full-fledged investigation. Therefore, the Court annulled the TCA decision. As a result, the TCA's decision was annulled by two other Courts, on different grounds. Later on, both decisions were separately appealed and brought

before the Council of State.

The Council of State overruled the first decision and approved the second decision, both leading to the same conclusion: Because the TCA had established the violation suspicion, it should have initiated a full-fledged investigation to determine whether and how Media Barometer violated the Competition Law.

The TCA's Recent Investigation and Conclusion

Upon the Council of State's said decisions, the TCA initiated a full-fledged investigation into yurddaş + partners in June 2017. The TCA examined (i) whether yurddaş + partners was in a dominant position in the media auditing services market, and (ii) whether yurddaş + partners' Media Barometer was creating a coordination of buying prices between the advertisers.

As a result of the investigation, the TCA found no evidence that Media Barometer had not created a coordination effect between the advertisers and decided that yurddaş + partners had not violated the Competition Law. It further decided that yurddaş + partners was not in dominant position in media auditing services. The TCA only published a short decision that included very limited information about the case and its outcome. The reasoned decision is expected to be published in the upcoming months and to reveal more details as to this interesting process.

It is likely that the companies purchasing Media Barometer as well as yurddaş + partners have gone through financial and reputational struggle as the procedure took a period of almost four years. The legal effect of the Notifications cleared away with the TCA's latest decision of no violation.

1.2.13. Turkish Competition Authority to Reinvent Effects Doctrine in Pharmaceutical Industry: The Roche Decision

Bahadır Balkı

On 27 September 2018, the Turkish Competition Authority ("TCA") published a decision[1] concerning allegations that Roche Müstahzarları A.Ş. ("Roche") had violated Articles 4 and 6 of the Law on the Protection of Competition ("Competition Act"). Within this scope, the TCA re-evaluated whether (i) Roche's agreement with a pharmaceutical wholesaler, Co-Re-Na Ecza Deposu Dış. Tic. Ltd. Şti. ("CORENA"), which imposed an export ban on the buyer, and (ii) its alleged interference with other wholesalers for interrupting their supply of goods to CORENA was in accordance with the law. This decision is crucial as it will shed some light on the TCA's approach towards export ban clauses. As will be explained below, the TCA insisted on its previous conclusion that the export ban in the agreement falls out of the scope of the Competition Act. The details of TCA's reasoning will only be made public when the reasoned decision of the TCA is published.

A Brief History of the Case

The TCA first initiated a preliminary inquiry to analyse CORENA's claims lodged against Roche, which simply indicated that Articles 4 and 6 of the Competition Act had been violated. CORENA alleged that Roche had refused to sign a supply agreement with CORENA, in connection with its refusal to remove the export ban in the agreement, despite the objection made by CORENA. The allegations further claimed that Roche prevented its other wholesalers from dealing with CORENA.

The TCA concluded that there were no legal grounds to initiate a full-fledged investigation based on these allegations in light of the evidence obtained during the preliminary inquiry.[2] Upon the TCA's decision, CORENA filed an appeal before the Turkish Council of State. In 2016, the Turkish Council of State annulled the TCA's decision on grounds that it contradicted the Competition Act and thus the TCA was required to make a re-run of the previous case.[3] Following the decision adopted by the Council of State, the TCA initiated an investigation, which it has recently concluded. As the reasoned decision is to be published later, the TCA decided that Roche's

behaviour put under the scope via allegations could not be deemed as a violation of the Competition Act and thus Roche shall not be required to pay any administrative fine.

Merits of the Case

When the allegations were first brought before the TCA in 2010, the merits of the case were scrutinized in the following areas:

1. The export ban clause included in the purchase agreement for pharmaceutical products between Roche and CORENA, and

2. Roche's interference in other suppliers (i.e., other wholesalers) to restrict CORENA's capability to supply.

With regards to the first point set forth by the TCA, the clause restricting exports in the supply agreement was not considered to fall within the scope of the Competition Act. In its assessments, the TCA indicated that the export ban in question did not affect the Turkish pharmaceutical market as the agreement merely prevented the sales of goods abroad and thus only affected the markets outside of Turkey. Pursuant to the "effect doctrine" set forth in the Competition Act,[4] the territorial applicability of the act was limited to conduct that affected any relevant market within Turkey.

A re-sale restriction, which only prohibits the buyer from exporting the relevant goods, falls outside of the Competition Act's scope per the effect doctrine, since it only isolates the foreign markets from competitive restraint that the sales of goods in question could have exposed in the absence of such restraint. Nevertheless, this is not the case for export bans that prevent the reseller from conducting sales to customers within Turkey who may then export the goods in question (i.e., indirect export bans). For instance, the TCA distinguishes between direct and indirect export bans, as in its Takeda Decision[5], indicating that a direct export ban prohibits a buyer from exporting a given product, whereas indirect export bans disable the buyer from selling such product to a purchaser in Turkey with a potential to export afterwards. Pursuant to this two-pillared approach adopted by the TCA,[6] a direct export ban falls outside of the Competition Act's scope, whereas an indirect export ban is within its scope and it may only be valid in case it satisfies the conditions for an individual exemption set forth in Article 5 of the Competition Act.

In its 2010 decision, the TCA held that the export restriction in the agreement should

be deemed as a direct export ban even though the wording of the clause was not unambiguous[7]

> *Therefore, it is not possible to undertake direct or indirect sales (exportation, etc.) of the products sold to the warehouse by Roche, to the countries outside the Republic of Turkey and/or to the persons and institutions located in such places or to release such products outside the territory of the Republic of Turkey by different means with commercial purposes.*

The TCA particularly underlined that the relevant clause only prohibited Roche's customers' sales of Roche products outside of Turkey and that it did not include any restrictions as to their sales to customers or regions within Turkey.

With regards to the second allegation, the TCA concluded that the mere refusal of CORENA's purchase request by other wholesalers did not constitute sufficient evidence to establish a violation. The TCA indicated that a violation would be proven only if the wholesalers' refusal could be associated with either the clause restricting exports, or the de-facto pressure imposed by Roche. Upon further examination and based on the information received from the wholesalers that was pointed out in the allegations of CORENA, the TCA determined that it was not possible to establish a causal link between the agreements or Roche's conduct and wholesalers' refusal to deal with CORENA.

Opinion of the Council of State and the TCA's Contrasting Approach

The Council of State of Turkey annulled the decision of the TCA, indicating that the alleged conduct could affect Turkish markets and thus the allegations would be assessed in light of the evidence obtained throughout the case and that further elaboration of findings within the scope of an investigation was necessary. The reasoning of the Council of State was as follow:[8]

> *(...) when the scope of the Act is considered, it is evident that the allegations included in the application regarding the complaint of the plaintiff would have effect in the Turkish market, and with regards to the other allegations, that the evidence provided by the plaintiff enclosed to its letter of complaint shall be evaluated in detail, acutely.*

The critical issue with respect to Council of State's foregoing assessment is that it did not specify whether it deems that direct export bans may affect Turkish markets or the relevant clause in Roche's distribution agreements included an indirect export ban.

The outcome of the TCA's investigation, which was initiated following the Council of State's decision, was long awaited as it could finally show how the TCA interpreted the Council of State's remarks and it could clarify how the TCA determines whether a certain restriction constitutes a direct or an indirect export ban. The short decision of the TCA lacks any detail whatsoever and it only states that the TCA did not find a violation.

A reasoned decision would clarify how the TCA reached this conclusion. There are two alternatives depending on TCA's interpretation of the Council of State's decision. If the TCA considers that the Council of State disagreed with its position that the relevant clause did not include an indirect export ban, the reasoned decision will probably include an individual exemption analysis with respect to the indirect export ban imposed by Roche. The established precedents of the TCA show that it generally grants individual exemptions to indirect export bans in the pharmaceutical industry.[9] This is the most likely outcome and would come as a relief.

If, on the other hand, the TCA considers that the Council of State disagreed with its position that a direct export ban is outside the scope of the Competition Act, the reasoned decision would be the first of its kind where a direct export ban is deemed to be within the scope of the Competition Act and is subjected to an individual exemption assessment. If this unlikely scenario is realized, this could potentially have significant impacts not only on the pharmaceutical industry, but on many other industries as well since direct export bans are extremely common in Turkey.

To sum up, the short decision did not eliminate the current uncertainty concerning the evaluation of direct export bans under Turkish competition law. Although the chances of seeing an unexpected decision is very low, the suspense remains due to the high stakes.

Footnotes

1. Decision of the TCA dated 26.09.2018 and numbered 18-34/577-283. The text of

the decision in Turkish is available at http://www.rekabet.gov.tr/Dosya/geneldosya/1-roche.pdf.

2. Decision of the TCA dated 17.06.2010 and numbered 10-44/785-262.

3. Decision of the Council of State numbered E. 2010/4617, K. 2016/4241.

4. The effects doctrine is founded by Article 2 of the Competition Act, which reads as follows: "This Act covers all agreements, decisions and practices which prevent, distort or restrict competition between any undertakings operating in or affecting markets for goods and services within the borders of the Republic of Turkey; abuse of dominance by dominant undertakings in the market; any kind of legal transactions and behavior having the nature of mergers and acquisitions which may significantly decrease competition; and transactions concerning the measures, observations, regulations and supervisions aimed at the protection of competition."

5. Decision of the TCA dated 03.04.2014 and numbered 14-13/242-107.

6. Decision of the TCA dated 03.04.2014 and numbered 14-13/242-107, para 28.

7. Decision of the TCA dated 17.06.2010 and numbered 10-44/785-262, para 70.

8. Decision of the Council of State numbered E. 2010/4617, K. 2016/4241, p. 8.

9. Decision of the TCA dated 05.02.2015 and numbered 15-06/71-29.

1.2.14. Jotun Decision: An Assessment of Online Sales Bans on the Eve of the New Guidelines in Turkey

Barış Yüksel and Gökçe Kuranel

The Internet is a functional and effective tool for conducting sales; the prominence of online sales is increasing day by day. Nevertheless, as online sales make it difficult for suppliers to maintain strict control over their distribution network, and suppliers may sometimes try to restrict or prohibit their dealers' online sales mainly to prevent sales to unauthorised dealers and protect physical sales points vis-à-vis online sales, which are more practical and advantageous for the consumers.

The Turkish Competition Authority ("**TCA**") issued the *Jotun Decision*[1] regarding restriction by suppliers of dealers' passive sales through the internet. The TCA held, with its decision, that Jotun had restricted its dealers' online sales via an express provision inserted in the Authorised Dealership Agreements.

The TCA emphasised that internet sales provide benefits such as reducing search costs for customers and distribution costs for dealers, facilitating dealers to reach more consumers in variable locations, and creating new business models. Jotun refers to the European Commission's e-commerce sector report which states that vertical restraints on e-commerce have been increasing at the distributorship level and that, to the Commission's opinion, the dealers' right to make online sales should not be restricted.

In its *Jotun* decision, the TCA explained the Pierre Fabre decision of the French Competition Authority that was upheld by the Court of Justice of the European Union ("**CJEU**") and became a landmark case in the EU.[2] The TCA reminded that in *Pierre Fabre*, an absolute ban on online sales was deemed as a restriction by "*object*" unless justified by the objective characteristics of the relevant product (e.g., prescription drugs). The TCA further noted that Pierre Fabre's (which is a player in the cosmetics and personal care products markets) defence that internet sales could harm the brand image and that an expert recommendation wass required in order to use the products had been rejected. The Jotun decision also mentions the recent CJEU's Coty[3] decision where the Court held that it is possible for a supplier of luxury products that had adopted a selective

distribution system to restrict the sales of its distributors through online marketplaces in order to protect its brand image. However, the TCA emphasized that Coty was solely related to the prevention of online sales through third-party platforms and not to an absolute ban.

It should be remembered here that the TCA granted, with its Antis *Kozmetik decision*,[4] an individual exemption to an online sales ban that was almost exactly the same as the one in Pierre Fabre. In Antis Kozmetik, the supplier of certain dermatological products argued (**i**) that customers must be informed about the special characteristics of the products by specialized salespersons, (**ii**) that online provision of such information is not possible, (**iii**) that online sales impair the effectiveness of selective distribution systems, and (**iv**) that the reputation of the brand may be damaged in the absence of specialized salespersons as the misuse of products may deteriorate customer satisfaction. The TCA consequently granted an individual exemption to the absolute ban on the online sales of distributors mainly due to these reasons.

Jotun is important as it indicates that the TCA seems to adopt a similar approach with the CJEU in terms of absolute bans on online sales after the amendments made in the Guidelines on Vertical Restraints, changing its relatively loose position in Antis Kozmetik. In Jotun, it was decided that Jotun's online sales ban could benefit from neither the group exemption nor the individual exemption. The TCA thus held that Jotun should revise and amend all of its dealership agreements and cease all its practices regarding passive sales restrictions, including online sales bans.

Jotun is also significant as it provides some crucial insights into how suppliers may preserve the integrity of their selective distribution system, which may be threatened by opportunities provided by online sales. Jotun claims that unless a ban on online sales of the authorized dealers is in place, unauthorized dealers may also purchase the products online for the purposes of reselling. While recognizing the validity of such claim, the TCA stipulated that an absolute ban on the online sales of the authorized dealers was a disproportionate measure and stated that it would be possible to remove that risk by imposing a limitation on the amount of products that could be purchased by an individual customer instead (thereby eliminating the possibility of engaging in unauthorized resales activities).

It is highly probable that the TCA will be dealing with various forms of online sales restrictions in the future and that each new decision will contribute to the shaping of the new legal framework to be established.

Footnotes

1. The TCA's decision dated 15.02.2018 and numbered 18-05/74-40.

2. Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS [2011] ECR I-9419.

3. Case C 230/16 Coty Germany GmbH v Parfümerie Akzente GmbH ECLI:EU:C:2017:941.

4. The TCA's decision dated 24.10.2013 and numbered 13-59/831-353.

1.2.15. Samsung and Apple Fined for "Planned Obsolescence"

Barış Yüksel, Mustafa Ayna and Gökçe Kuranel

The Italian Competition Authority, Autorità Garante Della Concorrenza E Del Mercato ("**AGCM**"), levied a fine on Apple and Samsung[1] on 24 October 2018 due to the "planned obsolescence" of their smartphones as they had been found to be slowing down their old phones over time by implementing inappropriate software to promote sales of their new products.

The AGCM initiated an investigation concerning particular smartphone software updates that have a negative influence on smartphones in January.[2] Apple and Samsung were accused of releasing software updates that slowed down their old smartphones, consequently stimulating the purchase of new smartphones.[3] The Italian executives stated that Apple and Samsung had induced unfair commercial practices and such practices expedited replacement of phones. It was indicated that neither Samsung nor Apple had provided information regarding the novelty of the implemented new software or any means of restoring the original functionality of the products.[4] In this regard, the competition agency discussed how when the companies presented new operating systems for their customers to download, they never warned their customers about the decrease in the performance of their phones and did not offer their customers an option to set their phones back to their previous status.[5]

AGCM determined that Samsung insistently suggested its Galaxy Note 4 owners install a new version of Google's Android operating system designed for Galaxy Note 7 and Apple insistently suggested its Iphone 6 users install an operating system tailored for Iphone 7 without informing them about the malfunctions that might arise as a consequence of installing such operating systems. As the new operating systems were not compatible with the old phones' systems, they decelerated them and caused problems.[6]

As a consequence of the investigation of the AGCM, each of the companies was fined EUR 5m due for slowing down their phones and the AGCM ruled that both of the companies were obliged to publish a notice regarding on their Italian websites the

Authority's decision in order to inform their customers.[7] The fines were the maximum amount allowed by the law.[8]

Apple also was fined for an additional EUR 5m as it did not provide sufficient information to its customers in relation to the "essential characteristics of lithium batteries."[9] In December 2017, Apple confirmed that it had been slowing down old Iphones intentionally in order to prevent problems arising from ageing batteries such as sudden shutdowns, but it did not admit that such actions were aimed to shorten the usage period of its products. After accusations in 2017, Apple apologised for its practices, decreased the cost of battery replacements, added information to iOS regarding battery health, and alllow users to deactivate the slowing down of the Iphone's processor.[10]
The investigation regarding similar complaints in Italy opened approximately at the same time with the investigation in France. However, the complaint in France was investigated by the consumer protection agency of the Ministry of Economy. In this manner, French Authorities prefer the consumer law perspective rather than competition law to deal with this issue. It is considered a crime to shorten the life of a product to encourage sales according to French law. The French consumer protection agency has the authority to order 5 percent of the annual turnover of an undertaking or jail sentence. Also, different from other investigations against Apple, the French Authorities approached this allegation as a crime.[11]

In addition, in January 2018, Apple was questioned by the U.S. Senate about slowing down its smartphones by implementing software. More than 60 separate lawsuits in the U.S. were merged into a single lawsuit in the Northern District of California and the lawsuit has not been finalized yet.[12]

In contrast to Apple, the software updates of Samsung have never been questioned.[13] Samsung's spokesperson criticised the decision and argued that Samsung has never intended to lower the performance of Galaxy Note 4 by software updates; instead, the company always aims for its customers to have the best experience from their products through software updates. Samsung will appeal the decision as they find it unfair.[14] Apple, however, remains silent regarding the decision of the AGCM.[15]

Footnotes

1. http://www.agcm.it/media/dettaglio?id=fa6d94c6-b6a6-4353-9231-092f0f2f649e&parent=Comunicati percent20stampa&parentUrl=/media/comunicati-stampa.

2. https://www.competitionpolicyinternational.com/italy-apple-samsung-fined-over-software-updates/.

3. https://www.telegraph.co.uk/technology/2018/10/24/apple-samsung-find-deliberately-slowing-phones-prompt-upgrades/.

4. https://www.competitionpolicyinternational.com/italy-apple-samsung-fined-over-software-updates/.

5. https://www.forbes.com/sites/janetwburns/2018/10/24/italy-fines-apple-samsung-a-few-million-for-planned-obsolescence-in-phones/#16a21ab05afb.

6. https://www.theguardian.com/technology/2018/oct/24/apple-samsung-fined-for-slowing-down-phones.

7. https://www.washingtonpost.com/technology/2018/10/24/italy-fines-apple-samsung-pressuring-customers-buy-new-phones-through-software-updates/?noredirect=on&utm_term=.6748c6c7c366.

8. https://www.forbes.com/sites/janetwburns/2018/10/24/italy-fines-apple-samsung-a-few-million-for-planned-obsolescence-in-phones/#16a21ab05afb.

9. https://www.washingtonpost.com/technology/2018/10/24/italy-fines-apple-samsung-pressuring-customers-buy-new-phones-through-software-updates/?noredirect=on&utm_term=.6748c6c7c366.

10. https://www.theguardian.com/technology/2017/dec/21/apple-admits-slowing-older-iphones-because-of-flagging-batteries.

11. https://www.bbc.com/news/world-europe-42615378.

12. https://www.theguardian.com/technology/2018/jan/10/apple-questioned-us-senate-slowing-down-iphones-french-investigation.

13. https://www.theguardian.com/technology/2018/oct/24/apple-samsung-fined-for-slowing-down-phones.

14. https://www.cnet.com/news/apple-and-samsung-fined-for-slowing-down-phones-with-updates/.

15. https://www.cnet.com/news/apple-and-samsung-fined-for-slowing-down-phones-with-updates/.

1.2.16. Amazon's Dual Role of Merchant and Platform under Antitrust Scrutiny in the EU

Barış Yüksel and Mehmet Salan

Amazon embraces a business model that places innovation, accessibility, and customer satisfaction at its core. Its current position indicates that it probably is the best company in the world in terms of implementing this model. According to most, the extraordinary growth and great commercial success of Amazon is mainly due to its focus on value creation rather than revenue, as well as its ability to identify and satisfy customer expectations even before such expectations are explicitly manifested.

In recent days, Amazon has joined Apple in the trillion-dollar club by achieving a valuation exceeding USD 1 trillion. This monumental growth of Amazon from small bookseller into the world's largest online retailer (and on-demand cloud service provider) with a valuation of more than USD 1 trillion is the subject to numerous articles and books penned by top-line economists and strategists. Everyone is keen on finding out what has made such success possible. Although there are various theories, it seems that Amazon's ability to collect and process customer data is key in its business model. Some argue that Amazon is operating on razor-thin profit margins in its retail business to maximize the amount of transactions over its platform that provides the company with even more precise information regarding the behaviours, habits, and expectations of its customers. In other words, it may be the case that Amazon prefers to be paid in data rather than cash.

This unorthodox approach has caused some mixed opinions among antitrust experts. The representatives of the classical Chicago-school approach, who place price-based consumer welfare on a pedestal and refuse to even consider any alternative parameter while evaluating the potential anti-trust effects of certain behaviours consider Amazon the upmost role-model to whom all others must look. Whereas the representatives of the newly emerging "*hipster*" antitrust movement are urging the competition authorities to shift their exclusive focus on prices and start paying attention to other parameters such as the monopolization of big data, which they claim has serious implications

in terms of privacy and freedom, are no less important when compared to end user prices. The proponents of this approach see Google, Apple, Facebook, and Amazon, which they sometimes refer to as "*data-opolies*," as huge threats the immense power over data of which constitutes an antitrust risk.

It appears that Amazon's huge accretion also has attracted the attention of the European Commission's ("**Commission**" or "**EC**"). Even though the Commission has not published an official announcement, EC Commissioner Margrethe Vestager has stated that a preliminary investigation has been initiated into Amazon's use of data collected from merchants that sell through its online platform.

It is no secret that huge tech companies (especially American companies) have been under the Commission's radar lately and that the Commission is not going easy on them. Only in the last two years, the European Commission has fined (**i**) Facebook USD 122 million, (**ii**) Qualcomm USD 1.2 billion, and (**iii**) Google USD 7.7 billion. At the same time, on the other side of the Atlantic, the Federal Trade Commission ("**FTC**"), which also enforces antitrust laws, has preferred a hands-off approach with respect to such tech companies. This approach, however, seems to have changed recently as the FTC has announced a series of hearings to be held with respect to tech giants, by which the it will take a closer look at issues like the market power of the tech companies, barriers to competing against them, the interaction between data privacy and competition, and how emerging algorithms affect consumers.

In order to get to the bottom of the preliminary investigation initiated by the Commission, one also should consider the business model adopted by Amazon. Along with its operations in logistics, payments, hardware, data storage and media sectors, Amazon's operations in e-commerce basically fall into two categories: (**i**) making direct sales to customers, and (**ii**) enabling merchants and individual sellers to utilize its platform to sell goods. In 2017, Amazon was responsible for 44 percent of all e-commerce sales with a revenue of USD 178 billion solely in the United States.[1] This success in e-commerce, among others, mostly stems from customer data collection and people-based marketing.

Amazon gathers data from its hundreds of millions of customers, including products viewed, length of time a product is displayed, products purchased, shipping information, selling history, buyer review information, accessibility, use, and referral sources. In this way, Amazon is able to analyse the needs of its customers even before they make any

purchases and encourages them to be loyal and frequent shoppers. Some also have argued that Amazon's USD 13.7 billion acquisition of Whole Foods in 2017 was also based on the consumer data regarding grocery buying habits and patterns that comes with the acquisition. "*With massive amounts of data from Whole Foods shoppers, Amazon will ultimately be able to tailor the grocery shopping experience to the individual*."[2]

The preliminary investigation of the EC focuses on the way Amazon uses customer data. Since Amazon operates as a marketplace for merchants it gathers data on every transaction and from every merchant in order to improve its services. However, Amazon also operates as a merchant that competes with other merchants using its platform. Therefore, Amazon's use of other merchants' customers' data and could be against antitrust rules. The reason is that the data gathered from its competitors could grant Amazon a huge competitive advantage as a merchant and could ultimately harm competition. According to Commissioner Vestager, this competitive advantage of Amazon, is due its ability to assess the "new big thing," "things people want," "offers people like to receive," and "things that makes people buy stuff" and to use this information to improve its own offerings.

While the method to regulate tech giants' business practices is being discussed by European officials, the result of this preliminary investigation will most certainly shed light on the approach to data-related competition concerns. Although it is true that the significance of big data in the new economy may justify a change of approach in antitrust implementation, the competition authorities must be diligent in determining how much they are willing to diverge from the traditional price-based consumer welfare tests, which seem to be the only reliable method of making concrete cost-benefit analyses. Moreover, it is also crucial that such investigations do not outlaw business practices that boost technological innovation and development.

Footnotes

1. https://www.statista.com/statistics/266282/annual-net-revenue-of-amazoncom

2. https://www.forbes.com/sites/gregpetro/2017/08/02/amazons-acquisition-of-whole-foods-is-about-two-things-data-and-product/#714f9630a808

1.2.17. Geo-Blocking and Restricting Retailers from Online Advertising Cost Clothing Manufacturer Guess EUR 40 Million in the EU

Hanna Stakheyeva

In December 2018, the European Commission ("EC") sanctioned clothing manufacturer Guess approximately EUR 40 million for its distribution agreements that during year 2014-2017 prevented EU consumers from shopping in EU Member States by blocking retailers from advertising and selling cross-border. Such anticompetitive practices allowed Guess to partition the European markets and maintain artificially high retail prices. The fine represents a 50 percent reduction due to the company's cooperation with the EC "beyond its legal obligation to do so", as mentioned in the EC's press release.

The EC's investigation into the Guess' distributorship agreements found that Guess was in violation of Article 101 TFEU, particularly due to restrictions imposed on the authorised retailors in relation to:

- using the Guess brand names and trademarks for the purposes of online search advertising;
- selling online without a prior specific authorisation by Guess. The company had full discretion for this authorisation, which was not based on any specified quality criteria;
- selling to consumers located outside the authorised retailers' allocated territories;
- cross-selling among authorised wholesalers and retailers; and
- independently deciding on the retail price at which they sell Guess products.

Consequently, Guess was able to maintain higher prices in the Eastern Europe (on average, 5-10 percent higher than in Western Europe).

Cooperation "beyond its legal obligation"

The fine imposed on Guess could have been twice as high if not for the active cooperation of the company with the EC. In particular, in addition to providing evidence with significant added value and acknowledging the facts, Guess revealed an infringement

of competition rules not yet knows to the EC, the prohibition of using the Guess brand names and trademarks for the purposes of online search advertising.

The case is a good example of the EC's antitrust enforcement of the most widespread and problematic business practices in e-commerce, cross-border sales restrictions in distribution agreements.

1.3.1. TCA's Second Clearance for the Same Transaction

Barış Yüksel and Özlem Başıböyük

In 2014, the Turkish Competition Authority ("TCA") granted a conditional clearance for the acquisition of Dosu Maya by Özmaya,[1] which reduced the number of players in the yeast market. This decision was later annulled by the decision of Ankara 8th Administrative Court.[2] In order to comply with the court decision, the TCA initiated a new examination[3] which has recently been concluded.[4] Although the reasoned decision has not been published yet, it is possible to make some inferences by taking a look at the result of the TCA's short decision.

This decision is of crucial importance since it is one of few examples of the Administrative Court reversing a decision of the TCA regarding the authorization of a concentration transaction. The fact that conditional clearance was given to the concerned concentration was criticized by the Administrative Court on the grounds that the remedies presented by the parties had been approved by TCA without a detailed economic analysis reviewing the post-clearance effects of the transaction. The Administrative Court voiced concerns as to whether the approved remedies were sufficient in order to eliminate possible competition problems and, if so, to what extent these remedies could be applied efficiently in practice.

To put it more explicitly, it was held by the Administrative Court that the merged entity (Dosu Maya + Öz Maya) and Pak Maya (which is one of the most powerful market player in the market for fresh bread yeast in Turkey) would hold a joint dominant position in the market for fresh bread yeast in Turkey and that the transaction would create anti-competitive coordinated effects. It was stated that the structure of the relevant market was conducive to the formation of a cartel or other anti-competitive coordination that could increase market prices or impair the quality and services. The Court pointed out that a cartel investigation also had been initiated by the TCA while the merger review process was ongoing and that the TCA had imposed monetary fines on these fresh yeast producers as a result of the investigation. According to the Administrative Court, this demonstrated that the market structure had been conducive to anti-competitive collusion even before the actualization of concerned concentration. In this regard, the

proposed remedies (which mainly comprised of behavioural remedies such as keeping the prices at a certain level, regularly reporting prices, and removing the territorial exclusivity of merged entity's dealers) approved by the TCA was found to be insufficient by the Administrative Court.

Upon the annulment decision of the Administrative Court, the TCA decided once again to grant a conditional clearance with new remedies along with the old ones. In this regard, it can be said that the annulment decision of the Administrative Court forced the TCA to show a more careful approach towards the authorization of the concerned concentration and to require additional safeguards to preserve the competitiveness of the relevant market. However, as mentioned above, the reasoned decision has not been published yet and therefore the scope of these new remedies proposed by the parties is not clear at this stage.

Even so, one issue to be noted is that if new remedies include similar behavioural remedies as in previous ones (which is highly probable since the divestiture of a yeast production facility, which is the most significant asset in the relevant market, by the merged entity could remove the entire rationale of the transaction), it may be difficult to argue that these would be sufficient to remove coordinated effects. This is because the TCA considers structural remedies to be more appropriate tools to eliminate coordinated effects when compared to behavioural remedies. Yet it should be noted that effective behavioural remedies, which are easy to implement and supervise, also may eliminate all sorts of horizontal concerns and a case-by-case analysis is always needed.

In light of the foregoing, it remains unclear whether new commitment packages are well-established or not, and it would be difficult to make an accurate evaluation until the reasoned decision is published. This being said, the new clearance may also be tested before the administrative courts and it will be interesting to see whether the courts share the TCA's optimism about the effectiveness, applicability, and supervisability of the remedies this time.

Footnotes

1. TCA's decision dated 15.12.2014 and numbered 14-52/903-411.
2. Ankara 8th Administrative Court's decision dated 19.01.2017 and numbered 2015/2488 E., 2017/172 K.
3. TCA's decision dated 24.05.2017 and numbered 17-17/252-M.
4. TCA's decision dated 31.05.2018 and numbered 18-17/316-156.

1.3.2. New or Old-Fashioned Approach for the Market Definition: the Turkish Competition Authority's TveK/D&R Decision

Ertuğrul Can Canbolat

On 27 August 2018, the Turkish Competition Authority ("**TCA**") announced that it had cleared the acquisition of one of the largest retailers of various products such as books, periodicals, music, electronics, accessories, video games and toys ("**D&R**") by another retailer and wholesaler of the relevant products ("**TveK**") unanimously[1]. Furthermore, the group of companies to which TveK belongs has operations in the supply and distribution of those products as well.

This was a particularly important and highly anticipated decision for antitrust practitioners on the following questions:

- whether the TCA will define a distinct market for online retail sales and for stores in shopping malls, and
- whether the TCA will also evaluate micro-geographical markets in depth.

Relevant Product Markets Defined by the TCA

To determine the anti-competitive concerns that may stem from an inspected transaction, the TCA, like other competition authorities, basically evaluates the interchangeability or substitutability of the products by the consumers due to the characteristics, prices, and intended use of the products concerned. Additionally, the interchangeability may be assessed from the supply side perspective. Therefore, any inaccurately defined markets, in an either broader or narrower sense, would lead to fallacies and the transaction would be subject to unreasonable objections raised on competition grounds. On the other hand, acknowledging the difficulties caused by the digitalization of most markets, credit should be given to the competition authorities in this regard. Indeed, the *TCA's TveK/***D&R** decision reveals, to some extent, its approach and solution to the above-mentioned difficulties.

[1] TCA's decision dated 29 May 2018, numbered 18-16/293-146.

In the *TveK/D&R* decision, the parties of the transaction are operating in the retail sale of a wide range of products, including but not limited to books, newspapers, periodicals, toys, and electronics. Accordingly, the TCA determined, on the basis of its previous precedents, the overlapping markets as follows[2]:

- horizontally overlapping relevant product markets: "market for the retail sale of books," "market for the retail sale of periodicals," "market for the retail sale of stationery products," "market for the retail sale of games, toys and hobby products," "market for the retail sale of retail sale market of consumer electronics," and "market for the wholesale of books";
- vertically overlapping relevant product markets: "market for the distribution of periodicals and products other than the publications" and "market for the publishing of periodicals and non-periodicals."

Moreover, after having affirmed that both parties are active in the online sale of the concerned products and the trend towards online shopping, the TCA plausibly stressed that the relationship between traditional and online sales channels and the importance of having a store in a shopping mall must be evaluated as well.

Online Sale vs. In-Store Sale

As for the relationship between traditional and online sales channels, the TCA referred to several decisions of the European Commission[3] and the national competition authorities of EU members such as the Competition and Markets Authority[4] and Autorité de la concurrence,[5] along with general reports published by audit companies. In this context, despite the lack of a comprehensive analysis for the necessity to distinguish the online market from the traditional market in most of the TCA's previous case law, it suggests that the TCA considered factors including extra services provided (e.g., informing about all discounts and campaigns, concluding more than one transaction, cancelling orders without any payment, comparing prices and enabling customers to find the least expensive items), accessibility, saving of time, and ease of use.[6]

[2] TCA's decisions dated 22 April 2010, numbered 10-33/529-188; dated 06 April 2012, numbered 12-17/465-136; dated 27 December 2012, numbered 12-68/1682-618; dated 06 November 2013, numbered 13-62/865-371; dated 07 November 2016, numbered 16-37/628-279.

[3] Case No. COMP/M.2978 LAGARDERE/NATEXIS/VUP on 7 January 2004; Case No COMP/M.4611 EGMONT/BONNIER (BOOKS) on 15 October 2007; Final Report on E-Commerce Inquiry Sector on 10 May 2017.

[4] Proposed acquisition of Ottakar's plc by HMV Group plc through Waterstone's Booksellers, Ltd., on 12 May 12 2006; Anticipated acquisition by Amazon.com, Inc. of the Book Depository International Limited ME/5085/11 on 26 October 2011.

[5] Decision 16-DCC-111 on the acquisition of Darty by the Fnac group on 18 July 2016.

[6] TCA's decisions dated 12 May 2011, numbered 11-30/591-187; dated 3 January 2013, numbered 13-01/7-7; dated 10 November 2015, numbered 15-40/662-231; dated 9 June 2016, numbered 16-20/347-156; dated 5 January 2017, numbered 17-01/12-4; dated 4 May 2017, numbered 17-15/175-87.

With regard to the supply side, as highlighted by the TCA, the in-store sales and online sales could not be deemed substitutable because of factores such as differences between investment amounts required, number of employees, and working patterns. To the contrary, the outcome of the TCA's analysis from the demand side perspective introduced that the mentioned sale channels, at least for the defined relevant product markets, are substitutable owing to the lack of a significant difference for consumers/customers. In this context, the TCA in this decision put special emphasis upon the competitive relation between those channels in an asymmetric manner. In other words, if it is determined that the online sale channel does create a competitive pressure on the traditional sale channel, the two channels are accepted within the same market regardless of whether the traditional sale channel creates such a pressure on the online sale channel.

The TCA then assessed the market size,[7] the portions of both traditional and online sale channels for books within the estimated book sales, the growth rates of both channels on a turnover basis,[8] the price differences between those channels (i.e., sale prices have been approximately 35 percent cheaper in online channels than traditional ones), and the consumers' reasons for choosing online shopping (i.e., mainly based on the prices). It should be noted that all of the above evaluations were based on the analysis of book sales and the TCA did not conduct any assessment in terms of other products concerned.

However, the responses of the competitors and publishers to the TCA's information requests appear not to have been in harmony. Some of them claimed that those channels could be defined as separate markets, but online sale channels have an effect on traditional sale channels, whereas others argued that the concerned channels are complementary rather than alternative and thus should be defined as a single market.

Eventually, the TCA concluded that it would conduct further analysis in accordance with a single market approach for book sales, i.e., "*market for the retail sale of books*." Nonetheless, the approach pursued by the TCA seems sceptical for some.
In this regard, it is also noteworthy that the TCA benefited from the information provided by the different stakeholders as well as the information submitted within the

[7] Based on the turnovers for different book categories such as educational publications except textbooks, cultural publications (including fiction publications for adults, other than fiction publications for adults, publications for belief, publications for children, and publications for adolescents) and others (academic, imported, etc.).
Based on the channels such as bookstore chains, independent bookstores, and point of sales, chain stores, exhibitions, distribution/wholesale, and online.

[8] The concerned analysis was not conducted on the basis of the above-mentioned different book categories.

scope of another recent clearance decision.[9]

Stores in Shopping Malls vs. Stores on Streets

Similar to the longstanding criticims valid in Turkey even nowadays with regard to the importance of the venue of a store,[10] the TCA has, to some extent, brought certainty to those discussions in the market for the retail sale of books.

Contraty to its *MARS/AFM*[11] decision, where it was determined that movie theaters at malls or multiplex movie theaters price their services considerably higher than independent movie theaters, which led to the conclusion that these two sub-segments should be defined as separate product markets, the TCA resolved not to make any distinction between bookstores in shopping malls and bookstores on streets.

The determination of the TCA mainly was based on the following facts:

- Although it is undeniable that being placed in a shopping mall brings certain commercial advantages, the location of the store plays a crucial role regardless of being placed in a shopping mall. This can be derived particularly from the evaluations made on a turnover basis that shows that some stores on certain streets achieve significantly higher turnovers.
- No significant difference has been shown to exist between the average prices of book sales and the size of the stores in shopping malls on streets or the quality.

Indeed, the players in the same market also asserted that stores in shopping malls and stores on streets are in direct competing with each other. This is because one is not superior to other in terms of benefits and costs, and because the criteria such as customer potential, rental conditions, competitors in near locations and operational infrastructure are taken into consideration in deciding the place of a store.

Broad Market vs Micro Markets: A Narrow Approach as in the Recent Merger Cases about Movie Theatres and FMCG Retailers?

The TCA defines the relevant geographical market as zones in which the undertakings are active in the field of supply and demand of goods and services that are easily

[9] TCA's decision dated 03 May 2018, numbered 18-13/248-113.
[10] Particularly due to the pros related to the nature of a shopping mall such as ability to satisfy different needs of consumers, lack of impact of any unfavourable weather condition, and lack of problems faced in parking.
[11] TCA's decision dated 17 November 2011, numbered 11-57/1473-539.

differentiated from neighboring zones due to the sufficient homogeneity of the competition conditions and significantly different competition conditions between the neighbouring zones. Therefore, depending on the case, it may adopt an approach in the narrowest (i.e., micro markets) or broadest (i.e., Turkey) term. Particularly for mergers in the retail and movie theatre sectors, the TCA has stressed that the definition of the relevant geographical market needs special attention.

For example, in its above-mentioned *MARS/AFM* decision, the TCA pointed out that a detailed evaluation of the relevant geographical market is necessary in order to analyze the effects of this transaction over end-user prices. Within this framework, it also noted that the 20-minute drive-time isochrone (the area that covers a diameter within 20-minute drive-time) also may be considered as the relevant geographical market. Then it referred to 38 micro markets that require in-depth analysis.

In this regard, another example would be the TCA's *MIGROS/TESCO* decision issued last year in relation to an acquisition realised by one of the largest FMCG retailers in Turkey.[12] Indeed, the TCA's evaluations in this decision explicitly strengthened the hand of the narrower market definition supporters and it implicitly revealed the future approach favoured by the TCA, at least in retail sectors. In the mentioned case, the TCA especially highlighted that problems associated with urbanization such as traffic, transportation, and parking impact consumers' preferences. Eventually, the TCA conducted its analysis in each of the defined districts.[13]

Similar to the above-mentioned cases, the TCA also defined 47 districts as micro-markets by explaining that the parties' activities are mainly focused on traditional retail, that the consumers would consider the distance for shopping purposes, and that this would be valid even if the traditional and online channels were defined as a single market. Nonetheless, the reason for potential criticism of this part of the determination would be that an evaluation of the effect of the notified transition on competition at a regional level has not been conducted in a sufficiently satisfactory manner. Indeed, the TCA mainly referred to the entry barrier that may arise in finding a proper location. Finally, it is also noteworthy that the parties informed the TCA about stores to be potentially closed or opened in the future and that this was not a commitment. However, the TCA only stressed the following issues without further analysis:

[12] TCA's decision dated 09 February 2017, numbered 17-06/56-22.
[13] To the contrary of the approaches adopted by the European Commission and some national competition authorities of the EU members, according to which the 20-minute drive-time has been taken into consideration.

- The number of overlapping markets would be reduced if the above-mentioned circumstances occur,
- The parties' activities would overlap mostly in shopping malls,
- Shopping malls generally rent one or two stores for such operations and this may create entry barriers in case there is no street to attract consumer traffic similar to the one that exists in shopping malls.

To sum up, the TCA's decision on the notified acquisition is likely to be considered a landmark decision as it considers online retail sales to exist in the same market as in-store sales. Further, the TCA reinforced its micro-geographic market assessments.

1.3.3. French-Italian (Essilor and Luxottica) "Wedding" Finally Approved in Turkey

On 1 October 2018, the TCA issued a conditional clearance for the merger of Essilor (a French-based supplier of ophthalmic lenses) and Luxottica (an Italian eyewear company). The merger as originally notified was not approved out of concern that the transaction would result in the creation or strengthening of a dominant position that might impede competition in the market significantly. The parties came up with a commitment package composed of sufficient structural and behavioral remedies to eliminate the TCA's concerns.

The commitment package included (i) structural remedies concerning the divestiture of Merve Optik Sanayi ve Ticaret A.Ş. (an eyewear company), including the obligation of the merged entity not to acquire the rights of distribution of the brands subject to the license agreement between Merve Optik Sanayi ve Ticaret A.Ş. and Marcolin S.p.A (an Italian eyewear company); and (ii) behavioral remedies, to be re-evaluated by the TCA at the end of a three-year period. More details will be available with the reasoned decision of the TCA in due course.

This transaction is a great example of a multijurisdictional filing that required notification to and close cooperation among competition authorities worldwide, including in particular the European Commission, the U.S. Federal Trade Commission, as well as the Competition authorities of Australia, Brazil, Canada, Chile, China, Israel, New Zealand, Singapore, and South Africa. It also shows that the same transaction may have different outcomes depending on its effect on the competition in the relevant market(s), i.e., while the transaction was granted unconditional approval from the European Commission, it received conditional approval from Turkey.

1.4.1. The EU Court of Justice Delivers Ruling on Excessive Pricing in Case Involving Copyright Management Association (AKKA/LAA)

Fevzi Toksoy and Hanna Stakheyeva

The question of excessive pricing as an abusive practice has been notoriously complex and competition authorities refrain from interfering in such cases normally. One of the main reasons for the non-intervention of the competition authorities in such cases is the difficulty in evaluating what constitutes excessive. This is confirmed by the limited case law and practice currently in place. Some jurisdictions, e.g., the USA, do not consider conduct of undertakings with market power that merely exploit customers as an infringement of law at all. Turkey follows the EU approach, according to which excessive pricing is regarded as one of the practices that may be prohibited if practiced by a dominant company (indirectly via "unfair pricing under Article 102 of the Treaty on Functioning of the EU ["TFEU"]).

Specific parameters for establishing excessive prices as a violation of EU competition law were first determined by the Court of Justice of the EU ("CJEU") in the *United Brands Case 27/76*, back in 1978. This test has been frequently applied by the European Commission, as well as confirmed by the CJEU in its *AKKA/LAA* judgement dated 14 September 2017.

Below we provide an analysis of the recent CJEU case in AKKA/LAA, particularly focusing on the CJEU's (clarified) vision of the methods applied for determining whether the pricing is excessive.

CJEU ruling in case C 177/16 AKKA/LAA, 2017

The CJEU on 14 September 2017 delivered its ruling on Case C 177/16 AKKA/LAA2 on excessive (unfair) pricing. While shedding some light on the issue and referring to its earlier judgements, i.e., the 1978 United Brands "excessive pricing" test, the CJEU's judgement in this case may be summarized as follows: "it is clear that it is unclear." By invoking such concepts as "appreciable," "significant and persistent," "objective," "consistent," admitting that there is no single adequate assessment method, and that

the national courts as well as the Competition Authorities have a "certain margin of manoeuvre," the CJEU once again confirmed that excessive pricing cases are particularly complicated.

The case was referred to the CJEU by the Latvian (Regional Administrative) court for the preliminary ruling in the course of an appeal in cassation proceedings brought by AKKA/LAA against the first instance court's judgement not fully satisfying the AKKA/LAA claims. In particular, AKKA/LAA requested the first instance court annul the decision of the Latvian Competition Authority (LCA) in full, as opposed to simply ordering the review of the amount of fine. AKKA/LAA was fined for abusing its dominant position via excessive pricing for its services of issuing for consideration licenses for the public performance of musical works and collecting fees for remunerating copyright holders. In fact, the company had been fined twice, initially in 2008 and subsequently in 2013, following the LCA's examination of the new amended rates.

For the purposes of investigating whether excessive pricing took place, the LCA mostly relied on a comparison of rates applied in Latvia for the use of musical works in shops and service centers with those applied in Lithuania and Estonia as neighboring Member States and markets. The rates applied in Latvia were two to three times higher than those applied in the other two Baltic States. The LCA also applied the PPP index and compared the rates in force in approximatley 20 other Member states, which confirmed that the rates exceeded the average level in other Member states.

The CJEU's recent ruling states that for the purposes of examining whether an undertaking applies excessive (unfair) prices, it is appropriate to compare its rates with those applicable in neighboring Member States/markets as well as with those applicable in other Member States/markets adjusted in accordance with the purchasing power parity (PPP) index, provided that the reference Member States/markets have been selected in accordance with objective, appropriate, and verifiable criteria and that the comparisons are made on a consistent basis. Moreover, the difference between the rates compared must be regarded as appreciable if that difference is significant and persistent. Such a difference is indicative of abuse of a dominant position and it is for the undertaking concerned holding a dominant position to show that its prices are fair by reference to objective factors that have an impact on management expenses.

The main question here is comparison with how many Member States/markets is sufficient, and moreover, what rate is to be considered as 'appreciably higher' within the meaning of the Lucazeau and Others judgement and Article 102 TFEU, as well as what reasoning the company can use to prove the fair nature of the rates. In that respect, the CJEU ruled:

- The United Brands test remains valid. The CJEU in the current case still refers to its United Brands test to determine excessive pricing by verifying whether (i) the difference between cost incurred and price charged is excessive, and (ii) if yes, whether the price imposed is either unfair in itself or when compared with competing products.

- No minimum markets to compare. The CJEU admits that there may be other methods by which excessive pricing may be determined, including the one based on a comparison of prices applied in various Member States/markets, even if such comparison is based on a limited number of Member States/markets (which may be a proof that the Member States are selected according to the objective, appropriate, and verifiable criteria).

- The choice of analogue markets depends on circumstances specific to the case. Those may include: consumption habits, other economic and socio-cultural factors (GDP per capita, cultural, and historic heritage). The CJEU left it to the national court to assess and decide on this depending on the circumstances of the case.

- Consistent basis of the price comparison. This is another rather vague concept referred to by the CJEU both in its earlier judgements in Tournier, and Lucazeau and Others, as well as this ruling. In essence, it is consistent where the method of calculating rates in various markets is analogous and takes into account the PPP index in the comparison with the rates charged in Member States/markets in which the economic conditions/living standards differ. Again, the CJEU emphasized that it is up to the Competition Authority concerned to make the comparison and to define its framework, considering that there is no single adequate method and the Competition Authority has a "certain margin of manoeuvre" here.

- "Appreciable difference" threshold. As such, there is not such threshold above which the difference between the rates compared is to be considered as appreciable, and hence serve as an indication of an abuse of a dominant position. The CJEU stresses that when an undertaking holding a dominant position imposes scales of fees for its services that are appreciably higher than those charged in the other Member States, that difference must be regarded as indicative of an abuse of a dominant position. The CJEU in the current case stated that the difference (between 50 percent and 100 percent higher in Latvia) is not as large as the difference observed between the fees in the cases that led to its earlier judgments in Tournier, or Lucazeau and

Others. At the same time it admits that such difference may also be qualified as "appreciable," since there is "no minimum threshold above which a rate must be regarded as 'appreciably higher' given the circumstances specific to each case." As long as the difference is both significant and persistent for a certain period of time (as opposed to temporary or periodic), it may be considered as appreciable. And again, it is up to the national court to verify this. In any case, those factors are only indicative of a possible abuse of dominant position.

- Justification/Defence to prove that the difference in rates is not excessive. The CJEU states that the company concerned may rely on objective dissimilarities between the situations in various markets/Member States included in the comparison. In case of the company concerned, this may be the relationship between the level of the fee and the amount actually paid to the copyright holders, the collection, administration, and distribution expenses, other objective factors affecting costs, such as specific regulation that places a heavier burden on the administration or other features specific to the market concerned. The CJEU emphasized that it is for the company holding a dominant position to show that its prices are fair by reference to objective factors that have an impact on management expenses.

Conclusion

Determining whether the price is excessive (unfair) has always been a challenge for the competition authorities in various jurisdictions, which also explains the reluctance of the latter to deal with and investigate such cases. The landmark judgement in the United Brands case, which dates back 1978, outlining the test for determining the excessive pricing, is still valid and the recent 2017 CJEU's judgement in AKKA/LAA case confirms this. Additionally, the CJEU thereby emphasizes that the difference in rates following the price comparison must be significant and not temporary in order to be considered as appreciable and hence abusive. The concept of significant is rather vague and subjective depending on the circumstances of each specific case. Even so, these factors are "merely indicative" of the abuse of a dominant position. In such situations, it is for the undertaking holding a dominant position to show that its prices are fair by reference to objective factors that may have an impact on management expenses; and it is up to the national court/competition authority to assess the circumstances of each specific case.

1.4.2. The U.S. Supreme Court's AMEX Decision and Its Implications for Ongoing Sahibinden.com Investigation in Turkey

Barış Yüksel

On 25 June 2018, the U.S. Supreme Court rendered its final decision with respect to the claims that American Express ("**AMEX**") had violated Article 1 of the Sherman Act via anti-steering provisions in its agreements with merchants. The decision contains significant insights as to how relevant markets should be defined for "*transaction platforms*," and how this relevant market definition determines the way in which an effect-based competition law analysis should be conducted.

Before moving on with the competition law related issues, background information regarding transaction platforms in general, AMEX's business model and the anti-steering provisions used by AMEX that constitute the subject of Supreme Court's assessments, will be provided.

Transaction Platforms: Transaction platforms provide services to two different customer groups that depend on these platforms to intermediate between them, and the value of these platforms to one group depends on how many members of the other group participate. Therefore, such platforms must take into consideration the effects of their pricing decisions on both consumer groups and design their pricing structure accordingly. The distinctive feature of transaction platforms is that such platforms must simultaneously serve both customer groups as the service they provide is the "transaction" itself and this service may not be provided to different customer groups separately. To exemplify, AMEX (and other players in the credit card market) has two customer groups, merchants and cardholders. The main function of AMEX is to ensure that AMEX cardholders can realize transactions with merchants that accept AMEX credit cards. Both customer groups derive more benefit from AMEX as the amount of transactions increase and the amount of transactions depend on the number of customers in each customer group. Moreover, the number of customers in one group depends on the number of customers in the other group (i.e., more cardholders would

prefer AMEX if it is accepted by a greater number of merchants and vice-versa).

AMEX's business model: The success of AMEX's business model depends on the amount cardholders spend, and AMEX provides better rewards and advantages in order to promote more spending. To finance these better rewards and advantages, AMEX charges higher (when compared to competitors) merchant fees. Therefore, some merchants may have an incentive to dissuade cardholders from using AMEX.

Anti-steering provisions: Anti-steering provisions refer to provisions in the agreements between AMEX and merchants (these constitute vertical agreements from a competition law perspective) that prohibit merchants from dissuading cardholders from using AMEX and encouraging them to use other credit cards (e.g., Mastercard and Visa).

The complaint was that the anti-steering requirements imposed by AMEX restricted competition and led to higher merchant fees. At the core of the compliant, lay the assumption that there were two separate markets in which AMEX operates, one for merchants and one for cardholders, and that these two markets should be assessed separately. Although this assumption was accepted by the District Court, the Supreme Court rejected it and held that there is only one market in which AMEX operated and this was the market for "transactions."

The Supreme Court's market definition created a fundamental change in the way in which the competitive effects of anti-steering requirements should be assessed. Whereas in the presence of two markets, the claimants could argue that increased merchant fees constitute proof of anti-competitive effects in and of themselves, this was no longer possible in the presence of a single market. The Supreme Court also provided detailed explanations concerning the pricing strategies of two-sided platforms, clarifying that "*the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing.*"

The Supreme Court pointed out that the claimants had the duty to prove the anti-competitive effects in the "market for transactions" by showing that the alleged anti-competitive conduct led to a decrease in output (i.e., number of transactions) and/or

a restriction of competition between credit card companies. The Supreme Court held that the claimants had failed to show any anti-competitive effects of the anti-steering provisions in the transactions market and stated that there was evidence to the contrary showing that output in the market had expanded and the overall quality improved during the time when anti-steering provisions were in force (the Court stressed that high merchant fees allowed AMEX to provide better services to the cardholders and to maintain its business model). Hence, the Supreme Court reversed the judgment of the District Court and concluded that anti-steering provisions in AMEX's agreements with the merchants were not anti-competitive.

The reasoning of the Supreme Court may have some implications for the ongoing Sahibinden.com investigation of the Turkish Competition Authority ("**TCA**").

Sahibinden.com is a two-sided platform serving both customers who desire to purchase or rent certain products (the buyer group) and those who want to sell or rent their own, or third parties', products (the seller group). Sahibinden.com adopts a pricing model where the services offered to the buyer group are completely free whereas sellers pay a certain fee for listing their products on the platform (there are various different methods for calculating this fee). Unlike AMEX, Sahibinden.com does not charge a commission from each transaction. However, the value of the platform is exclusively dependent upon its ability to match the seller group and buyer group, and the benefit each group receives from using the platform is directly proportionate to the number of the other customer group. Thus, Sahibinden.com must consider both customer groups when designing the most efficient pricing structure. Currently, Sahibinden.com prefers to subsidize the buyer group at the expense of the seller group. Yet, this does not mean that it is not adopting the most efficient pricing structure for both customer groups as this may well be maximizing output by creating an optimum buyer-seller balance (i.e., the number of transactions).

Within the scope of its investigation, the TCA is examining whether Sahibinden.com (which is allegedly in a dominant position in the markets for "*online automotive listings*" and "*online real estate listings*") is charging excessive listing fees and exploiting its customers in the seller group.

Although the Sahibinden.com investigation concerns an abuse of dominance claim and therefore differs from the AMEX case, the effect-based analysis to be conducted may indeed be quite similar in both cases as both are related to the effects of certain strategies adopted by two-sided platform operators. In light of the reasoning of the Supreme Court, the TCA needs to consider whether (**i**) it should solely focus on the services Sahibinden.com provides to the seller group, or (**ii**) it should regard the services provided to both customer groups as a whole and conduct its assessment accordingly. The effect-based analysis to be conducted under each scenario would be materially different. If the former approach is adopted, the TCA would need to rely on a classical excessive pricing tests that examine the relationship between the costs of a service and its price and the comparison of the dominant undertaking's price with that of its competitors. Under the latter approach, which was developed by the Supreme Court, the TCA would need to assess whether the output (e.g., the amount of transactions) is reduced or the competition between platforms is restricted because of the alleged excessive pricing.

Up until this time, the TCA has not assessed the alleged anti-competitive effects of pricing strategies of a two-sided online platform; the Sahibinden.com investigation will be a first. It will be interesting to see if the TCA follows the lead of the Supreme Court and develops a different test due to the characteristics of the market or if it simply applies the test used in the "classical industries" to two-sided platforms without major modification.

1.4.3. The Turkish Competition Authority Fines Online Platform Service Provider for Excessive Pricing (Sahibinden.com)

Hanna Stakheyeva and Ertuğrul Can Canbolat

The Turkish Competition Authority ("TCA") fined Sahibinden.com (online platform service provider) approx. EUR 1,525,801 for excessive pricing. The TCA initiated two full-fledged investigations against Sahibinden.com back in 2017. Consequently, the TCA concluded on 1 October 2018 that Sahibinden.com enjoys a dominant position in the markets for (i) online platform services for real estate sales/rental and (ii) online platform services for vehicle sales, and it has been abusing its dominant position in the relevant markets via excessive pricing.

The question of excessive pricing as an abusive practice is notoriously complex and competition authorities refrain from interfering in such cases normally. One of the main reasons for the non-intervention of the competition authorities in such cases is the difficulty of evaluating what constitutes excessive. This is confirmed by a limited case law and practice currently in place. Some jurisdictions, e.g., the U.S. do not consider conduct of undertakings with market power that merely exploit customers as an infringement of law at all.

Turkey follows the EU approach, where excessive pricing is regarded as one of the practices that may be prohibited if practiced by a dominant company (indirectly via the "unfair pricing" concept under Article 102 of the Treaty on Functioning of the EU ["TFEU"]). Specific parameters for establishing the excessive prices as a violation of the EU competition law were first determined by the Court of Justice of the EU ("CJEU") in the *United Brands Case 27/76* back in 1978. This test has been frequently applied by the European Commission, as well as confirmed by the CJEU in its AKKA/LAA judgement dated 14 September 2017.

The reasoned decision of the TCA on Sahibinden is expected to be published within the next months. It is very much awaited since it (hopefully) will provide detailed explanation of the issues of the dominant position and excessive pricing in online platforms.

1.4.4. Loyalty Came at a Price: The European Commission Fined Qualcomm EUR 997 Million for Abuse of Dominant Position

Baran Can Yıldırım and Mehmet Salan

The American chip maker Qualcomm Technologies Inc. ("Qualcomm") on 24 January 2018 was fined EUR 997 million by the European Commission ("Commission") for abusing its dominance in the Long-Term Evolution ("LTE") baseband chipsets market by rendering significant payments to Apple and enjoying in return the benefit of exclusive supply of its chips (between 2011 and 2016[1]).[2]

After the Commission's decision, shares of Qualcomm fell 1.2 percent in pre-market trading in New York. In a statement, the company declared that "Qualcomm strongly disagrees with the decision and will immediately appeal it to the General Court of the European Union." According to company officials, the decision "does not relate to Qualcomm's licensing business and has no impact on ongoing operations."[3] Additionally, the Commission currently is investigating Qualcomm's alleged predatory pricing (selling chipsets below cost) to drive out its competitor Icera Inc. out of market.

This is not the first time Qualcomm has been under scrutiny. In December 2016, Qualcomm was also fined by South Korea's Fair Trade Commission, in the amount of USD 854 million, for abusing its dominant position by foreclosing the market to its competitors. Similarly, in February 2015, Qualcomm settled to pay a USD 975 million fine in China for violating China's antimonopoly law by abusing its dominant position over cellular technology. As part of the settlement, Qualcomm also undertook to offer its licenses for third and fourth generation communications systems for high-speed wireless data to smartphones at a sharp discount to what it charges companies elsewhere.

The LTE Baseband Chipsets Market and Qualcomm's position

Baseband chipsets basically enable smartphones and tablets to connect to cellular networks. They are used both for voice and data transmission. The Commission determined that the entry to the LTE baseband chipsets market is difficult for new

players as (**i**) more than 90 percent of chipsets sold worldwide are produced by Qualcomm, (**ii**) comprehensive research and development is required to produce LTE baseband chipsets, and (**iii**) Qualcomm's protection through its intellectual property rights constitute a significant barrier. Accordingly, the Commission stated that Qualcomm held a dominant position in the global market for LTE baseband chipsets between at least 2011 and 2016.

The Abusive Practices of Qualcomm

According to the Commission, the abusive practices of Qualcomm consist of its anti-competitive agreements with Apple, which accounts for a significant share of LTE chipset demand. Agreements subject to investigation include clauses concerning Qualcomm's commitments to make significant payments to Apple on the condition that Apple would "exclusively" buy and use Qualcomm chipsets in its "iPhone" and "iPad" devices. Pursuant to their agreement, Qualcomm may demand these payments back if Apple commercially launches a device with a chipset supplied by any of Qualcomm's rivals. By taking Apple's potential of influencing other customers and manufacturers regarding procurement and design choices into consideration, the Commission established that Qualcomm's rivals were denied the possibility to compete effectively no matter how good their products were.

The Intel Judgement and Its Implications for the Qualcomm Case

Intel v. Commission,[4] which is considered one of the most important abuse of dominance cases to come before the courts in recent years, was decided by the Court of Justice of the European Union ("CJEU") in September 2017. It deals with the loyalty rebates granted by dominant companies and was of great significance for the Qualcomm Case as the CJEU found that exclusivity rebates granted by a dominant company are not per se anticompetitive and must be analysed whether they are capable of restricting competition (effects-based approach).[5]

The Intel v. Commission is considered to serve as guidance for the Commission as to how an abuse of dominance should be determined. In this regard, in the Qualcomm Case, the Commission proved its case by internal documents obtained from Apple, in which Apple considered seriously switching part of its baseband chipset requirements to Intel Corporation, Qualcomm's competitor. Evidence shows, however, that they

decided not to switch to Intel because of the repayment obligation. As such, the Commission proved both anticompetitive behaviour of Qualcomm, and that such behaviour in fact restricted the competition within the duration of the infringement as Apple didn't switch to Intel Corporation due to the repayment obligation.

According to the Commission, Qualcomm's practices denied consumers and other companies the benefits of effective competition, namely more choice and innovation. With Qualcomm decision, it is also seen that even the giants, Apple and Intel in the present case, need competition rules to improve their product quality and innovation and to reduce their costs.

Footnotes

1. The duration of the infringement established in the decision is five years, six months and 23 days.

2. http://europa.eu/rapid/press-release_IP-18-421_en.htm.

3. https://www.qualcomm.com/news/releases/2018/01/24/qualcomm-appeal-european-commission-decision-regarding-modem-chip-agreement.

4. Judgement of 6 September 2017, Intel v. Commission, C-413/14 P, EU:C:2017:632.

5. For further information on Intel v. Commission, please refer to ACTECON's previous article entitled "ECJ's Recent Intel Decision and Its Implications in Turkish Competition Law Enforcement":
http://www.mondaq.com/turkey/x/630612/ Antitrust+Competition

1.4.5. The TCA Imposed Its First Monetary Fines in the Electricity Sector

Barış Yüksel, Mustafa Ayna and Hasan Güden

The Turkish Competition Authority ("**TCA**") published its short decision concerning the first investigation ever conducted in the electricity sector and imposed a total fine of TL 38 million on Akdeniz Elektrik Dağıtım A.Ş. ("**AKEDAS**," an electricity distribution company in the Mediterranean region[1]) and CK Akdeniz Elektrik Perakende Satış A.Ş. ("**AKEPSAS**," the incumbent retail electricity sales company, which is under the same control structure as the distribution company) for abuse of dominance in the following relevant product markets:

- the "electricity distribution services" market in which AKEDAS is active, and
- the markets for retail electricity sales to (i) "*non-eligible customers*," (ii) "*industrial customers connected to the integrated system at the distribution level*," (iii) "*commercial customers*," and (iv) "residential customers" in which AKEPSAS operates.

The relevant geographic market for all the foregoing product markets has been defined as the "Mediterranean electricity distribution area."[2] This matter is important for the case at hand since the TCA seems to have abandoned its previous market definition approach, according to which the relevant geographic market for the retail sales of electricity to commercial and industrial large-scale customers was defined widely as "*Turkey*."

The TCA had previously initiated several preliminary inquiries in the electricity sector, but each time had refrained from conducting a full-fledged investigation although it had found that the undertakings that provide both electricity distribution and retail electricity sales services (under separate legal entities within the same control structure) were engaging in certain behaviors that prevented the market from becoming more competitive. The TCA's decisions not to investigate the said behaviors mainly could be explained by the fact that the Energy Market Regulatory Authority's ("**EMRA**") was

already working on certain sector specific regulations to prevent such conduct.

Rather than conducting investigations, the TCA adopted an interesting approach, sending the Electricity Distribution Services Association an extensive list of behaviors that would be deemed as abuse of dominance if performed by electricity distribution companies and incumbent retail electricity sales companies (the "**EDSA Notice**"). The EDSA Notice clearly sets forth that distribution companies and incumbent retail electricity sales companies are not exempt from competition law merely because they are active in a regulated market, and that the Council of State allows the imposition of separate fines by the TCA and the sector specific regulator for the same exact behavior.

Although the reasoned decision has not been published yet, some of the TCA's allegations have been made public during the oral hearing held on the premises of the TCA on 6 February 2018. Those allegations mostly concern behaviors that were previously categorized as abuse of dominance in the EDSA Notice and may now be categorized as follows:

i. icooperation between AKEDAS and AKEPSAS to provide an undue advantage to the latter vis-à-vis other retail electricity sales companies; and
ii. unilateral behaviors of AKEPSAS that hinder eligible customers' ability to choose other retail electricity sales companies.

Even though the details of these allegations and the behaviors that were deemed as abuse of a dominant position will only be disclosed in the reasoned decision, it is important to note that most of the allegations concern behaviors that may also violate EMRA's sector specific regulations. For example, one allegation was that the cooperation between AKEDAS and AKEPSAS were against EMRA's "unbundling principles" and thus constituted a violation of the Competition Law. If this allegation (as well as other similar allegations) was indeed regarded as a violation, it is highly probable that the reasoned decision may blur the lines between sector-specific regulations and competition law in the Turkish electricity sector. This was a significant problem in the telecommunications sector and many undertakings active in regulated sectors rightly complained that this legal uncertainty was detrimental to the efficient functioning of business. We should finally note that until this time, the Council of State only exacerbated this problem and made it even more difficult to distinguish between violations of ex-ante regulations and the Competition Law.

Footnotes

1. The "*distribution regions*" are determined by the state and are privatized through tender procedures (Turkey has currently 21 such regions). Each successful tenderer company operates as a legal monopoly in the concerned region.

2. This region comprises the provinces of Antalya, Burdur, and Isparta.

1.4.6. The Google Android Decision: Is EU Competition Law Becoming a Tool to Impose the Union's Industrial Policies and Should Turkey Follow the Commission?

Barış Yüksel and Mehmet Salan

After three years of investigation, on 18 July 2018, the European Commission ("**Commission**") issued its decision on the well-known Android case and fined Google LLC ("**Google**") an astounding EUR4.34 billion for abusing its dominant position. The Commission held in its decision that "*since 2011, Google has imposed illegal restrictions on Android device manufacturers and mobile network operators to cement its dominant position in general internet search*." The fine imposed on Google is the biggest to date. The decision also opens the door to civil actions under which affected parties may claim compensation for damages incurred due to Google's abusive conduct.

A Brief Summary of the Android Case

Android is the most popular smartphone operating system in the world and is used by various device manufacturers. According to the Commission, about 80 percent of smartphones in Europe use Android as their operating system. The Commission determined three types of illegal restrictions imposed by Google on Android device manufacturers. The Commission determined that Google had:

- required manufacturers to pre-install the Google Search and Google Chrome apps as a condition to access the Google Play Store (Application Store),
- made payments to some large manufacturers and mobile network operators on the condition that they exclusively pre-installed the Google Search app on their devices, and
- prevented manufacturers wishing to pre-install Google apps from selling any smart devices running alternative "forked" versions of Android not approved by Google.

Per the Commission, Google was in a dominant position in the markets for general internet search services, licensable smart mobile operating systems, and app stores for the Android mobile operating system. The Commission concluded that Google illegally tied the Google Search app and the Google Chrome browser to Play Store

and foreclosed the relevant markets to its competitors. Furthermore, the Commission decided that the incentives Google provided to device manufacturers for exclusively pre-installing Google's applications also cemented its dominant position in the relevant markets. The most critical basis behind the Commission's reasoning was that pre-installation of certain services led to market foreclosure due to strong "*status-quo bias*," which means that the consumers do not prefer to change pre-installed services even if, at least from a technical perspective, they can very easily do so.

Critiques from a Competition Law Perspective

The Commission's decision was viciously criticized immediately after its publication despite the limited available information on the merits. A significant majority of the criticisms pointed out the same exact problem, that consumers most likely will suffer due to this decision. Many agreed with the proclamation of Google's CEO that "*Android has created more choice for everyone, not less. A vibrant ecosystem, rapid innovation, and lower prices are classic hallmarks of robust competition*." As a matter of fact, since Android is a free-to-use open source project, it boosts innovation and ultimately benefits the consumers.

Although there seem to be numerous weak points to address in the decision, it seems that the "Achilles Heel" is the market definition. To say the very least, it seems counterintuitive to accept that iOS is not a direct competitor of Android. When the fact that the world is basically divided in two groups, of "Android People" and "Apple People," the Commission could have had a better chance defeding the notion that the Boston Red Sox and New York Yankees are not competitors. As this seems to be too absurd a claim to viably hold, the Commission also points out that there is no substitutability between Android and iOS from the perspective of OEMs, simply because iOS is not available to the OEMs. This approach raises another question: Since iOS constitutes a separate relevant market in which Apple enjoys a monopoly, can OEMs claim that Apple controls an essential facility and that it is abusing its dominant position by refusing to allow OEMs access to iOS? As unreasonable as this question might seem, the Commission's claims might justify such a claim.

Moreover, although it is too early to jump to conclusions, it seems very unlikely that the final decision of the Commission will include satisfying economic justifications concerning the concrete effects of the so-called "status-quo bias." Yet, it would be very

disappointing if the Commission solely relies on empirical data showing the number of customers that actually prefer the competitors of the pre-installed services because such an approach would completely disregard the fact that the pre-installed services here refer to Google Chrome and Google Search, which are undoubtedly the most preferred products in the market, and it would be comical to simply assume that the customers would not have preferred these services had they been not pre-installed in the first place.

As a final remark, some critics refer to a set of empirical studies which show that the Commission's decisions resulted in the slowing down of Research & Development ("**R&D**") in numerous markets.[1] According to "The Global Innovation 1000," Google has the second biggest R&D budget with EUR 11.8 billion.[2] It is probable that the decision of the Commission will force Google to cut its R&D investments. Therefore, considering the market reality, the Commission's decision may harm consumers by hindering effective competition and forestalling innovation.

Is it Possible that the Commission may be Pursuing a Different Agenda?

This is not the first time Google has come under the scrutiny of the Commission. Just one year had passed since the Commission had fined Google EUR 2.42 billion for abusing its dominant position by leveraging its dominant position in the search market to provide undue competitive advantage to Google Shopping. In that case, the Commission determined that Google had given featured placement to Google Shopping in Google search results and therefore restricted competition in comparison-shopping markets. Currently, Google's compliance with the EU competition watchdog's decision is being vigorously monitored. Further, it also should be noted that the Commission is currently investigating whether Google has reduced consumer choice by preventing third-party websites from sourcing search ads from Google's search advertising service, AdSense's competitors, and expected to render its decision in a little while.

It is beyond doubt that the Commission must apply the competition rules to the full extent whenever there is a violation and it is not the Commission's problem if this means imposing a fine of approximately EUR7 billion on a single company (which is higher than the total GDPs of San Marino and Montenegro). However, it is difficult to overlook the Commission's obsession with American tech giants. Considering the Commission's obvious hostility, one inevitably questions whether there may be other

motives behind the astronomical fines imposed on them. The latest Android decision (in light of the available data) as well as the Google Shopping decision support the view that the motives of the Commission are not baseless. Hence, one should at least entertain the idea that the Commission is no longer applying the EU competition law in a "purely technical manner" and it is pursuing a wider policy adopted by the European Union against the absolute dominance of Silicon Valley.

What does this mean for Turkey?

On 9 February 2017, the Turkish Competition Authority ("**TCA**") initiated an investigation into Google to see assess **(i)** Google's allegedly abusive practices concerning the supply of its mobile operating system and mobile applications/services, and **(ii)** the agreements made between Google and OEMs. The alleged abusive behaviours of Google are probably very similar (if not the same) as those investigated and penalized by the Commission.

The TCA closely follows the case law of the Commission and in a vast majority of the cases it adopts an approach similar to that of the Commission. Since the TCA's following the Commission's footsteps is also welcomed by the administrative courts, the TCA might be tempted to do the same in its ongoing investigation as well. However, the TCA should not disregard the possibility that this case might actually be different. It is crucial that the TCA assesses whether it would be adopting the "technical viewpoints of the Commission" or "its political motives." As the latter merely serves the industrial policies and the goals of the European Union (which are probably quite different from those of Turkey), the TCA should not rely on the Commission's analyses in case it has any doubts in that respect.

If the application of the competition rules is going to be affected by industrial policies (which we believe is bad for the economy), it should at least be ensured that they are not affected by someone else's industrial policies.

Footnotes

1. "The European Commission Is Undermining R&D and Innovation: Here's How to Change It," Thibault Schrepel, Assistant Professor, Utrecht University School of Law.
2. https://www.strategyand.pwc.com/innovation1000.

1.4.7. Google Fined: This Time by the Turkish Competition Watchdog

Bahadır Balkı

The tech giant Google[1] came under the Turkish Competition Authority's ("**TCA**") scrutiny due to its practices in the market for licensable mobile operating systems and has been under judicial review since July 2015. In September 2018, the TCA finally released its short decision and imposed a fine of TL 93 million (approximately USD 15 million based on today's exchange rate) for abuse of its dominant position through its agreements with mobile device manufacturers, in breach of the Turkish Competition Law No. 4054.[2]

Background of the decision

Following a complaint lodged by Russian Yandex Ltd. ("**Yandex**") alleging that Google had violated the Turkish Competition Law by forcing the original equipment manufacturers through its agreements to pre-install certain Google apps in their mobile devices, the TCA investigated the concerned practices of Google and concluded its preliminary investigation in December 2015.

The TCA found that Google, as a condition to grant licenses to device manufacturers for its operating systems, required them, among other things, to exclusively pre-install certain Google apps and to place these apps on the home-screen of the devices. In this regard, the TCA evaluated in its preliminary investigation, among others,

- whether this practice constitutes tying, which is prohibited under certain circumstances, and
- if so, whether such tying restricts competition.

Accordingly, the TCA resolved, by a majority of votes, not to carry out a full-fledged investigation into Google.[3] Instead, the TCA sent an opinion letter to Google, as per Article 9/3 of the Turkish Competition Law, in which it instructed Google to remove

the provisions in its agreements with original equipment manufacturers that force them to exclusively pre-install certain apps within the Google Mobile Services. It is noteworthy that the result of the TCA's preliminary investigation revealed Google's high market power in Turkey. In addition, the TCA acknowledged:

- exclusive pre-installation of Google apps may restrict the competition, and
- Google's practice of tying does not prevent consumers from downloading other apps and services, and this reduces the transaction costs in favor of consumers; thus, Google did not drive its competitors out of the market and did not violate the Turkish Competition Law.

Similarly, the main point in the dissenting votes was Google's high market power, distribution advantages of such exclusivity and tying practices against other apps and service providers, the foreclosure effect, and restriction of new entries due to such exclusivity and tying practices. However, two members of the TCA opined in favor of initiating a full-fledged investigating into the concerned practices.

Afterwards, Yandex appealed to the Administrative Court for an annulment of the decision. In March 2017, the Court annulled the TCA's decision on the grounds that the TCA should have initiated a full-fledged investigation to reveal whether Google's practices were against the Turkish Competition Law. Shortly after the Court's annulment, the TCA initiated a full-fledged investigation into Google's practices.

In the meantime, the European Commission in July 2018 fined Google an astounding EUR 4.34 billion for similar practices. Since then, the focus has been on the outcome of the TCA's full-fledged investigation. In September, the TCA announced that,

- Google holds the dominant position in the market for licensable mobile operating systems, and
- its agreements constitute abusive behavior within the meaning of Article 6 of the Turkish Competition Law.

Therefore, the TCA fined Google TL 93m in accordance with Article 16 of Competition Law and Regulation on Fines. Although the short decision lacks clear information as to the calculation of the fine, it is further understood from the reference to Article 5/3(b)

of the Regulation on Fines that Google's violation lasted longer than five years and accordingly, the fine increased by one-fold.

Google to take steps to establish efficient competition in the market again

In addition to the administrative fine imposed against Google, the TCA sent an opinion to Google to include a provision in its Mobile Application Distribution Agreements that explicitly states that device manufacturers are not prohibited to pre-install the apps of Google's competitors. The TCA considers this as a precaution to prevent possible competition concerns in the future and as a guarantee to bring precision for the device manufacturers.

Eventually, the TCA unanimously decided that Google should take the following steps in order to end the concerned violation and to ensure the efficient competition in the market again:

- with a view to ensure the device manufacturers' free choice between Google and its competitors, and to exclusively install other search widgets on the home screen, any provisions in Google's agreements that may directly or indirectly oblige the device manufacturer to install the Google search widget or bar exclusively on the home screen should be removed;
- any provisions in Google's agreements setting Google Search as a default search engine in various locations or in the current operating system designs should be removed;
- any provisions in Google's agreements that may directly or indirectly indicate an obligation to set Google Webview as the default and exclusive component for in-app searches should be removed;
- any promotions or incentives through financial or other means that may result in the creation of the aforesaid restrictions should be avoided;
- any provisions in Google's agreements preventing the device manufacturers from pre-installing the services of Google's competitors on devices and using those competitors' services in any of the search locations in the Android system should be abandoned.

Accordingly, within six months following the receipt of the TCA's reasoned decision,

Google must inform the TCA that it has taken the necessary actions to ensure that its agreements are in compliance with all of the above-mentioned instructions.

Conclusion

Google has been subject to several investigations stemming from competition concerns in the same relevant product/service market within recent years. In this regard, tremendously high amounts of fines have been imposed by the European Commission for strengthening its dominant position by illegal practices. Also, a settlement was reached between Google and a Russian antimonopoly watchdog, according to which Google agreed to pay USD 7.8 million and committed to taking steps similar to the ones it has had to take in Turkey.

Although the reasoned decision of the TCA has yet to be published, the short decision provides clues as to the TCA's concerns and the essential facts of the case. Similar with what happened following the European Commission's decision, the TCA's decision is expected to be criticized as it at least raises concerns about the broadening interpretation of abusive practices (especially for the firms active in tech markets) or policy change in the implementation of Article 6 of the Turkish Competition Law.

As a separate but important note, the TCA's decision shows once again that the TCA is still following the European Commission's footsteps to a significant extent in evaluating anti-competitiveness of a behavior, especially in complex matters.

Footnotes

1. Google LLC, Google International LLC, and Google Reklamcılık ve Pazarlama Ltd. Şti.
2. The TCA's decision dated 19 September 2018 and numbered 18-33/555-273.
3. The TCA's 28 December 2015 dated and 15-46/766-281 numbered decision.

1.4.8. The TCA Acknowledges the Place of Payment Institutions in the Merchant Acquiring Services Market

Barış Yüksel, Mustafa Ayna and Hasan Güden

The Turkish Competition Authority ("**TCA**") initiated a preliminary inquiry into the activities of Garanti Bank following a complaint lodged by the association representing the Turkish payment and electronic money sector ("ODED" in Turkish).

Though the TCA decided[1] not to launch a full-fledged investigation, it nevertheless withdrew the individual exemptions granted to Garanti Bank between 2014 and 2017.

ODED's Allegations

Recalling that payment and electronic money institutions are subject to Act No. 6493 of the Payment and Securities Settlement Systems, Payment Services, and Electronic Money Institutions, the ODED alleged (i) that payment services providers horizontally compete with banks in the merchant acquiring services market; (ii) that while banks tend to offer their services to companies with higher sales volume, payment and electronic money institutions try to respond to the financial needs of smaller companies; (iii) that credit card schemes, the main benefit of which for consumers is that they enable them to obtain instalment plans,[2] owe their existence to interbank cooperation, which makes it possible for banks to offer various benefits to card acceptors (e.g., merchants, retailers), and that competition takes place on the level of those schemes (and not on the basis of banks); (iv) that payment institutions' provision of service to card acceptors is conditional upon the procurement of point-of-sale ("POS") terminals from banks so that the said terminals constitute an essential facility; (v) that Garanti Bank did not respond to POS terminal requests and prevented other banks included in the Bonus scheme from providing POS terminals to payment institutions; (vi) that the supply relationship between Garanti Bank and payment institutions created downstream and upstream markets, that the commissions paid for POS terminals make up the largest cost item for payment institutions, that Garanti Bank prevents competition to take place by charging prohibitive commissions;[3] (vii) that Garanti Bank has leveraged its position on the banking market to drive payment institutions out of the merchant

acquiring services market[4]; and (viii) that the concerned anti-competitive practices may stem from Garanti Bank's exempted agreements.

The TCA's Assessments

The TCA noted that payment service providers are card acceptors' main service providers and that payment institutions have started to provide, in the merchant acquiring services market, digital and physical POS terminals as do acquiring banks (i.e., the banks of the card acceptors).
The Bonus scheme helps companies reach more clients, provides a non-cash payment means to customers, and offers the opportunity to benefit from different companies' instalment plans and points with a single card. In light of the foregoing, the TCA established the relevant product market as being the "multi-branded credit card issuing market" (the upstream market).
However, as the inclusion of merchants into credit card schemes is of utmost importance, the TCA, to perform its competition analysis, also defined a second relevant market as being the "merchant acquiring services market" (the downstream market).

The TCA first examined the Interbank Card Center's ("BKM" in Turkish) data according to which there are 1.8 million POS terminals for 59 million issued credit cards in Turkey and established that the competition structure of the merchant acquiring services market has recently changed with the entry of payment institutions in a market in which only banks were active. Indeed, in an environment where card acceptors were encountering difficulties with banks, the services of the payment institutions provided them with an alternative. Payment institutions, however, have to supply themselves with POS terminals from banks in order to provide their services in the downstream market.

The TCA, taking into account that payment institutions have no difficulty in accessing POS terminals which allow cash transactions, established that what is at stake in this case is the access to POS terminals enabling instalment payments. As stressed above, the ODED alleged that Garanti Bank's refusal to supply prevents payment institutions from supplying themselves with POS terminals, giving access to Bonus cards from the banks that are members of the Bonus scheme and that payment institutions are driven out of the market because they are barred from offering POS terminals allowing instalment payments.

The TCA determined from the evidence gathered during on-the-spot inspections that (i) Garanti Bank had limited cooperation with payment institutions since 2012, (ii) Garanti Bank's managers perceived payment institutions as a strategic threat after the adoption of the Act No. 6493 that made it compulsory to meet tough conditions for a company to have the Banking Regulation and Supervision Agency's ("BDDK" in Turkish) approval to provide payment services, and consequently, (iii) Garanti Bank had a negative approach to developing cooperation with payment institutions on the grounds that those institutions then would become Garanti Bank's competitors in the merchant acquiring services market and that their business model was expanding.

The TCA ruled that (i) Garanti Bank does not hold a dominant position in the upstream, multi-branded credit card issuing market, (ii) stronger competitors have higher market shares, and consequently (iii) Garanti Bank did not violate Article 6 of Act No. 4054 of the Protection of Competition ("Competition Act").

In response to the allegation of entry barriers through Garanti Bank's exempted agreements, Garanti Bank stressed that the signatory banks to the Bonus scheme may, outside the inclusion of new merchants to the Bonus scheme, freely determine their merchant acquiring services, to which institutions they will provide merchant acquiring services, and that Garanti Bank does not intervene in this process. Indeed, Garanti Bank's agreements entered into with certain banks had been exempted by the TCA from the year 2002 onwards.

The TCA noted that all the agreements signed between Garanti Bank and banks that are members to the Bonus scheme set out the prohibition to delegate to other banks, credit card issuing institutions, payment institutions,[5] or institutions providing merchant acquiring services Bonus scheme members' power to issue, or distribute Bonus credit cards, or to include additional merchants to the Bonus scheme ("sub-licensing prohibition").

The TCA determined (i) that 29 payment institutions had obtained the BDDK's approval since 2013; (ii) that to offer merchants the possibility of selling on instalment, payment institutions need to have access to the infrastructure of credit card schemes; and (iii) that due to the sub-licensing prohibition, banks that are members of the Bonus scheme could not provide payment institutions such a possibility.

The TCA's Individual Exemption Assessment

In view of the foregoing, the TCA decided to review the individual exemptions it previously had granted to Garanti Bank. First, the TCA examined whether the Bonus scheme contributes to improving the production or distribution of goods, the provision of services, or to promoting technical or economic progress, and established that banks use this scheme to benefit from an extensive network rather than to invest in their infrastructure and that they do not incur costs related to repair, maintenance, or human resources. Morever, the TCA underlined that the Bonus scheme allows merchants to reduce their costs as they have the opportunity to accept credit cards from different banks with a single POS terminal.

As regards allowing consumers a fair share of the resulting benefit from Garanti Bank's restricting practice, Garanti Bank indicated that thanks to the agreements entered into between Garanti Bank and the Bonus scheme's member banks card holders of the Bonus scheme, member banks (i) enjoy the advantages brought by a multi-branded credit card service, (ii) benefit from the instalment possibilities and points provided by the Bonus scheme, and (iii) access more easily a growing variety of goods and services. Eventually, according to Garanti Bank, the Bonus scheme's member banks have the opportunity to provide better services thanks to the investment, cost, price, and human resource advantages with which Garanti Bank's agreements provide them.

The TCA, however, noted that the ability of merchants to sell on instalment could be restricted if payment institutions are driven out of the merchant acquiring services market. Indeed, according to the TCA, despite the increase in the number of card holders, the fact that many merchants cannot make sales on instalment or can only offer instalment plans to some credit cards could affect consumers' welfare. Moreover, the TCA also considered that to be compelled to enter into separate agreements with different banks in order to enable sales on instalment to cards included in more than one credit card scheme at the same time could increase merchants' costs and thus affect consumer welfare.

As it is not clear which effect on consumers would prevail after the balancing of the advantages and disadvantages stemming from the sub-licensing prohibition, the TCA eventually concluded that the consumer welfare condition had not been met.

The TCA held in its previous decisions that competition in the credit cards market takes place between credit card schemes such as World, Bonus, Axess, Advantage, or Maximum rather than between banks themselves. Moreover, the TCA expected the credit card market to expand with the entry of payment institutions as banks would be able to reach more merchants and as consumers would have more opportunities to purchase on instalment. In this context, as the sub-licensing prohibition bars the entry to payment institutions to the merchant acquiring services market and thereby prevents them from becoming efficient players on the market, the TCA ruled that this condition had not been met either.

Garanti Bank argued that the sub-licensing prohibition only concerns the Bonus brand and scheme and that banks that are members of the scheme are free to provide merchant acquiring services to their own merchants by using their own brand. Nevertheless, it was determined that merchants' inclusion in the Bonus scheme is subject to Garanti Bank's approval.

Garanti Bank pointed out that the agreements signed with the Bonus scheme's member banks since 2002 only confers a non-exclusive, non-transferable, and non-sub-licensable licence to use the name "Bonus" and the Bonus scheme's practices.

Garanti Bank also argued that many payment institutions that obtained licences had difficulties they could not predict due to the fact that they had been subjected to new regulations. Garanti Bank suggested that payment institutions were unable to manage risks due to their lack of strong fraud and chargeback processes. Garanti Bank further alleged that certain payment institutions gave merchants access to Bonus POS terminals they had been provided by banks while no agreement had been entered into between the concerned banks and merchants regarding the setting up of POS terminals and without the concerned banks' knowledge. This latter case led, according to Garanti Bank, to enabling the concerned merchants to benefit from the advantages of the Bonus scheme without signing any agreement with the Bonus scheme's member banks.

The TCA stated that, according to other banks' responses to the TCA's request for information, (i) the majority of banks do business with payment institutions; (ii) the banks have a positive opinion of payment institutions' risk perception, which are subject to the BDDK's regulations and to the standards of institutions such as VISA and Mastercard; and (iii) the variety of services provided by payment institutions increases consumer welfare and contributes to the expansion of card usage.

Following its analysis, the TCA admitted that the sub-licensing prohibition could be deemed reasonably necessary to protect Bonus' brand image. The TCA, however, established that the sub-licensing prohibition could prevent payment institutions from supplying themselves with POS terminals from banks that are members to the Bonus scheme and that this constituted an impediment to payment institutions acting as intermediaries in sales on instalment realised by merchants in the merchant acquiring services market.

In the light of the foregoing, the TCA decided (i) that Garanti Bank had not infringed Article 6 of the Competition Act on the grounds that it did not hold a dominant position, (ii) that Garanti Bank's agreements were not eligible for negative clearance, (iii) that the said agreements were not eligible either for block exemption on the ground that they had been entered into between competitors, or for individual exemption given that they did not meet the conditions determined by Article 5 of the Competition Act; but nevertheless (iv), that no full-fledged investigation should be launched into Garanti Bank's activities. The TCA further decided to withdraw the individual exemptions previously granted to Garanti Bank's agreements.

In addition, the TCA held on the basis of Article 9(3) of the Competition Act (i) that the provisions (contained in Garanti Bank's agreements) restricting payment institutions' access to the Bonus scheme should be repealed, and (ii) that the banks that are members to the Bonus scheme should be able to enter into contract with any merchant in the market of merchant acquiring services market. Eventually, the TCA ruled that individual exemption could be granted to Garanti Bank's agreements provided the said repeals were carried out and submitted to the TCA within two months of the notification of its decision.

Footnotes

1. TCA decision numbered 17-28/462-201 and dated 07 September 2017.

2. Indeed, around 70 percent of credit card sales are instalment sales.

3. According to the ODED's allegation, the commission rate charged by Garanti Bank is 5-6 times higher than the interchange commission rate determined by the Interbank Card Center.

4. For example, by offering merchants POS terminals without charging any commission.

5. Those have been included in Garanti Bank's agreement after the entry into force of the Act No. 6493.

1.4.9. Abuse of Dominance and Patent Settlements: General Court Reduces Fine Imposed on Pharmaceutical Company (Servier case)

Hanna Stakheyeva

The General Court ("**GC**") partially annulled the EC's infringement decision finding the anti-competitive agreements and abuse of dominance by Servier on the market of a medicine used to treat heart diseases (perindopril). The GC reduced the total amount of fines imposed on the pharmaceutical company Servier by EUR 102,67 million. At the same time, the GC confirmed that certain patent settlement agreements may be restrictive of competition by object.

In 2014, the EC concluded that the patent settlement agreements entered into by Servier with generic companies constituted restrictions of competition by object and by effect. It also found that Servier had implemented, in particular by those agreements, an exclusionary strategy which constituted an abuse of a dominant position. The EC fined Servier EUR 330.99 million, as well as imposed smaller fines on the generics.

Main findings of the GC

a. As regards patent settlement agreements,

- Patent settlement agreements are important, and the parties to a dispute should be authorized/encouraged to conclude settlement agreements rather than pursuing litigation. The adoption of settlement agreements in the field of patents is not necessarily contrary to competition law.
- The agreements entered into by Servier with the generics (Niche, Unichem, Matrix, Teva and Lupin) constitute restrictions of competition by object, since those prevented the market entry of new players (market exclusion agreements).
- The amount of the fine imposed on Servier in respect of the agreement concluded with Matrix must be reduced by 30 percent and ultimately set at EUR 55.38 million instead of EUR 79.12 million (having regard to the links between that agreement and the agreement concluded by Servier with Niche and Unichem, as a whole on

account of overlaps between the infringements).

- The existence of an inducement by Servier in exchange for Krka's withdrawal from the market was not established; hence there was no restriction of competition by object or effect, and therefore the fines imposed on Servier and Krka in respect of that agreement must be annulled.

b. As regards the infringement consisting in the abuse of a dominant position of which Servier was accused,

- Competitive relationships in the pharmaceutical sector differ from the competitive interactions at work in other economic sectors. The demand for prescription medicines, such as perindopril, is determined for the most part not by the ultimate consumers, but by the doctors prescribing those medicines, who are primarily guided by therapeutic use when choosing what to prescribe, rather than by the cost of treatment.
- The EC made a series of errors in defining the relevant market. The EC wrongly considered that perindopril was a relevant market in itself.
- The EC wrongly concluded that Servier held a dominant position on the perindropil market in France, the Netherlands, Poland and the UK and also on the upstream market for perindropil active pharmaceutical ingredient technology and had abused that dominant position in breach of Article 102 TFEU. Consequently, the GC completely annulled the fine imposed on Servier on the basis of Article 102 TFEU.

Concluding remarks

The case is one of the rare examples of the GC setting aside the EC's decision finding, among others, on the infringement under Article 102 TFEU and complete annulment of the fine for the abuse of dominance. In total, the GC reduces the fine imposed on Servier by the EC decision by EUR102.67 million. The judgement may still be subject to the outcome of further appeals.

CHAPTER 2

INTERNATIONAL TRADE

2.1. Export Revenues Must Now be Brought in Turkey: Introduced by the Communiqué on the Protection of the Value of the Turkish Lira

Ertuğrul Can Canbolat, Baran Can Yıldırım and Burak Buğrahan Sezer

The Turkish Lira (TL) has been losing value for the last couple of months in an alarming manner. Indeed, it has lost well over 70 percent of its value against, for example, the U.S. dollar. While the predictions about the consequences of the "currency crisis" that has erupted in Turkey continue to be made, Turkish businesses have called for ensuring the stability of exchange rates. In this regard, the Turkish government has been working on potential solutions to overcome the currency fluctuations mainly resulting from tensions between Turkey and the U.S.

In September 2018, to avoid further devaluation of the Turkish Lira, the government published a communiqué[1] that introduced strict rules in relation to the export sales of Turkish companies. The Communiqué is based on the Decree of the Council of Ministers No. 32 on the Protection of the Value of Turkish Lira ("**Decree No. 32**"), which was originally published in 1989 and has been amended various times depending on the monetary policy of the respective government.

What is brought by the Communiqué is of significance for the following reasons:

- It will cause the contracts to be redesigned in compliance with the legislation,
- Export companies whose production depends on imported inputs will be deeply affected by the fluctuations in the currency because they will have to convert currencies multiple times as the legislation requires,
- Potential foreign investors' decisions will be affected at least to some extent.

Obligation regarding export revenues

Prior to the Communiqué, the most significant amendment to Decree No. 32 regarding export prices was published on 8 February 2008, Decree No. 2008/13186 Amending Decree No. 32 on Protection of the Value of Turkish Currency. One of the highlights of

said Amending Decree was that it did away with previous regulation which had dictated every exporter to bring their export revenue to Turkey and sell[2] it to the banks within 180 days. With the Amending Decree, exporters were allowed to reserve and use their export revenue freely.

However, the 180-days rule has come into force again with the additional regulations introduced in the latest Communiqué. According to the Communiqué, exporters are obliged to bring at least 80 percent of their export revenue to Turkey and to sell the foreign currency to a bank operating in Turkey within 180 days. A change to the old regulation is that exporters are left with a 20 percent window that they can reserve abroad.

The Communiqué will remain in force for six months starting from 4 September 2018.

Obligation to reshape payment methods

Another addition of the Communiqué to the old regulation is a limitation on acceptable payment methods for bringing the revenue. Said payment methods are as follows:

- Letter of Credit Payment
- Payment against Documents
- Payment against Goods
- Acceptance Letter of Credit Payment
- Payment against Documents with Acceptance Credit
- Payment against Goods with Acceptance Credit
- Payment in Cash

Additionally, customs administrations must be notified in case the revenue is brought back by an individual entering Turkey.

Specific time periods for specific exports

The Communiqué has brought various specifications for some goods. These specifications consist of different time periods for certain goods as follows:

- Export transactions in exchange of foreign currency (cash) must be realized in 24 months,
- Export revenues of contractor firms must be brought back into Turkey and sold to a bank within 365 days,
- Revenues of exports through consignment must be brought back to Turkey and sold to a bank within 180 days,
- Revenues of products that are exported temporarily must be brought back to the country and sold to a bank within 90 days from the expiration or date of sale in cases when the products do not return in time or are sold,
- Revenues of exports through leasing or credit must be brought back to the country and sold to a bank with 90 days.

Sanctions for non-compliance

The Communiqué states that exporters must close the export accounts after the relevant payment has been brought in a timely manner to Turkey. In case that an account is not closed, the intermediary banks must notify the Tax Offices within five days along with a statement describing the stage of transaction.
The relevant Tax Office must then issue a warning providing a 90-day period to the exporter to close the account. Time extensions may be granted to the exporters upon reasonable request or force majeure events.[3]

Law No. 1567 Regarding the Protection of the Value of the Turkish Currency foresees certain fines in the case of non-compliance with the Communiqué. According to the Law, an exporter violating the time periods shall be fined up to 5 percent of the current value of their export revenue. However, a certain period of time is allowed to the exporter following the issuance of the fine, in which the amount of fine to be paid is reduced to between TL 3,000 and 25,000 so long as the exporter brings the revenue to Turkey.

Conclusion

The free reserve of export revenue has been in force for the last 10 years. Along with the introduced Communiqué, exporters that depend on imported products will face a double loss on exchange since they must sell the export revenues and then invest in imports, which require foreign currency. Considering the fluctuation in the currency, the costs of exporters appear to be significant.

With trade wars and the currency crisis, any action from the Turkish government is crucial, and must be issued with expertise. Although the current state has parallels with general economic policy in the world, such practices are considered to be harmful to exporters, which raises speculative views on the issue. Additional and more effective measures for the ongoing currency crisis are awaited from the Turkish government.

Footnotes

1. Communiqué No. 2018-32/48 regarding Decree No. 32 on the Protection of the Value of the Turkish Currency dated 04.09.2018

2. The term sell used in the said Decree refers to converting the currency into Turkish Lira through banks.

3. Listed as banktruptcy, dissolution, arrangement for bankruptcy, death of the firm owner, strike, lockout, impossbility due to official decisions or banks' actions, natural disasters, war, blockade, lsos, impairment or extinhuisment of assets, lawsuits or arbitration.

2.2. Recent Presidential Decrees Have Made Changes to the Turkish Trade Regulation

Ertuğrul Can Canbolat, Hasan Güden and Öykü Erdil

The Turkish President's decrees published on 10 August 2018 amended various provisions concerning customs matters. Below will be sketched the measures (i) establishing additional duties against imports of wall paper and wall coatings, (ii) lowering the customs duty rates on some agricultural products, and (iii) modifying the list of countries eligible to Turkey's generalised system of preferences.

1. Safeguard Measures against Imports of Wall Paper and Wall Coatings

As a result of the safeguard investigation conducted by the Turkish Ministry of Trade, the Turkish President's Decree 18[1] extended for three years the safeguard measures (in the form of additional duties) on imports of certain wall paper and wall coating products by reducing the previous duties. The products concerned and the measures taken are as follows:

CN Code	Product	Additional Duties		
		06.08.2018 - 05.08.2019	06.08.2019 - 05.08.2020	06.08.2020 - 05.08.2021
4814.20.00.00.00	Wall paper and similar wall coating products (those face rough, embossed, painted, pattern printed, or made from paper, plastered or coated with a layer of plastic otherwise decorated)	3.75 USD/ kg	3.5 USD/ kg	3.5 USD/ kg
4814.90.10.00.00	Wall paper and similar wall coating products which are rough, embossed, painted, pattern printed or made from paper, coated or otherwise covered with protective transparent plastic materials, the surface of which is otherwise decorated			
4814.90.70.10.00	Wall papers and similar wall coating products (those face made of paper coated with plaited materials (whether these materials are joined together in parallel strands or flat-woven)			

Furthermore, the decision also provided a list of countries or customs territories (not including EU countries or the U.S.) that will be exempt from the afore-mentioned additional duties up to a certain threshold (quota) for a given period. Accordingly, imports of the concerned products originating in those countries (customs territories) are exempted up to 1,043 tonnes for each of the three periods mentioned in the table above. Furthermore, no country (or customs territory) can benefit from an exemption of more than 347 tonnes per period.

2. Reduction of the Customs Duties on Imports of some Agricultural Products

The purpose of the Council of Minister's Import Regime Decision 95/7606[2] is to make sure that imports are made in conformity to Turkey's interest and pursuant to the requirements of international trade. The Turkish President's Decree 19[3] decision updated the customs duties imposed to the imports of the products falling under the CN codes listed in the List 1 (concerning agricultural products) attached to the Import Regime Decision 95/7606. The list below is mainly related to products such as seeds, certain types of oil, or residues of starch:

	Product[4]	Duty Rate (percent)							
		EU, EFTA, Faroe Islands	Georgia	Bosnia and Herze-govina	South Korea	Malay-sia	Singa-pore	D-8	EU, EFTA, Faroe Islands
1	Sunflower seeds (whether or not broken): other; shelled; in grey-and-white-striped shell: other	13	13	0	13	13	13	13	3
2	Sunflower seeds (whether or not bro-ken): other	13	13	0	13	13	13	13	13
3	Residues from the manufacture of starch from maize (excl. concentrated steeping liquors), of a protein content, calculated on the dry product (exceeding 40 percent by weight): corn gluten	0	0	0	0	0	0	0	0
4	Residues of starch manufacture and similar residues: residues from the manufacture of starch from maize (excl. concentrated steeping liquors), of a protein content, calculated on the dry product (exceeding 40 percent by weight): other	0	0	0	0	0	0	0	0
5	Residues of starch manufacture and similar residues: residues from the manufacture of starch from maize (excl. concentrated steeping liquors), of a protein content, calculated on the dry product (not exceeding 40 percent by weight): corn gluten	0	0	0	0	0	0	0	0
6	Residues of starch manufacture and similar residues: residues from the manufacture of starch from maize (excl. concentrated steeping liquors), of a protein content, calculated on the dry product (not exceeding 40 percent by weight): other	0	0	0	0	0	0	0	0

	Product[4]	Duty Rate (percent)							
		EU, EFTA, Faroe Islands	Georgia	Bosnia and Herzegovina	South Korea	Malaysia	Singapore	D-8	EU, EFTA, Faroe Islands
7	Residues of starch manufacture and similar residues, incl. concentrated steeping liquors (excl. of starch from maize)	0	0	0	0	0	0	0	0
8	Beet-pulp	0	0	0	0	0	0	0	0
9	Bagasse and other waste of sugar manufacture (excl. beet pulp)	0	0	0	0	0	0	0	0
10	Brewing or distilling dregs and waste	0	0	0	0	0	0	0	0
11	Oilcake and other solid residues resulting from the extraction of groundnut oil	0	0	0	0	0	0	0	0
12	Oilcake and other solid residues resulting from the extraction of cotton seeds	0	0	0	0	0	0	0	0
13	Oilcake and other solid residues resulting from the extraction of linseed	0	0	0	0	0	0	0	0
14	Oilcake and other solid residues resulting from the extraction of sunflower seeds	0	0	0	0	0	0	0	0
15	Oilcake and other solid residues resulting from the extraction of low erucic acid rape or colza seeds yielding a fixed oil which has an erucic acid content of < 2 percent and yielding a solid component of glucosinolates of < 30 micromoles/g	0	0	0	0	0	0	0	0
16	Oilcake and other solid residues resulting from the extraction of high erucic acid rape or colza seeds yielding a fixed oil which has an erucic acid content of >= 2 percent and yielding a solid component of glucosinolates of> = 30 micromoles/g	0	0	0	0	0	0	0	0
17	Oilcake and other solid residues resulting from the extraction of coconut or copra	0	0	0	0	0	0	0	0

	Product[4]	Duty Rate (percent)							
		EU, EFTA, Faroe Islands	Georgia		South Korea	Malay-sia	Singa-pore	D-8	EU, EFTA, Faroe Islands
18	Oilcake and other solid residues resulting from the extraction of palm nuts or kernels	0	0	0	0	0	0	0	0
19	Oilcake and other solid residues resulting from the extraction of corn germs	0	0	0	0	0	0	0	0
20	Oilcake and other solid residues from the extraction of olive oil (>= 3 percent)	0	0	0	0	0	0	0	0
21	Oilcake and other solid residues from the extraction of olive oil (< 3 percent)	0	0	0	0	0	0	0	0
22	Oilcake and other solid residues resulting from the extraction of vege-tables: other	0	0	0	0	0	0	0	0

3. Update of List of Countries Eligible for Preferential Tariff Treatment

Presidential Decree 20[5] amended Annex 4 to the Import Regime Decision 95/7606 that sets forth the list of the countries eligible to benefit from Turkey's generalized system of preferences granting preferential tariff treatment to some developing and less-developed countries. Article 15 of the WTO Agreement on Implementation of Article VI of the GATT 1994 and Article XXXVI of the GATT 1994, among other provisions, authorise the implementation of such a preferential treatment between WTO members.

According to this decision, the list of eligible countries has been updated as follows:

- Developing countries: Bolivia, Cape Verde, Cook Islands, Ivory Coast, Philippines, Ghana, Kenya, Kirghizstan, Congo, Micronesia, Nigeria, Nauru, Niue, Uzbekistan, Pakistan, Paraguay, Sri Lanka, Swaziland, Tajikistan, and Tonga.
- Less-developed countries: Afghanistan, Angola, Bangladesh, Burkina Faso, Burundi, Benin, Bhutan, Congo, Djibouti, Eritrea, Ethiopia, Gambia, Guinea, Equatorial Guinea, Gambia, Guinea-Bissau, South Sudan, Haiti, Cambodia, Kiribati, Comor

Islands, Laos, Liberia, Lesotho, Madagascar, Mali, Mongolia, Burma/Myanmar, Mauritania, Malawi, Mozambique, Niger, Nepal, Rwanda, Solomon Islands, Sudan, Sierra Leone, Senegal, Somali, Sao Tome and Principe, Chad, Togo, Timor-Leste, Tuvalu, Tanzania, Uganda, Vanuatu, Samoa, Yemen, and Zambia.

Footnotes

1. See Turkish Official Gazette dated 10 August 2018 and numbered 30505.

2. Entered into force on 20 December 1995.

3. See the Turkish Official Gazette, dated 10 August 2018 and numbered 30505.

4. The CN codes of those products are as follows: 1: 1206.00.91.00.19; 2: 1206.00.99.00.19; 3: 2303.10.11.00.11; 4: 2303.10.11.00.19; 5: 2303.10.19.00.11; 6: 2303.10.19.00.19; 7: 2303.10.90.00.00; 8: 2303.20.10.00.00; 9: 2303.20.90.00.00; 10: 2303.30.00.00.00; 11: 2305.00.00.00.00; 12: 2306.10.00.00.00; 13: 2306.20.00.00.00; 14: 2306.30.00.00.00; 15: 2306.41.00.00.00;16: 2306.49.00.00.00; 17: 2306.50.00.00.00; 18: 2306.60.00.00.00; 19: 2306.90.05.00.00; 20: 2306.90.11.00.00; 21: 2306.90.19.00.00; 22: 2306.90.90.00.00.

5. See the Turkish Official Gazette dated 10 August 2018 and numbered 30505.

2.3. Multilateral Trading System under Strain: The U.S. and Turkish Measures May Hurt Trade between the Two Countries

Ertuğrul Can Canbolat and Hasan Güden

The recent political tensions between the United States of America ("**U.S.**") and Turkey have affected in a significant way the trade relations between the two countries in a context of an already heated global trade environment (some even describe it as a trade war).

In order to summarize the current state of the trade relations between the two countries, (**i**) in the context of which the debated trade tensions emerged will be identified, (**ii**) Turkey's retaliatory measures in this context will be described, and (**iii**) the U.S. response to Turkey's retaliation will be summarised.

1. The U.S. Context of the Current Trade Tensions

The U.S. Department of Commerce's ("**DOC**") reports to U.S. President Donald Trump released during the month of January 2018 may properly be considered as the trigger of the current so-called trade war.[1] Indeed, the DOC conducted two investigations pursuant to Section 232 of the Trade Expansion Act of 1962 in the effect of imports of, respectively, steel, and aluminum.[2] As far as Turkey is concerned, the report on steel imports recommended an alternative to satisfy national security requirements appropriately,

- to impose a global quota on all imported steel products at 63 percent of the 2017 import level, applied on a country and steel product basis or a global duty rate on of 24 percent all imported steel products (in addition to any trade remedy measure already applicable); or
- to impose a duty rate of 53 percent on steel imports from a subset of 12 countries, including Turkey (in addition to any trade remedy measure already application to any steel products from those countries), together with a 100 percent quota to the imports made from each other country in 2017.[3]

In fact, Trump's proclamations[4] of 8 March 2018 establishing global duties on steel and aluminum imports of, respectively, 25 percent and ten percent echoed the recommendations made by those reports. Those proclamations stipulate that, except as otherwise provided, the concerned duties will become applicable as of 23 March 2018, except for countries benefiting from an exemption.

2. Turkey's Retaliatory Response to the U.S. Additional Duties on Steel

In retaliation to the U.S. duties on the imports of steel and aluminum imposed through the presidential proclamations of 8 August 2018, the Turkish Council of Ministers issued on 11 June 2018 Decision No. 2018/11973 on the Implementation of Additional Financial Charges to the Imports Originating in the United States of America[5] (although the duty rates notified by Turkey to the WTO are not consistent with those published in this decision, only those latter are deemed valid). Nevertheless, as Trump took the decision[6] to double the additional duties imposed on the imports of steel originating in Turkey – due to the political crisis between the two countries and to the fall of the Turkish Lira against the U.S. dollar – the Turkish President held with Decision No. 21 Amending Decision No. 2018/11973 on the Implementation of Additional Financial Charges to the Imports Originating in the United States of America[7] to almost double all the retaliatory duties previously adopted. In the end, the additional duties introduced by the Turkish government are as follows:

Combined Nomenclature	Product	Additional Duties (percent)
08.02	Nuts	20
10.06	Rice	50
2106.90	Food preparations (Others)	20
22.08	Undenatured ethyl alcohol of an alcoholic strength of less than 80 percent; spirits, liqueurs and other spirituous beverages (excluding compound alcoholic preparations of a kind used for the manufacture of beverages)	140
24.01	Unmanufactured tobacco; tobacco refuse	60
27.01	Coal; briquettes, ovoids and similar solid fuels manufactured from coal	13,7

Combined Nomenclature	Product	Additional Duties (percent)
2704.00	Coke and semi-coke of coal, of lignite or of peat, whether or not agglomerated; retort carbon	10
2713.11	Petroleum coke, non-calcined	4
33.04	Beauty or make-up preparations and preparations for the care of the skin, incl. sunscreen or suntan preparations (excluding medicaments); manicure or pedicure preparations	60
3904.10	Poly (vinyl chloride), in primary forms, not mixed with any other substances	50
3908.10	Polyamides -6, -11, -12, -6,6, -6,9, -6,10 or -6,12, in primary forms	10
39.26	Articles of plastics and articles of other materials of heading 39.01 to 39.14	60
44.01	Fuel wood, in logs, billets, twigs, faggots or similar forms; wood in chips or particles; sawdust and wood waste and scrap, whether or not agglomerated in logs, briquettes, pellets or similar forms	10
48.02	Uncoated paper and paperboard, of a kind used for writing, printing or other graphic purposes, and non-perforated punch-cards and punch-tape paper, in rolls or in square or rectangular sheets, of any size, and handmade paper and paperboard (excluding newsprint of heading 48.01 and paper of heading 48.03)	20
48.04	Uncoated kraft paper and paperboard, in rolls of a width > 36 cm or in square or rectangular sheets with one side > 36 cm and the other side > 15 cm in the unfolded state (excluding goods of heading 48.02 or 48.03)	20
48.11	Paper, paperboard, cellulose wadding and webs of cellulose fibres, coated, impregnated, covered, surface-coloured, surface-decorated or printed, in rolls or in square or rectangular sheets, of any size (excluding goods of heading 48.03, 48.09 and 48.10)	50
5502.10	Artificial filament tow of acetate	60
7308.90	Structures and parts of structures, of iron or steel (excluding bridges and bridge-sections, towers and lattice masts, doors and windows and their frames, thresholds for doors, props and similar equipment for scaffolding, shuttering, propping or pit-propping)	60
8413.70	Centrifugal pumps, power-driven (excluding those of subheading 8413.11 and 8413.19, fuel, lubricating or cooling medium pumps for internal combustion piston engine and concrete pumps)	20
8479.89	Machines and mechanical appliances	20
87.03	Motor cars and other motor vehicles principally designed for the transport of persons, incl. station wagons and racing cars (excluding motor vehicles of heading 87.02)	120
9022.19	Apparatus based on the use of X-rays (other than for medical, surgical, dental or veterinary uses)	10

Furthermore, Turkey lodged a request for consultation before the WTO on 20 August 2018 following the doubling of the additional duties imposed on its exports of steel to the U.S.[8] If those consultations (which are mandatory) with the U.S. fail to produce a satisfactory solution within 60 days, Turkey will be entitled to request the establishment of a panel.

3. The USTR's GSP Eligibility Review

Following Turkey's retaliatory additional duties on USD 1.78 billion of U.S. imports[9] (before the amendments of 15 August 2018), the Office of the U.S. Trade Representative[10] ("USTR") announced on 3 August 2018 that it would initiate on its own motion a review of Turkey's eligibility to participate in the Generalized System of Preferences ("GSP") program. The stated objective of this program is the promotion of economic growth in designated developing countries by providing duty-free entry to the U.S. market for certain products. In this regard, approximately 3500 different products from Turkey are eligible to enter the U.S. duty-free under the GSP program.

The allegation underlying this review is that Turkey no longer complies with the "market access criterion"[11]requiring Turkey to assure the U.S. reasonable and equitable access to its market.

According to the USTR's press release, the U.S. imported USD 1.66 billion in 2017 from Turkey under the GSP program, representing 17.7 percent of total U.S. imports from Turkey.[12] The most-imported products by the U.S. from Turkey under the said program have been vehicles and vehicle parts, jewellery and precious metals, and stone articles.

The USTR then published on 8 August 2018 a notice in the Federal Register announcing a public hearing and comment period for the concerned review.[13] This notice provides contact information for those interested to make their comments to the USTR in order for this latter to address them in the context of the review announced. Accordingly, the interested parties would have to respect the following deadlines:

- 12 September 2018, for the submission of comments, pre-hearing briefs, and requests to appear at the public hearing for the GSP country practice review of Turkey that would take place on 26 September 2018 under the auspices of the GSP Subcommittee of the Trade Policy Staff Committee; and

- 17 October 2018, for the submission of post-hearing briefs.

Moreover, in support of its review, the USTR indicated in the concerned notice that Turkey had recently established a series of trade barriers that had a negative bearing on U.S. trade. The notice pointed out that Turkey had imposed additional duties[14] only to products originating in the U.S. and that the additional duties imposed by Turkey exceed the tariff concessions granted by Turkey under WTO rules (the so-called WTO schedule of concessions) in respect of some of the products concerned.

Conclusion

The foregoing demonstrates that import-restrictive policies have lately underpinned the use of trade defence instruments. In this context, nobody knows when and how the current political imbroglio between Turkey and the U.S., two long-standing allies, will end. What is certain at this point is that it contributed to the escalation of the ongoing trade confrontation. What is uncertain is the WTO's capacity to resolve the current tensions affecting global trade given the U.S. blocking of the appointment of the members of the Appellate Body. Against the backdrop of a weakened multilateralism, the developments of trade relations will then be dependent on the evolution of the political landscape. In an environment where trade defence instruments are being increasingly used with protectionist purposes, the efficient functioning of the WTO dispute settlement mechanism will prove extremely valuable.

Footnotes

1. See the DOC's following reports that have respectively been submitted to Donald Trump on 11 January 2018 on 17 January 2018: "The Effect of Imports of Steel on the National Security," published 16 February 2018.(https://www.commerce.gov/sites/commerce.gov/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf) (accessed on 28 August 2018); "The Effect of Imports of Aluminum on the National Security", published on 16 February 2018 (https://www.commerce.gov/sites/commerce.gov/files/the_effect_of_imports_of_aluminum_on_the_national_security_-_with_redactions_-_20180117.pdf) (accessed on 28 August 2018).

2. Section 232 lays down rules allowing the establishment of import restrictions for the protection of national security, so that Section 232 investigations "help to determine the effects of imports on U.S. national security and give the President the ability to address any threats to national security by restricting imports through tariffs" (see "What You Need to Know: Section 232 Investigations and Tariffs," published 8 March 2018) (https://www.whitehouse.gov/briefings-statements/need-know-section-232-investigations-tariffs/) (accessed on 28 August 2018)).

3. According to the report, this second option would enable the domestic industries concerned to reach 80 percent of their capacity utilization rate at 2017 demand levels (including exports); see Secretary Ross' press release regarding the reports on steel and aluminum in which the concerned capacity utilization rate is considered to be the "minimum rate needed for the long-term viability of the [steel] industry" (https://www.commerce.gov/news/press-releases/2018/02/secretary-ross-releases-steel-and-aluminum-232-reports-coordination) (accessed on 28 August 2018).

4. See Presidential Proclamation 9705 on Adjusting Imports of Steel into the United States, published on 8 March 2018 (https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states/) (accessed 28 August 2018); and Presidential Proclamation 9704 on Adjusting Imports of Aluminum into the United States, published on 8 March 2018 (https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states/) (accessed 28 August 2018).

5. See the Turkish Official Gazette dated 25 June 2018 and numbered 30459.

6. See the Presidential Proclamation 9772 Adjusting Imports of Steel Into the United States, published on 10 August 2018 (https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states-5) (accessed 28 August 2018), effective as of 13 August 2018.

7. See the Turkish Official Gazette dated and numbered 30510.

8. See file:///C:/Users/hasan.guden/Downloads/564-1 percent20(2).pdf (accessed on 28 August 2018).

9. See the Council of Ministers' decision dated 11 June 2018 and numbered 2018/11973.

10. The Office of the U.S. Trade Representative is responsible for developing and coordinating U.S. international trade, commodity, and direct investment policy, and overseeing negociations with other countries.

11. See Trade Act of 1974, Title V, §503 (d)(2)(A) (https://ustr.gov/sites/default/files/files/gsp/GSP percent20statute percent20updated percent20to percent202017.pdf) (accessed 28 August 2018).

12. See https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/august/ustr-announces-new-gsp-eligibility (accessed 28 August 2018).

13. See https://www.federalregister.gov/documents/2018/08/16/2018-17712/generalized-system-of-preferences-gsp-notice-regarding-the-initiation-of-country-practice-review-of (accessed 19 August 2018).

14. See the retaliatory measures imposed on 25 June 2018 through the Turkish Council of Ministers' Decision no 2018/11973, as amended by the Turkish President's Decision No. 21.

2.4. The EU's Provisional Safeguard Measures on Steel Products and a Practical Guide for Importers

Ertuğrul Can Canbolat, Baran Can Yıldırım and Özlem Başıböyük

Countries in the world trading ecosystem have been taking steps to establish a freer trade system since 1947, when the General Agreement on Tariff and Trade (GATT) was created. Especially after the establishment of the World Trade Organization in 1995 following the last round of the GATT (Uruguay Round of 1994), the restrictions and bans were rapidly removed from the exchange of goods between the countries. It is without dispute that the world economy has benefited extensively from the trade liberalization.

Recent events, however, suggest that the nations have started to stray away from trade liberalization by implementing protectionist approaches such as imposing tariff obstacles, duties, and quotas. It is further considered that the United States' recent restrictions triggered the concerned backwards trend (For more on the recent restrictions: Turkey Initiated a Safeguard Investigation to Steel Imports and Customs Updates in Turkey for the Import of Various Goods).

As a result of these protectionist approaches, the European Commission has announced that it has initiated a safeguard investigation into the imports of 26 steel product categories to prevent trade diversion into the EU by publishing a notice dated 6 March2018 and numbered 2018/C 111/10.[1] The scope of the investigation was extended to include two additional product categories on 28 June 2018.

The preliminary assessments carried out by the Commission revealed that there exists a threat of serious injury to the EU's steel producers and increase of imports as a result of unforeseen developments. Therefore, the Commission imposed a provisional safeguard duty of 25 percent on imports of 23 different product categories on 17 July 2018.[2]

Although the Commission alleged it had found that all necessary requirements present in the case at hand to impose a provisional safeguard measure, it is considered that the investigating authorities in trade defense investigations should thoroughly observe the

interest of all parties who may be affected from the measures, especially the dynamics of the downstream markets (i.e., the interest of the EU surrounding the free imports of the products concerned).

How are Turkey and other Developing Countries Affected?

It was decided that a provisional safeguard duty of 25 percent on the import of 23 product categories to the European Union would be applied for a period of maximum 200 days starting from 19 July 2018, regardless of their origin except for developing countries.

The relevant safeguard measure was to be imposed once imports exceeded a certain amount in quantity on the basis of each product category and would expire on 4 February 2019 at the latest. Therefore, no safeguard measures would be applied unless the relevant quota was exceeded.

Furthermore, in accordance with the applicable rules, the Commission undertook a separate evaluation for the developing countries, including Turkey. In this context, WTO member developing countries with shares in the European Union market less than three percent were excluded from the relevant safeguard measure, provided that the total market share of all WTO member developing countries was less than nine percent. Moreover, exclusion from the relevant safeguard measure on a product basis was granted for some developing countries with low levels of imports into the European Union.

The product categories on which the measure would be imposed on imports from Turkey, the relevant HS Codes, and the quotas mentioned above are presented in the table below:

Product Category	HS Codes	Quota	Duty
Non-Alloy and Other Alloy Hot-Rolled Sheets and Strips	7208 10 00, 7208 25 00, 7208 26 00, 7208 27 00, 7208 36 00, 7208 37 00, 7208 38 00, 7208 39 00, 7208 40 00, 7208 52 99, 7208 53 90, 7208 54 00, 7211 14 00, 7211 19 00, 7212 60 00, 7225 19 10, 7225 30 10, 7225 30 30, 7225 30 90, 7225 40 15, 7225 40 90, 7226 19 10, 7226 91 20, 7226 91 91, 7226 91 99	4,269,009	25 percent

Product Category	HS Codes	Quota	Duty
Non-Alloy and Other Alloy Cold-Rolled Sheets	7209 15 00, 7209 16 90, 7209 17 90, 7209 18 91, 7209 25 00, 7209 26 90, 7209 27 90, 7209 28 90, 7209 90 20 7209 90 80, 7211 23 20, 7211 23 30, 7211 23 80, 7211 29 00, 7211 90 20, 7211 90 80, 7225 50 20, 7225 50 80, 7226 20 00, 7226 92 00	1,318,865	25 percent
Metallic-Coated Sheets	7210 20 00, 7210 30 00, 7210 41 00, 7210 49 00, 7210 61 00, 7210 69 00, 7210 90 80, 7212 20 00, 7212 30 00, 7212 50 20, 7212 50 30, 7212 50 40, 7212 50 61, 7212 50 69, 7212 50 90, 7225 91 00, 7225 92 00, 7226 99 10, 7226 99 30, 7226 99 70	2,115,054	25 percent
Organic-Coated Sheets	7210 70 80, 7212 40 80	414,324	25 percent
Stainless Cold-Rolled Sheets and Strips	7219 31 00, 7219 32 10, 7219 32 90, 7219 33 10, 7219 33 90, 7219 34 10, 7219 34 90, 7219 35 10, 7219 35 90, 7219 90 20, 7219 90 80, 7220 20 21, 7220 20 29, 7220 20 41, 7220 20 49, 7220 20 81, 7220 20 89, 7220 90 20, 7220 90 80	476,161	25 percent
Non-Alloy and Other Alloy Merchant Bars and Light Sections	7214 30 00, 7214 91 10, 7214 91 90, 7214 99 31, 7214 99 39, 7214 99 50, 7214 99 71, 7214 99 79, 7214 99 95, 7215 90 00, 7216 10 00, 7216 21 00, 7216 22 00, 7216 40 10, 7216 40 90, 7216 50 10, 7216 50 91, 7216 50 99, 7216 99 00, 7228 10 20, 7228 20 10, 7228 20 91, 7228 30 20, 7228 30 41, 7228 30 49, 7228 30 61, 7228 30 69, 7228 30 70, 7228 30 89, 7228 60 20, 7228 60 80, 7229 70 10, 7228 70 90, 7228 80 00	728,270	25 percent
Rebar	7214 20 00, 7214 99 10	714,964	25 percent
Gas Pipes	7306 30 41, 7306 30 49, 7306 30 72, 7306 30 77	185,280	25 percent
Hollow Sections	7306 61 10, 7306 61 92, 7306 61 99	387,343	25 percent
Large Welded Tubes	7305 11 00, 7305 12 00, 7305 19 00, 7305 20 00, 7305 31 00, 7305 39 00, 7305 90 00	258,133	25 percent
Other Welded Tubes	7306 11 10, 7306 11 90, 7306 19 10, 7306 19 90, 7306 21 00, 7306 29 00, 7306 30 11, 7306 30 19, 7306 30 80, 7306 40 20, 7306 40 80, 7306 50 20, 7306 50 80, 7306 69 10, 7306 69 90, 7306 90 00	296,274	25 percent
Non-Alloy Wire	7217 10 10, 7217 10 31, 7217 10 39, 7217 10 50, 7217 10 90, 7217 20 10, 7217 20 30, 7217 20 50, 7217 20 90, 7217 30 41, 7217 30 49, 7217 30 50, 7217 30 90, 7217 90 20, 7217 90 50, 7217 90 90	393,091	25 percent

Finally, it also should be noted that imports from Norway, Liechtenstein, and Iceland, which are members of the European Economic Area, would not be subject to the relevant safeguard measures.

Competition between the product categories

The Commission undertook a comprehensive analysis for the competition among the product categories in order to decide whether the products of the EU producers were like or directly competitive with the ones being imported. The strong competition between imported products and products produced by the EU producers under the same categories due to similarities in terms of physical and chemical characteristics, price, quality and sales channel was noted.

The Commission also determined a significant relationship and strong competition among the products covered under different product categories. It was noted that products in different categories could easily be transformed into competitive products following simple processes. Therefore, the Commission considered that the products, if not protected under the provisional safeguard measure, could be converted into different products in the country of import and imported under different HS Codes, which would result in circumventing the measures.

As a result, it seen that competitive pressures could easily be shifted from one product to another and accordingly, it was decided to apply the provisional safeguard to all 23 product categories.

How will the duties be imposed on importers? A practical guide.

As explained above, the provisional safeguard measures to be imposed were to be implemented following a certain import amount on the basis of product category reached.

The relevant quotas, which were not country-specific, were to be allocated in accordance with the chronological order of the date of acceptance of the customs declarations for entry to free circulation. Therefore, quotas were to be allocated on a first come first served basis.

The relevant quotas may be tracked on the following website with the "*order number*":

http://ec.europa.eu/taxation_customs/dds2/taric/quota_consultation.jsp?Lang=en

Accordingly, the concerned customs administrations were to examine the exporters' customs and requests for customs quota pursuant to the legislation of the EU and if such request was found appropriate, the request containing the date of acceptance and the exact amount was to be forwarded to the Commission without delay.

The Commission was to conduct the allocation of quantities on basis of the date of acceptance of relevant customs declarations to extent permitted by remaining balance of the customs tariff quota. On the day of allocation, if the sum of the amounts for all customs tariff quotas accepted on the same day was higher than the remaining balance of the customs tariff quota, the Commission was to allocate the quantities on a *pro rata* basis.

In practice, quotas are allocated at the end of each business day. Accordingly, the relevant customs authorities would forward to the Commission the customs declarations at the end of each business day and the Commission would carry out the necessary duties in accordance with the customs declarations and requests attached to it. However, a blocking period was envisaged until 1 July 2018 and the Commission would not allocate the quota at the end of each day until that date. Customs declarations and requests received by the date of 1 July 2018 were to be allocated collectively at the end of the blockage period.

Footnotes

1. http://trade.ec.europa.eu/doclib/docs/2018/march/tradoc_156657.init-safe.en.C111-2018.pdf.

2. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.181.01.0039.01.ENG&toc=OJ:L:2018:181:TOC.

2.5. Turkey Initiated a Safeguard Investigation into Steel Imports

Ertuğrul Can Canbolat, Baran Can Yıldırım and Sinan Lahur

In recent years, the USA has been pursuing a very protectionist approach to imports and, accordingly, it has initiated safeguard investigations and imposed very high measures (e.g., on steel products). This approach has led other countries to implement protectionist approaches as well. In other words, the increasing number of trade defence measures taken by third countries has triggered new investigations by the EU to protect its domestic industries from the potential serious injury on the basis of the most recent developments, such as any trade diversion resulting from the U.S. measures or potential tendencies after such developments.

Such an approach has particularly become crucial for export firms active in a market which is characterized by extensive trade flows and where the customers as well as the suppliers operate on a global level. Thus, any restriction concerning exports/imports of products which are largely commoditized (no significant differences) and the price levels of which are relatively comparable across jurisdictions and dependent on the conditions of competition at a global level would definitely raise concerns and trigger, at least, counter-investigations to protect the interest of the country's main producers.

In this regard, the aforesaid ongoing world-wide protectionist approach in the international trade regime has finally found its response from Turkey as well. Right after the EU's newly initiated safeguard investigation concerning iron and steel products on 26 March 2018, the Turkish Ministry of Economy ("**Ministry**") launched a safeguard measure investigation concerning the imports of certain iron and steel products and announced this in the Official Gazette dated 27 April 2018 and numbered 30404. The result of the investigation, which covers a wide range of product and all countries, will absolutely have an effect on export, import and domestic markets for the subject products.

In the light of above, we will provide a brief discussion of recent events in this regard from the U.S.A. and the EU. Then, the Turkish Ministry of Economy's recent investigation will be discussed.

Background

As widely discussed, U.S. President Donald Trump last year issued a controversial executive order calling the Department of Commerce to open an investigation into whether steel imports harmed U.S. national security.[1] The executive order aimed to protect the country's national security from imports in accordance with a decades-old, rarely used law, namely Section 232 of the Trade Expansion Act.[2] Following this executive order, the Department of Commerce opened an investigation and analyzed the effects of steel imported to the U.S. As a result of the investigation, a report titled "The Effect of Imports of Steel on the National Security" was issued on 11 January 2018. The report indicates that steel imports had "weakened US internal economy and threatened to impair the national security as defined in Section 232."[3]

The protectionist approaches by the President Trump are not limited to this case. Within his administration, the U.S. has withdrawn from the Trans-Pacific Partnership[4] and is considering withdrawing from NAFTA.[5] Furthermore, new measures on steel and aluminum[6] and solar panels[7] are also on the agenda. In the news, this whole process is called *"trade war."*

EU officials previously stated that if the U.S. was to impose measures, then the EU would take these three steps to protect itself:

- take the case to the WTO,
- impose further safeguard measures, and
- impose tariffs on a series of American-made goods.[8]

Within this scope, the EU Commission launched a safeguard investigation concerning steel products to prevent trade diversion into the EU.[9] According to the EU, the surveillance system for steel imports, which had been in place since March 2016, granted evidence that imports of certain steel product had increased. The investigation is ongoing.

The Turkish Investigation

An action from the Turkish government against the actions taken by U.S. and EU had been

expected to prevent trade diversion into Turkey. As expected, the Ministry on 27 April 2018 *ex officio* initiated a safeguard investigation concerning imports of steel products by the Communiqué on the Safeguard Measures in Imports No: 2018/3 ("*Communiqué*") to find out whether steel imports caused serious injury the domestic industry and/or threatened to do so. The investigation covered 21 different steel products and the scope of products could be widened pursuant to information collected throughout the investigation. Currently, the following product categories are being investigated by the Ministry to find whether the imports caused serious injury the domestic industry and/or threatened to cause serious injury: (**i**) flat rolled products; (**ii**) bars, rods and angles; (**iii**) railway or tramway truck construction materials; (**iv**) tubes, pipes, hollow profiles; and (**v**) stainless steel.

As an important note, the Board of Evaluation of Safeguard Measures decided to consider whether products originating from EU may be exempted from the measures, if imposed.

Within this scope, exporters that cooperated with the Ministry in this investigation could enjoy no measure or lesser measures than those who did not. As such, exporters wishing to cooperate with the Turkish government were required to fill-in a questionnaire published on the Turkish Ministry of Economy's website and submit it to the Directorate General of Imports within 30 days. By doing so, exporters were considered as interested parties and given the chance to defend themselves in the process. Additionally, any interested party coulud attend the public and private hearing, where they would have the opportunity to orally present their position. Any oral or written communication regarding the investigation would be carried out in Turkish.

Within the said questionnaire, the exporters had to present the following matters to the Turkish Ministry's attention: (**i**) information on the concerned products (types, production technology, usage, competitiveness, substitutability etc.), (**ii**) the market structure of the concerned product, and (**iii**) economic indicators (profitability, domestic sales, export sales, employment, etc.) of the exporting company.

Importing companies could also fill-in a questionnaire to be considered as an interested party. In this questionnaire, the following information was required: (**i**) the status of the importer (industrial user, exporter, only importer, distributor or etc.), and (**ii**)

the purposes for the imports (raw material, exporting by processing, reselling to the domestic market or etc.).

Domestic industry could also participate in the investigation and defend their interest by filling-in a questionnaire, which included the following information: (**i**) the distribution channels, (**ii**) the raw materials of the concerned product, (**iii**) the technology of the concerned product, (**iv**) the worldwide demand amount, and (**v**) the domestic capacity.

As the above information suggests, the Ministry aimed to collect information regarding the concerned product in terms of export, import, and production. The information provided to the Ministry is crucial for the findings as to whether the iron-steel imports cause serious injury to the domestic industry.

Conclusion

Following the international trade measures imposed by the U.S., mainly the import tariffs on teel and aluminum, the EU also started a safeguard investigation regarding steel imports in response. Shortly after, Turkey announced that it had initiated a safeguard investigation concerning steel imports. It is not yet clear if imports originating in the European Union will be exempted from the possible safeguards measures. While the reflections of the Turkish investigation are yet to be seen, many exporters around the world are expected to participate in this investigation to protect their interest and to enjoy a potential no measure or lesser measures than their competitors. Therefore, it is clear this investigation will shape the relevant markets in Turkey.

Footnotes

1. https://www.commerce.gov/news/fact-sheets/2017/04/frequently-asked-questions-section-232-investigations-effect-steel-imports.
2. https://www.wsj.com/articles/trump-to-revive-1962-law-to-explore-new-barriers-on-steel-imports-1492661339.
3. https://www.commerce.gov/sites/commerce.gov/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf.
4. https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP.
5. https://www.nytimes.com/interactive/2017/upshot/what-is-nafta.html.

6. https://www.axios.com/trump-declares-his-trade-war-targets-steel-aluminum-2f68d5fe-69ec-4872-b1d5-aaae28f7bf4b.html.
7. http://time.com/5113472/donald-trump-solar-panel-tariff/.
8. These goods include; motorcycles, jeans, bourbon whiskey, orange juice, corn, steel, pleasure boats and cosmetics.https://www.verdict.co.uk/eu-trump-trade-tariffs-list/.
9. http://trade.ec.europa.eu/doclib/press/index.cfm?id=1823.

2.6. Trade Remedy Measures in Light of Evaluations by the Turkish Competition Authority

Mustafa Ayna and Hasan Güden

The Turkish Competition Authority ("**TCA**"), in the framework of its market evaluation, includes every factor which can potentially influence a market structure. As trade remedy measures have a direct impact on imports and exports and thus on domestic supply and demand, the TCA, in some of its decisions, considers the Turkish Ministry of Economy's ("**Ministry**") measures taken to protect Turkey's competitiveness in the context of international trade.

In addition to a short theoretical explanation of the interaction between competition law and trade remedies, below the TCA's decisions related thereto will be briefly discussed.

1. The Interaction between Competition Rules and Trade Remedies

It is generally considered that the scopes of competition rules and trade remedies overlap and that both affect market conditions and companies' activities. Nevertheless, as competition rules are implemented by the TCA and trade remedies by the Ministry, both constitute two separate areas with different legal aspects and require different expertise.

The Ministry, in accordance with the World Trade Organization's rules in this regard, takes its decisions on a country and product basis. In this context, the Ministry mainly takes either anti-dumping measures (i.e., as a result of an original dumping investigation), or safeguard measures (i.e., measures implemented irrespective of a dumping investigation). With the entry into force of those measures protecting domestic producers, importing companies have to adjust their activities in the market.

In a scenario in which anti-dumping measures have a duration of five years, interim review investigations (for which producers/exporters located in the country subject to the measure can apply after a period of one year following the adoption of the said

measure) and expiry review investigations (for which domestic producers can apply within the year before the expiry of the measure) have an important effect on the configuration of the market. Indeed, imports and exports shape the market structure and are dependent on the implementation of trade remedies. In this context, companies try to have an influence on the market structure by applying for the aforementioned review processes.

Although the TCA takes its decisions on an undertaking basis, some of them may seriously affect the whole of a sector when the decision contains sector-specific evaluations. Beyond investigation decisions, the TCA's decisions regarding preliminary inquiries, negative clearances, exemptions, and sector inquiries have considerable influence on the market as well.

As the definition of the relevant product market and the determination of the market structure are of great importance in the TCA's decisions and as the Ministry's decisions considerably affect markets, it is considered that the TCA may take into account the Ministry's measures within the framework of its evaluations.

It thus appears from the TCA's case-law that the Ministry's measures are taken into account within the framework of preliminary inquiries, investigations, exemption decisions, and the implementation of the merger control regime.

2. The TCA's Decisions Considering Trade Remedies in the Framework of its Competition Analysis

The TCA, in its Trakya Cam Decision,[1] pointed out that trade remedies could be identified as a relevant factor to be taken into account in the authority's market evaluation. In the Ministry's communiqués considered by the decision at hand, various trade remedies have been imposed on the imports (**i**) of flat glass from Iran spanning over three years (respectively USD 60/ton, USD 55/ton, and USD 50/ton), (**ii**) of safety glass from China (63.7 percent CIF) and Israel (53.2 percent CIF), and (**iii**) of clean float glass from Israel (37.57 percent CIF) and Romania (25 percent CIF). In effect, such measures have been deemed to have been established in order to diminish the competitive pressure exerted by imports on the domestic market.

Nevertheless, it follows from the analysis of imports' market share that despite the measures imposed by the Ministry, the market share of the imports of flat glass has continued to increase over the years. It has been determined that energy costs make up the largest cost component of flat glass production and that one of the reasons for the increase of imports' market share is the low level of energy costs in other countries compared to Turkey. Hence, notwithstanding the variety of measures taken by the Ministry, imports of flat glass continue to grow.

The TCA also includes such trade remedies in its market evaluation in other decisions.

In this regard, the TCA, in its decision[2] clearing the acquisition of 51 percent of Sasa Polyester Sanayi A.Ş.'s ("**Sasa Polyester**") shares by Indorama Netherlands B.V. ("**Indorama**"), made a detailed review of the Ministry's measures. After having defined the affected market as being the market of staple fibers of polyester, the TCA determined that safeguard measures are being implemented to protect the domestic producers and that Indorama is located in a country subject to the said measures. The TCA noted that this situation has led to a lower market share for Indorama and to a higher one for Sasa Polyester, unlike what would be the case under normal market conditions. The TCA pointed out that beyond the imposition of safeguard measures, other factors such as the absence of customs formalities, shorter delivery time than imported products, or the non-necessity to keep stock, also explain Sasa Polyester's higher market share.

Another decision in which the TCA reviewed safeguard measures is the decision[3] by which it had to deal with the privatization of Tuzla salt plant's assets. The TCA noted regarding imports' market share that while increasing before the adoption of the Ministry's safeguard measures, the concerned share started to decrease with the entry into force of the said measures. The TCA, as a result, drew the conclusion that almost all of the demand was being met domestically and that this had led to an increase of the domestic producers' market share.

Eventually, in another decision[4] in which imports' effects on the market were taken into account and by which the TCA ruled not to grant neither a block exemption nor an individual exemption to the exclusive dealership agreement that was to be entered into between Sağlam Satış ve Pazarlama A.Ş. and Swedish Match Kibrit ve Çakmak Endüstri A.Ş. The TCA held that the competitive pressure exerted by imports had declined to a negligible level after the imposition of two types of safeguard measures in 2009 (i.e.,

additional customs duties and fixed duties imposed on the basis of unit value).

3. The TCA's Decisions Considering Companies' Cooperation within the Framework of Trade Remedy Applications

In another decision[5] that led the Association of Manufacturers of Friction Materials ("**AMFM**") being fined for exerting pressure to prevent the products of non-member undertakings from being resold, the TCA had to consider, among others, whether the behaviour of brake calliper manufacturers through the aforementioned association of undertakings created competition concerns. In effect, brake calliper manufacturers had gathered in order to jointly apply before the Ministry for trade remedies. The TCA ruled that although it could be considered that the concerned manufacturers intended to drive a competitor out of the market, it was deemed reasonable for those manufacturers to act together to ensure the exercise of a legal right. To conclude, the TCA decided that the AMFM's attempts to prevent the importation through the adoption trade remedies did not violate competition rules.

Eventually, in a decision[6] in which a negative clearance was granted to a "cooperation protocol" ("**Protocol**") entered into between three competing companies active in the market of grooved pipe fittings, the TCA established that the Protocol did not violate competition rules on the grounds (**i**) that its purpose was to ensure cooperation and coordination of the concerned companies' actions before the Ministry aimed at solving the problems created by the imposition of additional customs duties on the imports of the concerned product, and (**ii**) that the concerned companies pledged in the Protocol not to exchange any piece of information containing strategic information or trade secrets.

Conclusion

Based on the foregoing analysis, the conclusion could be drawn that the Ministry's trade remedies do affect the markets and that information exchanges between competitors regarding the Ministry's measures will likely be on the TCA's agenda in the future. In effect, such measures imposed on the imports of specific products from specific countries have a potentially significant impact on the domestic market and may lead to the taking of business decisions aimed at preventing the entry of foreign companies into the Turkish market.

Footnotes

1. The TCA's decision dated 21.12.2017 and numbered 17-42/670-298.

2. The TCA's decision dated 08.01.2015 and numbered 15-02/24-10.

3. The TCA's decision dated 25.02.2010 and numbered 10-19/236-91.

4. The TCA's decision dated 25.04.2012 and numbered 12-22 / 569-164.

5. The TCA's decision dated 04.10.2005 and numbered 05-64/925-248.

6. The TCA's decision dated 11.12.2014 and numbered 14-50/880-400.

2.7. Turkish Safeguard Legislation from the Perspective of the Latest PET Case

Ertuğrul Can Canbolat, Cansı Çatak and Mehmet Salan

On 16 January 2018, the Turkish Ministry of Economy ("**Ministry**") published a new regulation that contained the rules and procedures regarding the application, allocation and usage of the tariff quotas to be issued with regards to the imports of polyethylene terephthalate (having a viscosity number of equal to or more than 78 ml/g) listed under 3907.61.00.00.00 CN Code ("**PET**").

Having stated that **(i)** the latest approach pursued by Turkey in the safeguard investigations plays a crucial role for the exporters, and **(ii)** the subject product is of great significance for industries involved in packaging of food and drinks, cosmetics, detergents, and other chemicals as well as those involved in manufacturing of photographic films and x-rays, polyester stable fibers and yarns, plastic plates, rubber cable and seatbelt, this article will briefly summarize first the Turkish safeguard legislation and then the PET case.

A Brief Explanation of the Turkish Safeguard Legislation

The Regulation on Safeguard Measures for Imports ("**Regulation**") and the Decree on Safeguard Measures for Imports ("**Decree**"), which prescribe the main aspects of Turkish safeguard investigations and safeguard measures, such as the definitions and procedures of a safeguard investigation, empower the General Directorate of Imports ("**General Directorate**") to initiate either a safeguard investigation on its own initiative or upon a written complaint by the Turkish domestic industry.

Article 1 of the Regulation provides that where a product is imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic producers producing like or directly competitive products, the Ministry may remedy this actual serious injury. In other words, the main legislation governing trade remedies sets out the following fundamental conditions to impose trade measures:

- an increase in the quantity of imports of the concerned product, and
- the existence or threat of serious injury to the domestic industry.

Therefore, in any case, there has to be sufficient evidence regarding the representativeness of the domestic industry and the serious injury to the domestic industry caused by the imports of a specific product. Following the initiation of the investigation and announcement of the application form, any parties have 20 days to fill in the application form to be considered "interested parties." After such an application, a username and password to access the questionnaire are provided by the Directorate General to interested parties. Further, the interested parties are required to complete and submit the relevant questionnaire online within 30 days from the date of issue of the initiation communiqué. All responses and comments, along with its supporting documents, must be submitted in Turkish; otherwise, the Ministry will not accept the application. As there is no obligation or fine set out for non-cooperation, any party may prefer not to share its confidential data with the Ministry; however, in such cases, the investigation is concluded on the basis of the available data.

The Turkish safeguard measure legislation provides that safeguard investigations should be completed within nine months from the initiation date; however, this deadline may be extended for a further six months. During this period, the Ministry may decide to issue its preliminary determination and accordingly, recommend to the Council of Ministers to impose a provisional duty.

In cases where the Ministry concludes that the subject product is imported in increasing quantities and this causes or threatens to cause serious injury to the domestic producers of a like or directly competitive product, the Ministry shall consider Turkey's interest while determining the safeguard measures, which may be in the form of customs duties, additional financial charges, restrictions on quantity/value of imports, tariff quotas or a combination of these. The duration of a safeguard measure shall not exceed four years (which is extendable if the safeguard measure continues to be necessary to prevent or remedy serious injury and there is evidence that the domestic producers are adjusting to the conditions of the internal market). The total period of application of a safeguard measure shall not exceed ten years for WTO members.

Summary of the PET Case

Pursuant to the application submitted by the Turkish domestic producers for the continuation of the safeguard measure concerning PET, the Ministry decided to initiate a safeguard investigation on 17 June 2017. In its application, the domestic industry also provided information about the import statistics and its economic indicators. The domestic industry further claimed that within the scope of their efforts to increase their product variety during the measure period:

- at the beginning of 2013, work was carried out by the domestic industry to produce highly profitable and export-oriented products for special use and ensuring their use also in the internal market. In this context, the domestic industry started to manufacture products preferred by end-users abroad.
- the tank space project for the liquid raw materials was completed and a new solid waste recovery facility had been built.
- in 2016, products for the purpose of special use were produced.
- the projects for the production of special product are still ongoing.

In conclusion, the domestic industry argued in its application that,

- the safeguard measure for the imports of the concerned product was first implemented on 8 November 2011, and in 2014, the duration of the measure was extended. Following the extension of the implementation of the measure, the domestic production indicators have shown a positive trend.
- despite decreases in 2014 and 2015, imports increased in 2016. During the concerned period, some economic indicators of domestic producers were distorted.
- the domestic producers, with their works carried out during the period of safeguard measures, maintained their conformity with the market conditions.
- it is important to be able to provide employment with new investments and to keep the PET industry standing with domestic producers instead of imports.
- in order to make and sustain the investments, the continuation of the imposition of the current safeguard measure plays a crucial role.

After the evaluation of the explanations provided by all interested parties, the Ministry, on October 2017, sent a letter suggesting the continuation of the safeguard measures for the subject product (i.e., additional financial obligation) at the rates indicated in the below table:

CN Code	Product Description	Customs Value (percent)		
		1. Period (8/11/2017-7/11/2018)	2. Period (8/11/2018-7/11/2019)	3. Period (8/11/2019-7/11/2020)
3907.61.00.00.00	Having a viscosity number of ≥ 78 ml/g	6.40	6.20	6.00

The Ministry also recommended the granting of an exception for developing countries in line with the Article 9.1. of the WTO Agreement on Safeguards.

Upon these suggestions, the Council of Ministers resolved to impose the above-stated measures and to apply tariff quotas of 6995 tons (and not more than 2332 tons per each country) for the purpose of excluding the countries and customs zones (provided as annex to the decision of the Council of Ministers). In this regard, it also specified in its decree that (i) any import within the scope of tariff quotas was to be realized with an import license issued by the Ministry, and (ii) the rules and procedures regarding the application, allocation and usage of the tariff quotas were to be determined by the Ministry through a communiqué.

On 16 January 2018, the relevant communiqué was published in the Turkish Official Gazette. The main rules and procedures are as follows:

- any request for the issuance of a license will be carried out electronically (in case of a problem, physically),
- only one import license may be requested in an application,
- applications line will be taken into consideration on a first come, first served basis,
- the volume per each import license shall not exceed 200 tons,
- an import license may be issued only for a country or customs zone,
- in order to issue a new import license, there shall be at least 15 days following the lastly issued import license for the same applicant,
- in cases where the import license is issued physically, it shall be given back to the Ministry after its expiry, and
- the import license is not transmissible or assignable.

Analysis

Having stated that **(i)** the object of most of trade remedies is protection of the domestic industry, **(ii)** in parallel with the controversies regarding the application of the safeguard mechanism in general, the Ministry applies this mechanism in a very limited manner (more precisely, there are only six safeguard measures in force and four of them only relates to the imports of various products from Iran, whereas the other two measures

apply to all countries), (**iii**) the Ministry conducts such proceedings professionally, and (**iv**) the Ministry attaches great importance to confidentiality, it should be emphasized that the cooperation of the interested parties and the design of a good defence strategy as well as the responses lead to a more accurate picture of the market and thus a more favourable result.

2.8. WTO Panel: Turkey's Claims against the U.S. Measures on Certain Tubes and Pipe Products are Admissible

The WTO Panel established to resolve the dispute between the U.S. and Turkey with respect to measures imposed by the USA on the imports of certain pipe and tubes from Turkey, in December 2018 found that the U.S. had acted inconsistently with the WTO Agreements and thus, most of the claims brought by Turkey were been found admissible. The Panel recommended the U.S. to bring measures into conformity with its obligations under the Agreement on Subsidies and Countervailing Measures ("**SCM Agreement**").

Background

On 8 March 2017, Turkey requested consultation with the USA with regards to countervailing measures imposed by the U.S. on certain types of pipe and tube products from Turkey. Those products included circular welded carbon steel pipes and tubes, heavy wailed rectangular welded carbon steel pipes and tubes, welded line pipe and oil country tubular goods ("**goods**").

In its request for consultation, Turkey claimed that the administrative proceedings carried out by the U.S. and measures imposed were inconsistent with the WTO rules. The measures appeared to nullify or impair the benefits accruing to Turkey directly or indirectly under the WTO Agreements. However, consultations failed to settle the dispute and thus Turkey requested a panel to be established to solve the issue.

Turkey claimed that the measures imposed on the goods by the U.S. were inconsistent with WTO law and requested that the Panel render a report finding its claims admissible. The U.S. requested that the Panel reject Turkey's claims in their entirety.

The Panel's report

In Panel's opinion the U.S. had failed to consider the extent of diversification of economic activities within Turkey and to properly evaluate the length of time in which the alleged subsidy program had been operating relating to hot-rolled steel. The Panel also upheld Turkey's claims that the USA followed a practice of cumulatively assessing the effects of subsidized imports with those of dumped, non-subsidized imports from all countries in original investigations.

At the same time, the Panel determined that the procedure carried by the U.S. with respect to oil country tubular goods had complied with the WTO law and therefore dismissed Turkey's claim. Also, the Panel rejected Turkey's claims with regard to the application of the SCM Agreement to likelihood-of-injury determinations, and dismissed Turkey's claims concerning the sunset reviews.

Concluding remarks

The Panel found that the U.S. had acted inconsistently with regards to its obligations arising from the WTO rules and, therefore, recommended the U.S. bring its measures into conformity with its obligations. It should finally be emphasized that such decision rendered by the Panel favored Turkey in this so-called trade war. However, the final decision rendered by the WTO, the Appellate Body in particular, has yet to be seen.

CHAPTER 3

REGULATIONS

3.1. Turkish Data Protection Authority's Resolution Concerning SMS, E-mail, and Call Advertising

Ertuğrul Can Canbolat, Baran Can Yıldırım and S. İrem Akın

Shortly after its establishment with Turkish Data Protection Law No. 6698 ("**Law**"), the Turkish Data Protection Authority ("**DPA**") started to observe the data protection ecosystem of Turkey. In this regard, the DPA has been focusing on the areas, where data protection concerns are perceived more concentratedly. One of the instruments that the DPA has been putting to use is the adoption of resolutions where violation is prevalent. It is worth to note that "resolutions" are different than "decisions" in nature within the meaning of the Law.

As paragraph 6 of Article 15 proposes, "*As a result of the inspection conducted either ex officio or upon complaint, in case it is determined that the violation is prevalent, the Board shall adopt a resolution and publish it*." Different from the DPA's decisions, resolutions are adopted in cases where the violation not only exists, but is also prevalent. Also, the Law supposes that the resolutions must be published whereas the decisions are only served to the concerned parties since they are based on a one-time act.

Within this article, we will discuss the DPA's recent resolution adopted with a view to preventing companies from reaching out to their customers or potential customers without the explicit consent of said individuals for advertising purposes by means of SMS, e-mail, and calls.[1]

Recent Resolution of the DPA

SMS and e-mails are two of the most preferred ways by companies in recent years to reach out to their customers for advertising purposes. Since companies can make announcements about their new products, campaigns, discounts and other marketing relating subjects through a single SMS, a call, or an e-mail, these methods have become more appealing than other traditional advertising instruments.

It is also undeniable that their convenience and accessibility create significant competitive advantage to firms which are highly engaged with their consumers. That

being said, individuals have a right to not receive those advertisements thanks to data protection regulations. Since the mentioned instruments are directly linked to consumers' mobile phones, personal computers, and other personal devices, this issue inevitably is closely related to personal data and its protection.

As such, the DPA adopted a resolution dealing with this issue and published it on 1 October 2018 in the Turkish Official Gazette. The DPA stated that it hadd received numerous complaints about advertisements sent through e-mail, SMS, and calls without the explicit consent of the individuals and had determined that these operations constituted a violation. As the violation was found to be prevalent by the DPA, it adopted the following resolution:

- The operations of the data controllers and the data processors acting on behalf of the data controllers who send SMS or e-mails or make calls for advertising purposes shall be stopped unless they have the explicit consent of the data subjects or satisfy the conditions given in Article 5 for processing;
- The data controller shall take all necessary technical and organizational measures for providing an appropriate level of security in order to prevent the unlawful processing of personal data, prevent unlawful access to personal data, and safeguard personal data. In case personal data are processed on behalf of the data controller by another natural or legal person, the data controller shall be jointly liable with such persons with regard to taking the measures.
- Administrative fines will be imposed in the scope of Article 18 on persons who continue to be a part of above-mentioned actions.
- Since personal data that are subject to processing may have been obtained illegally, these operations will be reported to public prosecutors in accordance with Article 136 of Criminal Law No. 5237 and Article 136 of the Criminal Procedure Law No. 5271.

This resolution of the DPA clearly gives the indication that the DPA is interactive with the applications and requests of individuals, especially regarding breaches of data protection rights. The DPA likely will continue to take similar actions and adopt resolutions on subjects that affect individuals' everyday lives and privacy.

Footnote

1. The DPA's 16 October 2018 dated and 2018/119 numbered Resolution.

3.2. New Exemptions from the Registration Obligation within the Scope of Turkish Data Protection Rules

Ertuğrul Can Canbolat, Baran Can Yıldırım and S. İrem Akın

Similar to what was experienced following the establishment of the Turkish Competition Authority, the Turkish Data Protection Authority ("**DPA**") has also been working very hard to ensure the establishment of a fair and equitable practice regarding the data protection regime for all relevant stakeholders. In this regard, the DPA has recently granted new exemptions to the registration obligation of the data controllers as regulated under Article 16/2 of Law No. 6698 on Personal Data Protection, and the Regulation on Data Controller Registry. This article does not focus on the relevant legislation, but rather briefly explains the DPA's recent decisions in relation to the concerned obligation.

In May 2018, the DPA announced a decision[1] in which the following list of professions were granted exemption from the registration obligation in their operations: (i) data processors that process data in a non-automated manner on the condition that they are part of a "filing system,"[2] (ii) notaries, (iii) associations/foundations/unions[3], (iv) political parties, (v) lawyers, and (vi) certified public accountants and sworn-in certified public accountants.

Shortly after the announcement of the above-mentioned decision, various stakeholders requested that the DPA extend the professions which enjoy exemption from the registration obligation.

Within the same month of the announcement, the Customs Brokers Associations (in İstanbul, Ankara, Bursa, İzmir, and Mersin) requested the DPA include "*customs brokers*" and "*authorised customs brokers*" in the exemption. Further, in the same period of time, the Turkish Justice Ministry's Department of Mediation requested that mediators be included in the scope of the exemption. As a result of its evaluations, the DPA accepted the requests and resolved to broaden the scope of the concerned exemption in line with those requests.

In mid-July, the DPA on its own initiative narrowed the scope of the exemption by excluding data controllers (either real person or legal entity) whose annual number of employees is less than 50 and whose annual balance is less than TL 25 million. It

should be noted that data controllers whose major area of activity is the processing of special categories of personal data (i.e., any data revealing health, sexual life, criminal conviction, racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, etc.) are still subject to the registration obligation.

Finally, the DPA established the deadlines for fulfilling the registration obligation as follows:

- The registration obligation of the data controllers whose annual number of employees is more than 50 and whose annual balance is more than TL 25 million will begin on 1 October 2018 and those data controllers should register with the Data Controllers' Registry by 30 September 2019.
- The registration obligation of data controllers located abroad will start from 1 October 2018 and they should register with the Data Controllers' Registry by 30 September 2019.
- The registration obligation of data controllers (**i**) whose annual number of employees is less than 50, (**ii**) whose annual balance is less than TL 25 million, and (**iii**) whose major area of activity is the processing of special categories of personal data will begin on 1 January 2019 and the concerned data controllers should register with the Data Controllers' Registry by 31 March 2020.
- The registration obligation of data controllers who are public bodies or agencies will start from the date of 1 April 2019 and they may register by 30 June 2020.

In conclusion, the above-mentioned decisions of the DPA draw the boundaries of the application of the data protection law and bring certainty with regards to the registration obligation, at least to some extent. On the other hand, it is undeniable that the Turkish data protection law practice still needs improvement. In this regard, we believe that the lack of sufficient transparency to provide greater precision in the enforcement of the data protection legislation (e.g., the lack of grounds for setting the limit to 50 employees/TL 25 million, or choosing the concerned professions) may be brought to the attention of the Turkish courts.

Footnotes

1. DPA's decision dated 02 April 2018 and numbered 2016/32.

2. "Filing system" is defined as "any recording system through which personal data are processed by structuring according to specific criteria" under Article 3/)(h) of the Law.

3. The exemption only covers those which are operating in compliance with the relevant legislation and which are processing personal data limited to their operations and only related to their own employees, members and donors.

3.3. Turkey's Personal Data Protection Board Released Three New Decisions

Ertuğrul Can Canbolat, Baran Can Yıldırım and S. İrem Akın

The Turkish data protection legislation has become a hot topic since its announcement in the Official Gazette in 2016. It has not only raised the question for the companies of how to minimize the risks of non-compliance and thus to reduce the possibility to be fined, but also led to some controversies with regard to both its substantive and procedural parts. The Turkish Data Protection Authority ("DPA") continues its activities in an efficient manner given its guidelines and decisions published on its website.

In this regard, the DPA recently announced three decisions that may provide guidance for freedom of press, social media platforms, and the job application process. This article highlights the main aspects of these decisions.

One of the decisions relates to the application of an individual requesting that a column in a newspaper that gives a reference to her/his name be deleted. In this regard, the DPA concluded that considering the concerned individual is a "public figure," the relevant column is protected under the freedom of press (i.e., freedom of speech), according to the Turkish data protection legislation. There, the concerned individual's request was rejected.

Another recent decision concerns the sharing of an applicant's medical report, which is deemed as one of the "special categories of personal data" under the Turkish data protection legislation. In its short decision, the DPA states that the doctors involved in the treatment took photos of the screenshot (concerning the data subject's health report) obtained from the data controller's mobile application and shared them through their social media platforms. Accordingly, the DPA imposed a fine on the data controller due to the fact that it failed to take all the necessary technical and organizational measures for providing an appropriate level of security in order to safeguard personal data.

Lastly, the DPA imposed fines on an online human resources services company and on a company group, based upon the unlawful sharing of personal data of job applicants.

In this regard, the DPA found that:

- after the online job application made by a data subject via a platform, the sharing of the information about the application, name/surname, and e-mail address of the applicant with other job applicants without a legal basis constitutes a violation of the obligations of a data controller under the Turkish data protection legislation.
- transfer of personal data between the data controller companies within the same group is considered a transfer of data to third parties and any transfer of the data of a job applicant between those companies without his/her consent is in violation of the Turkish data protection legislation.

Finally, it should be noted that none of the decisions refers to the amount or calculation method of fine imposed to the concerned data controllers.

In the light of the above, it appears that Turkish companies are facing problems in ensuring that all necessary technical and organizational measures for providing an appropriate level of security in compliance with the Turkish data protection legislation. Furthermore, those decisions also highlight that (**i**) any analysis under the Turkish data protection law is in connection with other fundamental legal principles such as freedom of speech, and (**ii**) special attention should be paid by the online service providers and company groups. Consequently, it appears that, as anticipated, the DPA has become more and more effective each year.

It will be interesting to observe whether authorities in other jurisdictions will monitor the DPA's decisions and take actions to find out whether the concerned companies are violating the data protection rules in their jurisdiction.

3.4. Effective Data Protection Compliance in Turkey

Ertuğrul Can Canbolat, Baran Can Yıldırım and Sinan Lahur

While the European Union's data protection regulations date as far back as 1995, Turkey recently announced the enactment of the Turkish Law on the Protection of Personal Data after a decade of legislative process. Pursuant to the Turkish Law on the Protection of Personal Data, the Data Protection Authority ("**DPA**") also was established as the main regulatory body responsible for data protection in Turkey. Prior to the Turkish Law on the Protection of Personal Data, the data protection regime in Turkey had been governed by other legislation such as the Turkish Criminal Code, the Turkish Civil Code, as well as sectoral specific laws such as the Law on Regulation of Electronic Commerce and the Banking Law. It should be emphasized that the aforesaid legislation relating to data protection is still in effect, but the general framework of the data protection regime is now governed by the Turkish Law on the Protection of Personal Data ("**Data Protection Law**").

As Turkey has an obligation to harmonize its laws with the acquis communautaire as part of its full membership negotiations, the Turkish data protection legislation is quite similar to the EU's Data Protection Directive 95/46/EC. Considering that the efficiency of the EU's data protection regulation and the effectiveness of the applicable fines relating to it have long been debated, it would not be wrong to argue Turkey was late to enact the Data Protection Law and to observe its effects. That being so, the EU had already adopted the General Data Protection Regulation to replace the Data Protection Directive 95/46/EC.

The Data Protection Law empowers the DPA to enforce the legislation in a strict manner and to impose an administrative fine between TL 5,000 (approximately EUR 1,100) and TRY 1,000,000 (approximately EUR 214,000) for non-compliance. Having said that, the DPA is under the obligation to provide guidance on the application of the rules so as to prevent any uncertainties.

Similar to the process of the enactment of the Turkish Competition Law and the establishment of the Turkish Competition Authority, the DPA is expected to become one of the most active public institutions in Turkey. Accordingly, the DPA has published various regulations (e.g., on the registry of controller, the working principles and rules of the Data Protection Board ["Board"], and the deletion, destruction, or anonymizing of personal data) and several guidance papers (e.g., regarding the deletion, destruction or anonymizing of personal data, explicit consent, and transfer of personal abroad) whereas it has announced only two resolutions:

- Decision (dated 21 December 2017 and numbered 2017/61) in relation to the lack of explicit consent for data processing,
- Decision (dated 21 December 2017 and numbered 2017/62) in relation to taking the necessary technical and administrative measures to prevent the existence of unauthorised third parties at the counter or desk and to hinder persons from hearing/seeing/learning/possessing each other's personal data while being served.

It should be mentioned that according to the Data Protection Law, the DPA is not under obligation to publish all of its decisions except those for which infringement is widespread; that is why the actual number of decisions rendered by the DPA is uncertain.

As the potential administrative fines are onerous as per the Data Protection Law, designing an effective system within a company to ensure compliance with the data protection rules and thus minimizing the risks associated with non-compliance have become one of the central issue, particularly for multinational companies that have operations in Turkey.

How to Design a Data Protection Programme

As for the compliance aspect of the issue, firms are required to take all necessary measures to comply with the Data Protection Law. "The Guideline on Personal Data Security," which was published on the DPA's website may be considered as a starting point for designing an effective compliance program.

- **Have a Data Protection Policy**

Firms need to establish a data protection policy or update the current one as soon as possible to comply with the Data Protection Law. Indeed, ensuring the effectiveness of such a policy is vital. All existing agreements and documents need to be reviewed with the participation of the responsible department to ensure that they are in compliance with the Data Protection Law. If any infringing clauses, statements, or conditions are found within those documents, firms need to take the necessary steps to comply with its notification obligation and to remedy the issue before any further breaches. The Data Protection Law does not grant any intra-group processing activity, thus all entities in the group are responsible for their own data protection.

- **Data Protection Risk Assessment**

Firms need to analyse the characteristics and risks of the sector in which they operate as a part of their data protection compliance programme to understand the risk level. In other words, by determining the risk level of data, firms can effectively take the necessary measures to comply with the Data Protection Law and use their resources effectively. Since the DPA has so far been observing the markets and has yet to interfere, the sectoral laws and practises can serve as guidelines for the firms to determine the best practises for data protection. Including but not limited to the above requirements, in order to ensure detection of breach ex-ante, carrying out continuous audit internally and establishing report mechanisms are also essential.

- **Legal Framework for the Processing of Personal Data and Personal Data of Special Nature**

According to the Data Protection Law, "all information relating to an identified or identifiable natural person" is defined as personal data and such data shall not be processed without the explicit consent of the data subject. Additionally, the processing of data is defined as "any operation performed on personal data including but not limited to collection, recording and transferring." The processing of personal data without explicit consent is allowed under certain conditions, such as if it is clearly provided for by the laws or if it is mandatory for the protection of life or physical integrity of the person or of any other person who is bodily incapable of giving his consent or whose consent is not deemed legally valid. Additionally, personal data relating to race,

ethnic origin, political opinion, philosophical belief, religion, sect or other belief, clothing, membership in associations, foundations or trade-unions, health, sexual life, convictions and security measures, and biometric and genetic data are deemed to be personal data of special nature under the Data Protection Law and again subject to the explicit consent of the data subject. Lastly, personal data relating to health and sexual life may only be processed by any person or authorised public institutions and organizations that have confidentiality obligations and for the protection of public health, operation of preventative medicine, medical diagnosis, treatment and nursing services, planning and management of health-care services as well as their financing without seeking consent.

- **Rights of the Data Subject**

According to the Data Protection Law, the natural person whose personal data is processed is defined as the "data subject" and granted certain rights in the Data Protection Law. Within this scope, data subjects shall be informed regarding their data, such as whether their data is processed and if so, the purpose of processing the data and other information including whether his/her data is transferred abroad or domestically. Moreover, the data subject has the right to correct his/her personal data if it is found to have been processed wrongly. Also, the data subject may request the deletion or destruction of his/her personal data under the conditions laid down by the Data Protection Law.

- **Training the Staff**

The quintessential aspect of the data protection policy should be, along with the operation and the assets of the firm, raising the awareness of the firm's staff regarding data protection. The lack of properly trained staff might waste firms' investment in data protection policy and poses a risk of potential sanctions. Further, departments such as HR, marketing, and IT are required to undergo more rigorous training regarding data protection since their daily activity is more data-oriented. Also, accessing personal data platforms by staff can be segregated based on department's relevancy. Lastly, periodical/random internal auditing of data compliance could raise awareness of the staff as well as to uncover any potential problems in terms of data protection.

- **Analysing the Status of Data and Cybersecurity**

As some data can be out-of-date, firms need to reanalyse the relevance and up-to-datedness of the data they process. Also, having and processing less data always mitigates the risk level of a firm. In addition, to ensure the cybersecurity of the firm, rather than having one cybersecurity measure, multiple and supplementary cybersecurity measures are always preferable in this regard. Moreover, if the data are physically collected using such means as paper, USB drives, CDs/DVDs, then additional physical security measures must be taken, for instance, recording the access to those physical platforms and locking down the entrance when it is not in use. If data are collected in cloud systems, encrypting access to the cloud(s) as well as encrypting the data are suggested. According to Article 12 of the Data Protection Law, if the processed data are collected by other parties illegally, the controller shall notify the data subject and the Board within the shortest time. However, the type of breach such as technical or administrative was not specified, nor the meaning of the shortest time. Therefore, it shall be expected that the future precedents of the DPA shall clarify the issue.

- **Transferring Data**

As a rule, the Data Protection Law seeks the explicit consent of the data subject for data transfer. However, personal data may be transferred without explicit consent if certain conditions are met such as: if it is clearly provided for by the laws or mandatory for the protection of the life or physical integrity of the person or of any other person who is bodily incapable of giving his consent or whose consent shall not be deemed as legally valid. For data of special nature, the same rule applies if sufficient measures to transfer data of special nature are taken. However, the definition of sufficient measures is also ambiguous.

For transferring data abroad, the Data Protection Law follows the same approach and seeks explicit consent. Similarly, for transferring personal data abroad without explicit consent, the above conditions are still required along with the existence of sufficient protection in the foreign country. If sufficient protection is not provided, then the controllers in Turkey and in the related foreign country must guarantee sufficient protection in writing and the Board must authorised such transfer. The Board shall

determine and announce the countries which have a sufficient level of protection. Moreover, when authorizing the transfer of data abroad, the Board shall consider certain factors such as, the international conventions to which Turkey is a party, reciprocity status relating to data transfer, the nature, purpose and duration of processing of data case by case, the relevant legislation and implementation by the foreign country, the protection guaranteed by the controller in the foreign country. Additionally, if the data transfer may harm the interests of relevant individual(s) or Turkey, the Board must take the opinion of public institutions and authorize the transfer. The DAP has not published any list in this regard. The provisions of other laws concerning the transfer of personal data either domestically or foreign are reserved. At this point, Turkey has no specific rules regarding data transfer agreements. Therefore, the Data Protection Law, along with the Code of Obligations and, if the agreement has a foreign element, International Private and Civil Procedure Law shall be applicable.

Conclusion

As the above findings suggest, data protection is highly significant and requires a tailored approach for firms' compliance with the Data Protection Law. However, since the data protection regime is so new in Turkey, the vague language of the Data Protection Law is still an issue and some terms need to be defined for clarification. Moreover, even though there has been no fine imposed on a firm in Turkey and the DPA's approach is still ambiguous: fines ranging from TL 5,000 (approx. EUR 1,100) to TL 1,000,000 (approx. EUR 214,000) can pose a risk for firms. Also, since the DPA is not under the obligation to publish its decisions, firms can also be dealing with hardships to comply with the implementation of the Data Protection Law. Though said deficits currently exist, firms need to start establishing or updating their data protection policies to comply with the Data Protection Law's requirements to prevent possible sanctions by the DAP.

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It comprises a mixture of our essays, case summaries and articles on recent developments that we have selected during 2018 in competition law, international trade and regulation areas.

We hope that you refer to this book as a helpful resource. Obviously, the content is aimed to provide the reader with general information on the covered topics. We would be grateful to receive your feedbacks, opinions, updates on new developments as well as different point of views. Have a joyful and fruitful reading!

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