
Main Developments in Competition Law and Policy 2023 – Türkiye

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The Turkish Competition Authority (“TCA”) had a busy agenda in 2023 both in terms of enforcement and policy actions. Let us elaborate on some of them here. For your convenience, we have classified those in the following sections: (i) antitrust, focusing on violation in the digital markets, no-poaching agreements, resale price maintenance (ii) legislative developments regarding leniency policy and the draft DMA-related amendments to the Turkish Competition law, (iii) merger control, (iv) procedural issues primarily focusing on onsite inspections. We conclude with our vision of the TCA’s priority areas for 2024.

Antitrust

Violations in the Digital markets

The digital economy was at the top of TCA’s priorities in 2023.[1] The TCA conducted numerous important inquiries into digital platforms. Among the most significant enforcement actions were investigations into:

- *Algorithms* of a major online marketplace platform Trendyol, a subsidiary of Alibaba Group. According to TCA’s **announcement**, the platform had been creating undue advantage for itself by interfering with the listing and scoring algorithms and using the third-party seller data in its own retailing operations. The company was fined approx. EUR 2,000,000 for the abuse of dominance.[2]
- Automatic pricing mechanisms of three major online marketplace platforms **Amazon, Hepsiburada and Trendyol**. The investigation is still ongoing.
- Self-preferencing and other allegedly abusive practices of Google. The company allegedly abused its dominant position by tying and self-preferential actions regarding its online visual advertisement and advertisement technologies services **operations**. It was also alleged that it abused its dominant position in general search services **market**. The two cases are still ongoing.
- Prevention of data portability and exclusivity clauses of a major online second-hand shopping platform **Sahibinden**. It was concluded that the platform complicated the ability for its corporate members to use more than one platform by preventing data portability. By preventing data portability and via the non-competition obligations in its contracts, Sahibinden applied de facto/contractual exclusivity, thus complicating the activities of its competitors, according to **the TCA’s decision**. The company was obliged to comply with several obligations to ensure the termination of the violation and the establishment of effective competition in the market.
- Tying arrangements, online advertisement bans of an online bus ticket purchasing **platform** The investigation was closed with binding commitments targeting tying arrangements between ticketing software services and other platform services, online advertisement bans for transport companies in competing platforms and clauses banning competing platforms to contact with transport companies.

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- Long term exclusive agreements of a subscription services platform for audiobooks and eBooks. The TCA **decided** that the platform prevented the entry of competing firms in the market by concluding long-term exclusive agreements with publishing houses and authors. The investigation was closed with a range of commitments by the platform, which addressed the TCA's concerns on exclusivity arrangements.c
 - Cooperation agreement with the exclusivity clauses and minimum clicking obligations between a betting platform and an online platform offering worldwide sports news, scores, predictions, and analytics, based on market foreclosure concerns for other virtual betting sites. Interim measures were applied in this case. The decision particularly targeted the exclusivity clauses and minimum clicking obligations between the parties

No-poaching agreements

The TCA **concluded** an investigation into nearly 50 undertakings across many sectors focusing on whether the concerned undertakings had any blacklist/no-poaching/gentlemen agreements to prevent/block the transfer of employees. It was found that 16 undertakings violated the Turkish Competition Law by agreeing on not to recruit each other's employees. The TCA concluded that in addition to reducing the mobility of workers between undertakings, these agreements also may have artificially depressed the real value of wages. As a result, inefficiency in the allocation of workers could arise and the competitive structure in labor markets might be harmed, according to the TCA.

The TCA concluded that such practices fell within the scope of the cartel definition and thus individual exemption provisions could not be applied to such agreements. An interesting observation that follows from the decisions of the TCA, as well as competition authorities in other jurisdictions in this regard is that labour markets are perceived broadly, i.e., even undertakings operating in different sectors may be viewed as competitors in terms of competition for labour capital.

Increasing number of investigations across many other sectors

There have been quite a high number of investigations across sectors including for example FMCG, cosmetics and personal care, cement and ready mix, consumer electronics and white goods, oil, medical devices, streaming of football events, batteries, private schools, optics, fresh yeast, fertilizers and agrimotors. The TCA's fines imposed in 2023 amounted approximately to TRY 2,7 billion (approx. EUR 81,9 million)[3]. According to the statistical information provided by the TCA, the number of investigations initiated in the first half of 2023 totalled to 56, which is a significant number considering that the total number of investigations initiated in 2022 was 78.

RPM

Resale price maintenance maintained its actuality in 2023. Among the landmark RPM cases in 2023 is the

one related to the honey producer Sezen Gıda Mad. Tarım ve Hayvancılık Ürün. Tic. ve San. (“Anavarza”). The **decision** is a very good example of fact assessment in RPM allegations, instead of a formalistic approach and mainly relying on correspondences of the undertakings concerned.

The internal correspondence found at Anavarza did raise concerns that the company might have interfered in the resale prices, however, since it was an intracompany correspondence which did not demonstrate there was an agreement regarding the resale prices, the allegations were not confirmed. The TCA also took into account that (i) the supplier did not show any efforts to transform the recommended shelf prices into fixed resale prices, (ii) the communication between the supplier and the reseller was only a reminder that new list of prices was to be applied, (iii) the internal communications of the supplier did not prove any agreement between the supplier and its reseller, and (iv) the TCA did not find any evidence that would show a pressure or threat by the supplier with respect to the enforcement of the prices based on the fact that it was an intracompany correspondence.

The decision does not change the TCA’s position regarding its by-object approach to RPM. However, it is remarkable since it emphasizes that internal communications may fall short of proving a pressure, threat or encouragement that prevents the purchaser from determining its own selling price, and thus are not able to demonstrate a violation of Article 4 of the Turkish Competition Law via the RPM.

Legislative developments

Amended leniency policy

As of 16 December 2023, there is a new **Regulation on Active Cooperation in Detecting Cartels** (“Leniency Regulation”) in Türkiye. It brings certain significant amendments to the leniency policy. Among others, it introduces:

- a concept of “cartel facilitator”, i.e. “undertakings and associations of undertakings that, without operating at the same level of the production or distribution chain as the cartel members, mediate in the establishment and/or maintenance of a cartel, facilitating the creation and/or continuation of a cartel with their activities;”
- a possibility for unconventional cartels such as hub-and-spoke to benefit from leniency;
- a requirement to submit information/documents with “significant added value”, i.e. *those that will “strengthen the TCA’s ability to prove the cartel, considering the evidence that it already has.” This means that applicants which simply repeat the information what the TCA already has in the file and do not provide any added value, will not be able to benefit from leniency;*
- an opportunity for horizontal violations, e.g. anti-competitive information exchanges, that ultimately do not qualify as a cartel under the Leniency Regulation) to benefit from the leniency regime;
- a time limit of three months. To be eligible for a reduction in fines for the applicant who cannot be granted full immunity, the applicant must comply with a time limit of three months to submit the leniency application “following the notification of the investigation provided that it is before the notification of the investigation report” (**Art. 5 of the Regulation**).

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

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

Draft DMA-related amendments

The DMA developments in the EU have impact on the laws of other jurisdictions, and Türkiye is a good example of that. There is a Draft Amendment to the Turkish Competition Law (expected to be adopted in 2024). With minor deviations, the provisions of the Draft Amendment are very similar to the DMA in the EU. They concern: (i) the main definitions, (ii) the obligations to be imposed on the undertakings, (iii) the processes envisaged for compliance with these obligations, including sanctions for any non-compliance, and finally (iv) amendments regarding the on-site inspections. For instance, undertakings offering at least one core platform service in Türkiye to fulfil certain technical and administrative requirements that will facilitate the Board's on-site inspection power for undertakings that do not have headquarters in Türkiye or do not have centralized technical and administrative equipment.

Merger control

Throughout 2023 we followed the TCA's practical application of the technology undertaking exception. The "technology undertaking" rule provides significantly lower thresholds for technology undertakings that (i) are active or (ii) have R&D activities, in the Turkish geographic market or (iii) that provide services to customers in Türkiye. Technology undertakings are defined as undertakings active in areas of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals and health technologies.

Elon Musk was faced with a gun-jumping fine of USD 44 billion for a failure to notify the Twitter deal. The transaction should have been notified to the TCA, since Twitter is a digital/online platform that qualifies for the technology undertaking exception; thus, there was no need even to check Twitter's (Target) turnover in Türkiye for the thresholds analysis.

Following the assessment of its effects on the competition in the market, the TCA concluded that there was no significant impediment to the effective competition in the market, hence, it was approved. Nevertheless, due to the non-compliance with the merger control formalities in Türkiye, the TCA imposed an administrative fine on Elon Musk/ Acquirer (at the rate of 0,1% of Elon Musk's economic unit's gross income generated in Türkiye).

Procedure: Unconstitutional On-site Inspections

Important developments shaping the procedural rules of onsite inspections was brought on an individual application by the Constitutional Court of Türkiye.[4] It concluded that on-site inspections conducted solely based on the TCA's decision without a court order were not in compliance with the Turkish Constitution and deemed them a violation of the right to the inviolability of domicile. Despite the determination of constitutional violation, the Constitutional Court did not annul the article related to dawn raids (Article 15) in the Turkish Competition Law as the judgement of the Constitutional Court was made upon an individual application of an undertaking putting forward the violation of constitutional rights of the undertaking concerned. Since the Constitutional Court is not authorized to annul an article / a law upon an individual application, it notified the Turkish Grand National Assembly of the decision with the purpose to solve the structural problem under Article 15 of the Turkish Competition Law. The decision creates repercussions on the TCA's dawn-raiding methods, since it has been conducting on-site inspections without a judge's order over nearly 25 years, a practice which was also approved by the Council of State up to this date.

Additionally, 2023 added several decisions on the hindrance of on-site inspections. Just to name some of them:

- Several undertakings were fined because instant chat messages and/or emails were deleted during the inspection (see **here**, **here**, **here** and **here**). In another **case** an undertaking was hit with a monetary fine for disallowing the case team to conduct a remote inspection on a single e-mail account.[5]
- Fines were imposed on undertakings operating in the real estate sector in Ankara based on hindered or complicated dawn raids, by way of: employees leaving the premises, claiming that their relative had been involved in a serious traffic accident (which was not exactly correct), objecting to the inspection on the grounds that it might involve the personal data of more than 4,000 members of the relevant association, refusing the TCA access to the phone claiming that it was for personal use, but following the court order it was inspected and found to contain work-related correspondence. In this case TCA fined Çilek, Empa, Şanal, and GBK in the amount of 0.5% of their annual turnover. However, considering that this amount would be below the lower threshold set for administrative fines, the amount was increased to TRY 105,688.00 for each undertaking. Additionally, for Şanal and GBK, the TCA imposed a periodical fine of 0.05% of their turnover for each day the completion of the on-site inspections was delayed.
- A private school was fined as well for hindering the onsite inspection by keeping the case-handlers waiting, questioning their authority, and not allowing them to conduct their inspection and not providing them with the requested information and documents.

2024 Expectations

Digital markets will continue to be in the spotlight of the TCA, just like in other jurisdictions where regulating the digital markets has become a trend and an objective necessity. We expect a significant “digital” transformation of the Turkish Competition Law in line with the EU rules. The technology sector and the DMA-related amendments to the Turkish Competition Law are likely to be among the top

enforcement areas of 2024 in Türkiye.

Additionally, competition enforcement in the labour markets will be strengthened, and hence undertakings should refrain from collaborating/exchanging information on wages and no-poaching. A strong competition compliance policy for employees and employers is encouraged.

[1] The TCA published its 403-page preliminary report titled “Online Advertisements Inquiry Preliminary Report” and its 293-page work titled “Reflections of Digital Transformation on Competition Law” in 2023. Furthermore, it announced that it initiated a sector inquiry into mobile ecosystems to understand the competitive/anti-competitive effects that mobile ecosystems (might) cause and design effective policies based on this.

[2] Trendyol decision dated 26.07.2023 and numbered 23-33/633-213.

[3] This figure was calculated based on TCA’s Decision Statistics Report for the first half of 2023 as well as public announcements regarding the fines imposed on undertakings, on TCA’s website.

[4] The case concerned the individual application of Ford Otomotiv Sanayi A.Ş. (“Ford Türkiye”) by alleging the violation of its fundamental rights and freedoms.

[5] Çözüm case (22-56/878-363)