Main Developments in Competition Law and Policy 2021:Turkey

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2021 has been a busy year in many aspects, including competition law and policy in the Republic of Turkey. The Turkish Competition Authority ("**TCA**") developed and adopted its secondary legislation in response to amendments to Law No. 4054 on Protection of Competition ("**Turkish Competition Law**")[1]. These recent developments on the secondary legislation include (**i**) the introduction of the Regulation on the Settlement Procedure, the De Minimis Communiqué and the Communiqué on the Commitments, and (**ii**) amendment of the Block Exemption Communiqué on Vertical Agreements. The TCA also paid close attention to the fast-moving consumer goods market and digital markets.

Below we summarize the 2021 key competition law developments in Turkey. In Part II you may read about the main legislative changes. Part III focuses on substantive issues, while Part IV highlights the procedural issues that occurred in 2021. Lastly, Part V mentions the upcoming future policies that were debated in 2021.

Legislative Changes- Part II

Following the Turkish competition law amendments in 2020, the secondary legislation had to keep a step with this process. The main changes brought by these developments are briefly presented below.

Regulation on the Settlement Procedure

The settlement mechanism between the TCA and the undertakings within the scope of an investigation formally became available with the amendments introduced in 2020. Accordingly, pursuant to Article 43 of the Turkish Competition Law, an undertaking that admitted that it had committed a violation within the investigation may settle by applying to the TCA until the notification of the investigation report is prepared. In return, the amount of the administrative monetary fine may be reduced by up to 25%.

In 2021, to detail the settlement mechanism's procedure, the Regulation on The Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position ("**Settlement Regulation**") came into effect. In this context, any kind of anti-competitive behaviour may be subject to the settlement process since conditions such as the absence of hard-core violations (price-fixing, market allocation etc.) are not required to apply for the settlement. According to the Settlement Regulation, the TCA may initiate the settlement procedure after the investigation has been initiated, either upon request of the investigation parties or ex officio. If the TCA initiates the settlement process ex officio, the

investigation parties within fifteen days following the TCA's invitation to settlement should notify the TCA on whether they wish to start settlement negotiations.

As stated above, Article 43 of the Turkish Competition law sets 25% as the maximum rate for a fine reduction in the settlement process. Settlement Regulation additionally sets a minimum rate for reduction as 10%. If there is a leniency application together with the settlement process, the reduction rate determined within the scope of the Active Cooperation Regulation and the reduction rate determined under the settlement procedure will be added and applied together. At this point, it should be also noted that, in the event that the process is concluded with a settlement, the administrative fines imposed and the points included in the settlement text shall not be actionable by the settlement parties.

In this context, the TCA's decision No 21-37/524-258 dated 05.08.2021 is important since it is the first example that the settlement mechanism was applied. The case relates to the investigation into (**i**) Türk Philips Ticaret A.Ş., (**ii**) Dünya Dış Ticaret Ltd. Şti., (**iii**) Melisa Elektrikli ve Elektronik Ev Eşyaları Bilg. Don. İnş. San. Tic. A.Ş., (**iv**) Nit-Set Ev Aletleri Paz. San. ve Tic. Ltd. Şti. and (**v**) GİPA Dayanıklı Tüketim Mamülleri Tic. A.Ş., which was terminated with settlement for each party due to the settlements texts submitted by the parties.

De Minimis Communiqué

Another significant development is the introduction of the de minimis principle in Turkey. Under Article 41 of the Turkish Competition Law, it was stated that based on criteria such as market share and turnover, the TCA might decide not to initiate an investigation concerning those agreements, concerted practices and decisions and actions of associations of undertakings that do not significantly restrict competition in the market, except for hard-core violations. In 2021, the TCA published the Communiqué on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings That Do Not Significantly Restrict Competition ("**De Minimis Communiqué**") to clarify the rules and procedures regarding the application of Article 41 in practice.

In the De Minimis Communiqué, the thresholds which indicate whether an agreement significantly restricts competition are determined. For the horizontal agreements, it is deemed that an agreement does not significantly restrict competition in the market, provided that the total market share of the parties to the agreement does not exceed 10% in any of the relevant markets affected by the agreement. This threshold of 10% applies as well, where the agreement cannot be classified as between competing undertakings or between non-competing undertakings. Lastly, as for the agreements between non-competing undertakings, if the market share of each of the parties does not exceed 15% in any of the relevant markets affected by the agreement, the relevant agreements do not significantly restrict competition in the market.

Additionally, suppose an investigation is initiated on the grounds that the market shares of the parties to the agreement or the members of the association of undertakings within the relevant

market affected by the agreement or decision cannot be accurately determined. In that case, the TCA may terminate the investigation during the investigation process if it is found that the market shares of the parties being investigated do not exceed the thresholds mentioned above.

Communiqué on the Commitments

Another considerable development in the secondary legislation introduced in 2021 is the Communiqué on the Commitments to Be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition, and Abuse of Dominant Position No. 2021/2 ("**Communiqué on the Commitments**"), which has entered into force in March 2021.

According to the Communiqué on the Commitments, only infringements that are not recognized as hard-core infringements benefit from the commitment mechanism. Another noteworthy issue raised by the Communiqué on the Commitments is the timing of commitment submission. Indeed, according to the Communiqué on the Commitments, commitments must be submitted to the TCA within three months of receiving of the investigation notice.

The Communiqué on the Commitments also stipulates that the content and nature of the commitments must be explained in detail during the submission of the commitments. Such content and nature include, but are not limited to, the competition problem that the commitment is intended to solve, what the commitment is, when it will be fulfilled, how long it will last, and how it will be applied.

As a result of its examination, if the TCA decides that the proposed commitments are appropriate, it will make the commitment binding for the parties and decide to terminate the investigation or seek the opinion of third parties. If the TCA does not find the proposed commitment appropriate, it may allow the parties to amend the commitment only once within a specified scope and time frame, or it may decide to terminate the commitment process entirely.

Block Exemption Communiqué on Vertical Agreements

Alongside the newly introduced legislation, some amendments were also made to the Block Exemption Communiqué on Vertical Agreements No. 2002/2 ("**Communiqué No. 2002/2**"). With the Communiqué Amending the Block Exemption Communiqué on Vertical Agreements (Communiqué No: 2002/2) No. 2021/4 ("**Communiqué No. 2021/4**"), the market share threshold, which determines the limits of the block exemption be applied within the scope of the Communiqué No. 2002/2, has been reduced.

In particular, the market share threshold, which was determined as a prerequisite for the signed/to be signed vertical agreements to benefit from the block exemption, has been reduced from 40% to 30%. Parallel to the change in this threshold, amendments were made based on the 30% threshold in the provisions that allow a temporary exemption to be made in case the market share is below 40%

but then increases. In this context, it has been amended that if the market share was not more than 30% initially but then rises above the threshold, while not exceeding 35%, the exemption will continue to be valid for the next two years following the year the market share threshold was first exceeded. Again, it is stated that in the event that the market share exceeds 35%, while it was not more than 30% initially, the exemption will continue for the year following the year in which the market share threshold was first exceeded.

Additionally, since the prerequisites for block exemption has been amended, a transition process has been envisaged for undertakings to reevaluate their practices that benefit from a block exemption. Accordingly, agreements that benefit from block exemption earlier but do not meet the new thresholds should be adjusted in compliance with the legislation until 5 May 2022.

Substantive Issues- Part III

Resale price maintenance ("**RPM**")

According to Turkish competition law, retailers are free to set their own resale prices; thus, suppliers are prohibited from interfering with the resale prices of retailers. In 2021, the administrative court made a remarkable decision on the subject.

As it is known, the TCA decided in 2020 that the oil companies namely BP Petrolleri A.Ş. ("**BP**"), OPET Petrolcülük A.Ş. ("**OPET**"), Petrol Ofisi A.Ş. ("**Petrol Ofisi**") and Shell & Turcas Petrol A.Ş. ("**Shell**") determined the resale price of their dealers by interfering with the pump sales prices and therefore violated Article 4 of the Turkish Competition Law. The administrative monetary fines imposed on four undertakings were TRY 1.502 billion (EUR 265,371.02 million)[2], which was a record at the time of the decision[3].

BP, Petrol Ofisi, Shell and OPET, the undertakings faced with the fine, following the decision of the TCA, appealed to the administrative court for the annulment of the decision. Thereupon, the Ankara 7th Administrative Court decided to annul the TCA's decision in terms of the administrative fine imposed on OPET because the standard of proof beyond reasonable doubt was not met[4].

According to the Court, the resale prices of OPET's dealers and the recommended sale prices determined by OPET were the same at a rate of 74%-94%, but there was no evidence that OPET interfered with the resale prices or gave instructions in this direction. In this context, it was emphasized that the violations' evaluations should be clear and definitive, that it would be legally insufficient to reach an opinion based on suspicion, and that the incident should be proven with concrete evidence to show that this suspicion was justified. Accordingly, the TCA's decision was annulled.

Hub and Spoke

In the TCA’s decision[5] it was concluded that the five largest supermarket chains operating in

Turkey, namely Yeni Mağazacılık A.Ş. (“**A101**”), BİM Birleşik Mağazalar A.Ş. (“**BİM**”), CarrefourSA Carrefour Sabancı Ticaret Merkezi A.Ş. (“**Carrefour**”), Migros Ticaret A.Ş. (“**Migros**”) and Şok Marketler Ticaret A.Ş. (“**ŞOK**”) coordinated prices. The changes in prices occurred allegedly as a result of direct or indirect information exchanges via common suppliers, by intervening in the prices of undertakings that made discounts or that did not increase the prices in the period when the prices rose throughout the market through suppliers. In addition, it was alleged that the compliance with the collusion among the undertakings was continuously followed by means of punishment strategies such as discounts made quickly based on products and/or regions and/or making a return invoice for the supplier in case competitors' prices did not rise. Consequently, it was decided that the undertakings in question violated Article 4 of the Turkish Competition Law through agreements, or concerted practices that aimed to fix retail prices of many products they sell and also had the nature of hub and spoke cartels.

In addition, Savola Gıda ve San. Tic. A.Ş. ("**Savola**"), who is a supplier operating in the sunflower seed oil market, was also fined. Savola's arguments that the *ne bis in idem* principle should be applied in the case were not accepted and Savola was penalized both for being part of the hub and spoke cartel and for determining the resale price of the chain supermarkets.

23 undertakings and an association of undertakings, who were also party to the investigation, were not found to be violating the Turkish Competition Law and thus they were not fined. Five chain supermarkets and Savola, on the other hand, were given an administrative fine of TRY 2,7 billion (approximately EUR 336 million)[6], which is a record for total amount of fine imposed by the TCA.

Discount Practices/Rebates

Although desirable from the consumers' perspective, discount practices can be anti-competitive if they are implemented by the dominant undertaking since such implementation may cause exclusion of competitors.

In 2021, the Unilever Decision[7] attracted attention in this regard. It was determined that Unilever Sanayi ve Ticaret Türk A.Ş. (**Unilever**) is dominant in the market for industrial ice cream, the market for ice cream for immediate consumption and ice cream for at-home consumption. The TCA evaluated Unilever's discount and rebate system and concluded that increasing the amount of discounts for the sale points whose sale and turnover figures are decreasing while the number and volume of freezers are increasing is not rational. It was concluded that Unilever abused its dominant position with the rebates it implemented.

The TCA also held that Unilever imposed a non-compete obligation via its agreement with Getir Perakende Lojistik A.Ş. ("**Getir**"), which was prohibited in a decision given in 2008 by the TCA regarding the industrial ice-cream market. Accordingly, it was decided that Unilever violated Article 4 of the Turkish Competition Law.

Lastly, the exclusivity clause included in the loan agreements that regulated the use of freezers belonging to Unilever prevented competition at sales points with closed sales areas smaller than 100m^2. The TCA decided that these loan agreements should be granted an individual exemption if they were arranged so that competing products were allowed to use 30% of the visible part and total volume of the freezer at the sales point, for the sales points that were 100 m^2 or smaller closed sales areas and if there were not any freezers directly accessible by consumers, except for Unilever's.

An administrative fine of TRY 480 million (approximately EUR 60 million)[8] was imposed on Unilever due to its abuse of dominance and non-compete obligation in such a way breaching Article 4 of the Turkish Competition Law.

Procedural Issues- Part IV

On-site Inspections

In addition to the Guidelines on the Examination of Digital Data during On-Site Inspections which was published last year, the TCA was generous in making decisions regarding hindering/complicating on-site inspections in 2021.

When the TCA's decisions in which an administrative fine was imposed on undertakings are examined, it is clear that the deletion of e-mail or Whatsapp correspondence is frequently cited as the reason for the violation. In this regard, the TCA's İgsaş Decision[9] and Unmaş Decision[10] are worth mentioning.

In the İgsaş Decision, it was stated that that during the on-site inspection carried out at İstanbul Gübre Sanayi A.Ş. ("İgsaş"), a sales and marketing specialist's phone was examined, and it was discovered that a WhatsApp group chat containing conversations related to the undertaking was left half an hour after the inspection began, and the messages were deleted. Furthermore, it was found that 165 and 171 e-mails were deleted from the e-mail accounts of two regional sales managers who were not present at the undertaking during the investigation. The TCA concluded that access to potential evidence and findings was complicated as a result of İgsaş employees' actions and that the on-site inspection was attempted to be hindered. As a result, an administrative fine was imposed on İGSAŞ in the amount of five per thousand of its 2020 turnover.

In the Unmaş Decision, it was determined that Whatsapp conversations were deleted by the employees of the undertaking. The TCA determined that Unmaş Unlu Mamuller Sanayi ve Ticaret A.Ş. ("Unmaş") hindered and complicated the on-site inspection by deleting the data on the phones after the inspection began and after TCA personnel warned employees not to delete the data on the phones. Accordingly, an administrative fine was imposed on Unmaş equal to five per thousand of its 2020 turnover.

Furthermore, the TCA adopted some decisions that delayed the on-site inspection to be considered hindering/complicating the inspection and thus a violation. In this regard, the TCA's Eti

Decision[11], Unilever Decision[12] and Unmaş Decision are worth mentioning[13]. It should also be noted that both Unilever Decision and Unmaş Decision were reviewed by the administrative courts in 2021.

In the Eti Decision, in addition to deleting the messages in the Whatsapp chats, the TCA determined that Eti Gıda San. ve Tic. A.Ş. ("Eti") delayed the on-site inspection. Consequently, an administrative fine was imposed on Eti in the amount of five per thousand of its 2020 turnover.

Concerning the Unilever Decision, the court discovered that Unilever Türkiye did not reject the request for an inspection to cover all Unilever Türkiye employees, but instead explained that it would only take a long time, then contacted Unilever Headquarters in order to obtain an "eDiscovery" search warrant and that this permission was obtained the same day and the relevant data were made available. It was stated by the court that the approximately six-hour period until the permission was obtained would not constitute hindering/complicating of the on-site inspection[14].

The Unmaş Decision, on the other hand, shows that the e-mail account password requested by TCA personnel was provided with a 36-minute delay. Examining the decision, the court determined that TCA's decision was lawful, emphasizing that this period was sufficient to hinder/complicate the on-site inspection[15].

As can be seen, there is no established (consistent) case law regarding on-site inspections at this time. However, it can be stated that the number of the TCA decisions on the subject have increased in recent years, and fines for hindering/complicating on-site inspections are imposed quite strictly.

Interim Measures

Under Article 9 of the Turkish Competition Law, the TCA can take interim measures if the occurrence of serious and irreparable damages is likely until the final decision is taken to maintain the situation before the infringement. These measures cannot exceed the scope of the final decision.

The TCA, in addition to its decision to initiate an investigation[16], also decided to take interim measures on DSM Grup Danışmanlık İletişim ve Satış Ticaret AŞ ("**Trendyol**")[17]. In the decision, it was determined that Trendyol had a dominant position in the market for multi-category e-marketplaces. According to the TCA, Trendyol favoured its own retail activities by (**i**) intervening in the algorithm in such a way providing an advantage to its own products and (**ii**) using third-party data to develop its own commercial activities and to compete with the third-party sellers. It was also stated that by intervening in the algorithm, Trendyol was favouring some of the third-party sellers against others.

As a result, the TCA imposed interim measures on Trendyol, including a prohibition on all types of practices, such as interventions made through algorithms and coding, that would provide an advantage over competitors; a prohibition on the sharing and use of all types of data obtained and produced from marketplace activity for other products and services under its economic integrity;

and a prohibition on all types of practices that may discriminate among sellers selling in the marketplace.

The Upcoming Future- Part V

In 2021, the TCA maintained its growing interest in digital markets. Furthermore, developments in the FMCG market provided hints for the future.

Digital Markets

Competition in digital markets, which has been on the agenda of many competition authorities in recent years, has also been the subject of the TCA's studies. In addition to the investigations initiated against undertakings operating in digital markets, some of which are covered above, the TCA also initiated sector inquiries regarding e-marketplaces and digital advertising.

In May 2021, a preliminary report regarding the Sector Inquiry on E-Marketplace Platforms was published[18]. To ensure the market's competitiveness, the TCA included three complementary policy proposals in its E-Marketplace Platforms Sector Inquiry Preliminary Report ("**Report**"). The first of these is to review and strengthen secondary legislation in order to clarify and strengthen the implementation of the Competition Law for the e-marketplace platforms. It is stated that there is a need in this context in terms of MFN and exclusivity applications used by the platforms.

The second policy proposal is to implement a Platform Behavior Regulation to balance the current asymmetric bargaining power in favour of marketplaces. Within the scope of this Regulation, it is stated that the criteria that the marketplace takes into account in listing/sorting, as well as the significance of these criteria, should be explained to sellers within the scope of the contract. It is also stated that marketplaces must ensure that consumers and sellers have access to the data that they provide to the marketplace. It is also emphasized that the general fee schedule pertaining to the prices and fees that the marketplace demands from sellers should be transparently accessible to the sellers.

The third policy proposal aims to identify the gatekeepers in digital markets and the behaviours they are required to avoid, as well as to implement a legal regulation governing these prohibited behaviours. Gatekeepers should not impose contractual or wide MFN conditions on their sellers in this context. Furthermore, they should refrain from using non-public data obtained through the activities of sellers on their own products that compete with the products of those sellers. Gatekeepers should not give their own products an advantage in the rankings on their platform.

The TCA launched a Sector Inquiry on Online Advertising in January 2021[19], in addition to the Sector Inquiry on E-Marketplace Platforms. Within the scope of this inquiry, the TCA stated that it aimed to evaluate (**i**) the sector's structure and functioning, (**ii**) structural and/or behavioural competition concerns, (**iii**) the adequacy of existing competition law tools in terms of establishing effective competition, and (**iv**) new tools to address these emerging areas. However, no preliminary

or final report on the inquiry has been released yet.

As evidenced by these two Sector Inquiries, digital markets are one of the most pressing issues on the TCA's agenda, and the TCA is actively working to analyze these markets.

FMCG

The TCA has paid particular attention to certain sectors over the last year. FMCG retailing can be considered one of these sectors. In addition to the comprehensive completed investigations, the TCA published a preliminary report on the FMCG Retail Sector Inquiry[20].

The preliminary report emphasized that market concentration has increased in recent years and that the four undertakings with the largest market share (namely A101, BİM, ŞOK, and Migros) have significant market power. It was also discovered that three of these four undertakings (A101, BİM, and ŞOK) are discount markets. The widespread availability of private label products in discount markets, as well as these markets' flexible decision-making mechanisms, have been identified as factors that increase buyer power over suppliers.

The possibility of abuse of high buyer power determined by the TCA was emphasized, and it was stated that unfair commercial practices (such as retailers receiving compensation from suppliers under various names, imposing long payment terms, unilateral changes in the contract) might occur due to this buyer power. Accordingly, in the preliminary report, it was concluded that an independent administrative authority with the power to impose sanctions should be established to supervise retailers and suppliers' activities and prevent the abuse of buyer power by retailers.

Finally, for the steps to be taken in the future, it was stated that the presumption of concerted practice could be used more effectively in the examination of the actions of the actors in the sector, and the concept of a joint dominant position could be taken into account. It was also underlined that stricter control could be made in merger and acquisition applications, especially by narrowing the definition of the geographical market. The notification thresholds for merger and acquisition transactions could be determined specifically for the sector.

Concluding Remarks

Compared to 2020, 2021 was definitely much less COVID-oriented in terms of competition law. Yet, the effects of the pandemic are ongoing and reflected in competition law, as in any aspect of our lives. With the wild growth in digitalization in the last couple of years, the digital markets have been in the spotlight for the TCA, as they are for other competition authorities around the globe. We believe that the cases and sector inquiries are concrete examples for showing the focus on digital markets.

Turkish competition law is continuing to strengthen its fundamentals via both secondary legislation and case law. Of course, the list of things to improve in competition law never ends, as the

competition law subjects constantly evolve. We believe that the Turkish competition law will continue to follow these evolvements and keep itself updated for the coming years.

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[1] On 16 June 2020, the Turkish Parliament approved the long-awaited amendments to Law No. 4054 on the Protection of Competition. It came into force on 24 June 2020.

[2] At the 2018 exchange rate, i.e. EUR 1 = TRY 5.66

[3] The TCA's decision dated 12.3.2020 and numbered 20-14/192-98.

[4] The Ankara 7th Administrative Court's decision dated 30.6.2021 and numbered 2021/60 E. 2021/1364 K.

[5] https://www.rekabet.gov.tr/Dosya/geneldosya/zincirmarketler_nihaikararduyurusu-ingilizce-pdf

[6] At the 2020 exchange rate, i.e. EUR 1 = TRY 8.03.

[7] TCA's decision dated 18.03.2021 and numbered 21-15/190-80.

[8] At the 2020 exchange rate, i.e. EUR 1 = TRY 8.03

[9] TCA's decision dated 12.08.2021 and numbered 21-38/544-265.

[10] TCA's decision dated 20.05.2021 and numbered 21-26/327-152.

[11] TCA's decision dated 29.04.2021 and numbered 21-24/278-123.

[12] TCA's decision dated 07.11.2019 and numbered 19-38/584-250.

[13] TCA's decision dated 7.11.2019 and numbered 19-38/570-238.

[14] Ankara 6th Administrative Court's decision dated 06/07/2021 and numbered 2020/268 E. 2021/1283 K.

[15] Ankara 8th Administrative Court's decision dated 14/12/2020 and numbered 2020/510 E. 2020/2119 K.

[16] https://www.rekabet.gov.tr/en/Guncel/investigation-concerning-dsm-grup-danism-242ff96f662bec11813900505694b4c6

[17] TCA's decision dated 30.09.2021 and numbered 21-46/669-334.

[18] https://www.rekabet.gov.tr/Dosya/sektor-raporlari/e-pazaryeri-si-on-rapor-20210705115502897-pdf

[19] https://www.rekabet.gov.tr/tr/Guncel/rekabet-kurulu-cevrim-ici-reklamcilik-se-aa233ec4677eeb11812c00505694b4c6

[20] https://www.rekabet.gov.tr/Dosya/sektor-raporlari/htmperakendeciligisektorincelemesionraporu-20210705115428725-pdf