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## The TCA Rules: State Owned Financial Entities are under the Same Economic Unity

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Article by Caner K. Çeşit and Burak Buğrahan Sezer

On 9 December 2020, the Turkish Competition Authority (“TCA”) published a reasoned decision<sup>[1]</sup> concerning an individual exemption application regarding two bancassurance agreements signed between (i) Güneş Sigorta A.Ş. (“**Güneş Sigorta**”) and Türkiye Vakıflar Bankası T.A.O. (“**Vakıfbank**”), (ii) Vakıf Emeklilik ve Hayat A.Ş. (“**Vakıf Emeklilik**”) and Vakıfbank. Concerned bancassurance agreements are aimed to gather non-life insurance services, life insurance services and personal pension services under one roof. The TCA ruled that concerned agreements do not fall within the scope of Article 4 of the Law No. 4054 on the Protection of Competition (“**Competition Law**”) because undertakings on each side of the agreements are not considered as separate undertakings.

### The Transaction Concerning the Unification of State-Owned Insurance and Pension Companies Under Turkey Wealth Fund

Before delving into the details of the agreements, the TCA examined Güneş Sigorta’s and Vakıf Emeklilik’s control structure. According to the information in the case file, it is understood that; the majority shares of non-life insurance companies, namely Güneş Sigorta, Halk Sigorta A.Ş. (“**Halk Sigorta**”) and Ziraat Sigorta A.Ş. (“**Ziraat Sigorta**”), and pension companies namely Vakıf Emeklilik, Halk Hayat ve Emeklilik A.Ş. (“**Halk Emeklilik**”) and Ziraat Halk ve Emeklilik A.Ş. (“**Ziraat Emeklilik**”) have been acquired by TVF Finansal Yatırımlar A.Ş. (“**TWF Financial Investments**”). TWF Financial Investments is a company established by Turkey Wealth Fund (“**TWF**”)<sup>[2]</sup>.

TWF, is the sovereign wealth fund of Turkey established by the Law No. 6741 on Establishment of Turkey Wealth Fund Management Company and Amendments in Certain Laws (“**Law No. 6741**”). It should be highlighted that TWF, the companies established by the TWF and its sub-funds are exempted from the application of numerous laws, including the Competition Law, by their statute. Therefore, the TCA has decided that;

- the transaction concerning the unification of non-life insurance companies, namely Güneş Sigorta, Ziraat Sigorta and Halk Sigorta, which are subsidiaries of TWF Financial Investments, under “Güneş Sigorta” is not subject to the TCA’s merger control;
- Vakıf Emeklilik, Ziraat Emeklilik ve Halk Emeklilik which operate in life insurance and pension services, will be unified under “Vakıf Emeklilik” and this is related to restructuring of undertakings within the same economic unity.

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Within this context, the TCA determined that parties of the concerned agreements, Güneş Sigorta and Vakıf Emeklilik are undertakings under same economic unity controlled by TWF.

Additionally, Vakıfbank's situation is remarkable and should be separately examined. This part of the TCA's decision is highly significant, also creating the main motivation for this article, due to the fact that the TCA seems to be changing its stance towards state-owned undertakings and choosing an opposite perspective with regards to its prior decisions. Indeed, in its decision, the TCA evaluated the current control structure of state-owned depository banks, namely Vakıfbank, Türkiye Ziraat Bankası A.Ş. ("**Ziraatbank**") and Türkiye Halk Bankası A.Ş. ("**Halkbank**").

### **The TCA's Stance on the Control Structure of State-Owned Depository Banks**

Even though the TCA recognizes its consistent case law on the government's control over the banks is realized only as general supervision and overseeing, and these banks compete with privately owned banks and each other in the market, thus they cannot be deemed to be under the same economic unity. The TCA further highlighted that TWF became a shareholder of the state-owned banks (as of 24.02.2017 for Ziraatbank, as of 10.03.2017 for Halkbank and as of 20.05.2020 for Vakıfbank), and it is a controlling economic undertaking that steers the companies in which it invested and their strategic decisions in a commercially profitable direction. In its decision the TCA set forth that TWF is the controlling shareholder of both Güneş and Vakıf Emeklilik and the second biggest shareholder of Vakıfbank.

Although the biggest shareholder of Vakıfbank is the Republic of Turkey Ministry of Treasury and Finance ("**Ministry**"); unlike the Ministry, the TCA put forward that the TWF is more than a governmental organization, with its own commercial agenda and aim to make investments to earn income. Therefore, the TWF is the controlling undertaking which steers the companies it invested in and their strategic decisions to a commercially profitable direction. On the other hand, when it comes to the Ministry, the TCA further stated that the government only plays an overseeing role and does not get involved with commercial decisions or aims to make profit thus does not control entities it owns. Additionally, the TCA mentioned that even though the TWF is set up as an independent company, it is still in the governmental organization and the Ministry is expected to act in harmony with the strategic decisions of the TWF. The TCA applied the same principle on the depository banks and concluded that Ziraatbank, Halkbank, and Vakıfbank are ultimately controlled by TWF and thus are in the same economic unit.

Nevertheless, this conclusion as to the control structure of the state-owned banks seems to be in contradiction with the TCA's prior stance towards the control status of the banks owned by TWF. In its decision dated 27.12.2018 and numbered 18-49/767-372 ("**2018 Decision**"), the TCA ruled that Ziraatbank, Halkbank and Vakıfbank are independent and competing undertakings. In the 2018 Decision, it is mentioned that Ziraatbank and Halkbank are indirectly controlled by TWF and Vakıfbank is controlled by General Directorate for Foundations. However, the decision argued that the government's control over the banks is realized only as a general supervision and overseeing, and these banks compete with privately owned banks and each other in the market. As a result, the TCA

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concluded that they cannot be deemed under the same economic unit[3].

It should also be highlighted that 2018 decision referred to the TCA's famous "*12 Banks Investigation*"[4] in which Ziratbank, Halkbank and Vakıfbank claimed that they are state-owned entities and they were belonging to the same economic unit thus, an agreement among themselves cannot be considered within the scope of the Competition Law. The TCA did not accepted this claim by referring to the State's control over the banks is only limited to general supervision and overseeing and they cannot be deemed under the same economic unit.

### **Concluding Remarks**

Although the concerned agreements enforce a non-compete clause which establishes exclusivity regarding Vakıfbank's bancassurance services last for 20 years, after examining the control structure of the concerned undertakings, the TCA ruled that aforementioned bancassurance agreements do not fall within the scope of Article 4 of the Competition Law at all, thus cannot be evaluated under Article 5 of the Competition Law (the article on individual exemption) since Vakıfbank, Güneş Sigorta and Vakıf Emeklilik are part of the same economic unity.

The TCA's decision shows that the economic entities under TWF's portfolio are all controlled by the TWF and cannot be deemed as separate undertakings. As a result, these firms are not expected to compete with each other; instead, they can align their competitive behaviour. This conclusion contradicts with the TCA's past decisions which clearly deemed that the government's shareholding is limited with general supervision and overseeing and it is not capable of granting the government the control of the undertakings. Such swings in the TCA's case law show that the government will be much more active especially in the financial markets.

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[1] The TCA's decision dated 27.08.2020 and numbered 20-39/539-240.

[2] The TCA utilized the mentioned abbreviation for both Turkey Wealth Fund and Türkiye Varlık Fonu Yönetimi A.Ş. (which is a company established for the management of Turkey Wealth Fund).

[3] Paragraph 7 of the TCA's decision dated 27.12.2018 and numbered 18-49/767-372.

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[\[4\]](#) The TCA's decision dated 08.03.2013 and numbered 13-13/198-100.