THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Fifteenth Edition

Editor
Aidan Synnott

THE LAWREVIEWS

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PREFACE

As detailed in the chapters that follow, competition enforcement remained quite active in many jurisdictions during the past year. Authorities around the globe devoted significant attention to merger control and to conduct matters – including abuse of dominance and cartel activity.

Enforcers in several countries and at the European Commission investigated and took action with respect to numerous transactions, and several deals saw concurrent investigations and other proceedings. In this regard, the discussions in the European Union and United States chapters detailing the actions against the Illumina–Grail transaction are particularly notable. An administrative law judge at the US Federal Trade Commission (FTC) determined that FTC complaint counsel failed to prove its prima facie case in challenging this deal. However, the European Commission prohibited the deal after it asserted jurisdiction pursuant to a referral from a Member State. There are other examples of divergent outcomes in the chapters that follow, including the differing treatment of the proposed Cargotec–Konecranes transaction by the European Commission (which approved the deal) and the US Department of Justice and UK Competition and Markets Authority (which effectively blocked it).

More generally, merger control activity in many jurisdictions remained robust. For example, as reported in the Brazil chapter, enforcers there reviewed a record number of mergers. Elsewhere, an amended competition law in Finland changed the merger notification thresholds there. There were also changes in the Turkish merger control regime, including a new provision broadening notification requirements for transactions regarding the acquisition of technology undertakings. In Italy, a new law expanded the powers of the competition authority and changed the test applicable in merger control investigations. There were other notable legislative developments, and the discussion of the passage of the Digital Markets Act and the Digital Services Act in the European Union chapter will be of particular interest.

Several jurisdictions saw notable cartel enforcement activity, with Brazilian, European Commission, Japanese and Portuguese authorities undertaking dawn raids. These actions targeted companies in online food delivery, water infrastructure, automotive, advertising and fashion industries, among others. Cartel activity related to the provision of goods or services to public entities received attention from several authorities, including the Canadian Competition Bureau and the US Department of Justice. Finnish, French and Swedish authorities also took several actions against cartels in the past year. Meanwhile, the General Court in the European Union dealt with several appeals from Commission decisions regarding alleged cartel conduct. Several enforcers, including the US Department of Justice and the European Commission, updated policies and guidance related to their leniency programmes.

Conduct-related enforcement actions against technology companies also featured prominently. Canada, the European Commission, France, Turkey and United States all moved forward with investigations and proceedings in this area. The Swedish competition

authority published a report regarding conduct in digital platform markets, concluding that 'competition law may lack sufficient flexibility with regard to new types of markets'. The Turkish competition authority also issued a report on e-marketplace platforms, and the Taiwan Fair Trade Commission released a white paper on the digital economy.

Several authorities also brought abuse of dominance (or monopolisation) cases against companies outside the tech space – including against pharmaceutical firms. The French competition authority issued several fines for abuse of dominance, including against companies supplying electricity and gas. Conversely, the Italian Council of State annulled a fine that the competition authority had levied on energy companies there. In addition, several authorities, including those in Portugal, Turkey and the United States, continued to pursue labour-related enforcement activity.

We will continue to watch with interest to see how competition regulation and enforcement evolves around the globe in the coming year.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
March 2023

Chapter 15

TURKEY

Bahadır Balkı, Caner K Çeşit, Ulya Zeynep Tan and Miraç Mert Karakaş[1]

I OVERVIEW

Law No. 4054 on the Protection of Competition (the Competition Law) has been in force since 1994 and the Turkish Competition Authority (TCA) was established in 1997.

The Turkish Competition Board (TCB) is the decision-making body of the TCA. The TCB is vested with special powers to enforce the competition rules regarding restrictive practices, abuse of dominance and mergers, as well as to draft and enact secondary legislation (i.e., regulations and communiqués) for the implementation of the Competition Law. It also provides opinions on amendments to be made to competition legislation and monitors legislation, practices, policies and measures of other countries concerning agreements and decisions limiting competition. The TCA watches closely global developments in competition law enforcement, especially those made by the European Commission and national competition authorities.

In 2022, the TCB rendered a total of 386 decisions, including 78 competition law infringement claim decisions, 238 merger and acquisition decisions, seven privatisation decisions, 19 negative clearance and exemption decisions, four decisions rendered following a court decision and 40 other decisions. Of the 78 competition law infringement claim decisions, 58 concerned infringements of Article 4 of the Competition Law (on agreements, decisions and practices preventing, distorting or restricting competition in relevant markets), 14 concerned Article 6 violations (abuse of dominant position) and six concerned both these Articles. Fines in 2022 totalled 1,857,426,810.16 Turkish liras. These cases concerned a range of industries, including information technology (IT) and platform services, media, advertising and broadcasting, agriculture and agricultural products, the food industry (packaged product production, wholesale and retail, alcoholic and non-alcoholic beverages, food and beverage services), logistics, warehousing and mail (port and port services, land, air and sea transport, customs services), the appliance industry (white goods, small home appliances, electrical products, electronic products, office machines and computers), textile and ready-made clothing industry (production, marketing, wholesale/retail sales) and health services (drugs, hospitals, health equipment and supplies).

Along with a previous investigation into the labour market, where 48 undertakings were investigated in respect of gentleman's agreements regarding the transfer of employees, in 2022 the TCA initiated a similar investigation against seven undertakings providing IT services to assess the same allegations. Furthermore, the TCA has recently announced

1 Bahadır Balkı is a managing partner, Caner K Çeşit is a counsel, Ulya Zeynep Tan is an associate and Miraç Mert Karakaş is a junior associate at ACTECON.

a reasoned decision regarding the labour market, which sheds light on where the TCA stands in assessing gentleman's agreements. In the decision, the TCA found that gentleman's agreements entered into by private hospitals have the potential to prevent competition based on a variety of evidence. Apart from labour-related investigations, the TCA investigated the fast-moving consumer goods (FMCG) sector and fined suppliers a total of 878.6 million liras for facilitating coordination of Turkey's five biggest supermarket chains to fix prices.

Following the publication of the preliminary sector inquiry report, the TCA issued its final report on e-marketplace platforms. The report examined the dynamics of the sector, prominent e-marketplace business models both in Turkey and worldwide, consumer and seller profiles in the market, and possible competition problems. The last section of the final report is devoted to the revision of the policy recommendations made in the preliminary report in order to address the competition concerns that arise in line with the analyses, findings, observations and assessments made in the preliminary report. In this context, the policy recommendations have been revised and finalised by taking into consideration the changes and developments in the sector. In March 2022, the TCA published another final report regarding the fresh fruit and vegetable sector. The study sought to stress the reasons for price volatility and structural problems in the agriculture sector by comparing with similar instances across the world. Moreover, the report urged the restructuring of producer unions and cooperatives for agricultural products and the implementation of agricultural policies and production planning.

In March 2022, Turkish merger control underwent significant changes with the adoption of Communiqué No. 2010/4.[2] The increased turnover thresholds for transactions that require TCA approval, along with special rules for tech companies, became effective as of 4 May 2022. Moreover, an amendment to the Regulation on Fines[3] was published in the Official Gazette in 2022 as part of the aim to provide a uniform approach to the determination of annual gross revenue, considering the varying practices of undertakings.

II CARTELS

i Definition of a cartel

Agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings that have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited in accordance with Article 4 of the Competition Law. Therefore, cartel activities in the markets are covered by Article 4 of the Competition Law.

However, the Competition Law does not provide a definition of practices deemed to be a cartel. Instead, the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position (the Regulation on Fines), which further stipulates the procedures and principles relating to the fines to be imposed for a violation of the Competition Law, defines the cartel as follows:

2 Communiqué No. 2010/4: Communiqué Concerning the Mergers and Acquisitions Calling for the Authorisation of the Competition Board.

3 Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position.

agreements restricting competition or concerted practices between competitors for fixing prices; allocation of customers, providers, territories or trade channels; restricting the amount of supply or imposing quotas, and bid rigging.

Moreover, according to Article 3(c) of the Regulation on Active Cooperation for Discovery of Cartels (the Leniency Regulation), the term 'cartel' refers to competition-limiting agreements or concerted practices concluded between competitors concerning price-fixing, allocation of customers, suppliers, regions or commercial channels, supply amount restrictions or quotas, and collusive bidding in tenders.

Finally, Paragraphs 44 and 57 of the Guidelines on Horizontal Cooperation Agreements stipulate that exchange of competition-sensitive information among rivals (e.g., future prices, outputs or sales amounts) is deemed to be cartel conduct if it is in the nature of an agreement with the object of fixing prices or quantities.

ii Fines for cartel behaviour

Pursuant to Article 16(3) of the Competition Law, those who commit behaviour prohibited in Article 4 of the Competition Law shall be subject to an administrative fine of up to 10 per cent of the annual gross revenue of the relevant undertakings, associations of undertakings or members of such associations generated by the end of the financial year preceding the decision or, if it is not possible to calculate this, the financial year closest to the date of the decision as determined by the TCB.

Pursuant to Paragraph 3 of Article 16(4) of the Competition Law provides that managers or employees of undertakings or associations of undertakings who are found to have had decisive influence on the violation may be given fines of up to 5 per cent of the fine given to the undertakings or associations of undertakings.

In determining the percentage of the fine to be imposed, the TCB takes the characteristics of the violation into account and thus the consequences of an infringement vary depending on the facts of the specific behaviour. However, the Regulation on Fines states that the TCB is entitled to impose a base fine of:

a between 2 and 4 per cent for cartels; and

b between 5 per mille and 3 per cent for other violations of the undertaking's turnover.

Reviewing the mitigating[4] and aggravating[5] factors, the TCB is entitled to increase the fine percentage up to 10 per cent of the company's turnover achieved within the previous year.

That said, there are no criminal sanctions in the cartel enforcement of the TCA, except for bid rigging in public procurement, in which case it would be possible for the TCA to report this cartel activity to the prosecutor's office.

4 Such as provision of assistance to the investigation beyond fulfilment of the legal obligations, the existence of encouragement by public authorities or coercion by other undertakings in the violation, voluntary payment of damages to those harmed, termination of other violations, and attribution of a very small share of annual gross revenue to the practices subject to the violation.

5 Such as recidivism in respect of the violation, maintaining the cartel after notification of the investigation decision, failure to meet the commitments made for the elimination of the competition problems within the scope of Articles 4 or 6 of the Competition Law, providing no assistance to the investigation, and coercing other undertakings to engage in the violation.

iii Leniency programme

The Leniency Regulation is the main legislation regulating the requirements and procedures that shall be satisfied to apply for a leniency in Turkey. The Leniency Regulation provides immunity or the possibility of a reduced fine for infringements that could qualify as cartels. Under Turkish competition law the leniency procedure is only applicable to cartels; however, one exception to this was the Corporate Banking decision. Although there was no finding of cartel conduct, Bank of Tokyo-Mitsubishi UFJ Turkey was not subject to the imposition of a fine by the TCB because it cooperated with the authority.

The first undertaking to submit the information and evidence and meet the requirements laid down in Article 6 of the Leniency Regulation independently of its competitors, before the preliminary inquiry decision or as of the decision by the TCB to carry out a preliminary inquiry until the notification of the investigation report, shall be granted immunity from fines on condition that the TCA does not have, at the time of the submission, sufficient evidence to find the violation of Article 4 of the Competition Law. Managers and employees of the undertaking shall also be granted immunity from fines. Further reductions of fines are provided in detail in the Leniency Regulation.

According to Article 6 of the Leniency Regulation, to benefit from the active cooperation or leniency application, an undertaking must:

a submit information and evidence in respect of the alleged cartel, including the products affected, the duration of the cartel, the names of the undertakings party to the cartel, specific dates, locations and cartel meeting participants;

b not conceal or destroy information or evidence related to the alleged cartel;

c end its involvement in the alleged cartel unless requested otherwise by the assigned unit on the grounds that detecting the cartel would be complicated;

d keep the application confidential until the end of the investigation, unless otherwise requested by the assigned unit; and

e maintain active cooperation until the TCB takes the final decision after the investigation is completed.

Any leniency application must be submitted before the settlement application. If both the leniency application and the settlement application are accepted, the parties may benefit from both discounts.

iv Settlement mechanism

The settlement mechanism was introduced with the amendments made to the Competition Law in 2020. After initiating an investigation, the TCB may, on the request of the parties concerned or on its own initiative, start the settlement procedure, considering the procedural benefits that may arise from a rapid resolution of the investigation process and the differences in opinion concerning the existence and scope of the infringement. Before the notification of the investigation report, the TCB may come to a settlement with the undertakings and associations of undertakings under investigation that acknowledge the existence and scope of the infringement. As a result of the settlement procedure, a discount of up to 25 per cent may be applied to the administrative fine. If the process is concluded with a settlement, the parties to the settlement may not take the administrative fine and the provisions of the settlement text to court. In contrast to the leniency procedure, the settlement mechanism can be applied to violations other than cartels. The secondary legislation regarding the settlement mechanism was adopted in July 2021.

v Significant cases

The TCB has continued its previous approach, and after fining Turkey's five biggest supermarket chains and a supplier with a record total of 2.7 billion liras in 2021, another investigation was initiated against the supermarkets, as well as other producers/suppliers and retailers operating in the FMCG sector, resulting in a total fine of 878.6 million liras. While 13 undertakings were subject to the fine for either partaking in a hub-and-spoke cartel or resale price maintenance, or both, although the previous five supermarket chains were also determined to have violated the Competition Law, they were not subject to the fine under the *ne bis in idem* principle.

In addition, the TCB concluded its decision on Audi, Porsche, Volkswagen, Mercedes-Benz and BMW, the 'Circle of Five', in response to a claim that the automotive companies violated Article 4 of the Competition Law by coordinating with regard to the development of components. Assessing the evidence, the TCB reached the conclusion that these companies' conduct had no significant detrimental impact on competition and therefore terminated the investigation.

Moreover, in recent years, there has been an increasing view that the market power of employers in labour markets suppresses wages or causes them to decrease, and maintains working conditions below competitive levels. In particular, employers prevent the transfer of employees between undertakings through direct or indirect agreements, which may deprive employees of job opportunities that offer higher wages and better conditions. Thus, the competitive structure in the labour market may be damaged by the decrease in mobility of labour among enterprises or may artificially limit workers' ability to obtain wages of the correct value for the labour actually undertaken. In this context, adopting the same approach as in 2021, when an investigation was initiated against 48 enterprises arising from a gentleman's agreement in the labour market, another labour-related investigation was launched into seven IT companies to reveal whether any gentleman's agreement had been concluded between the parties.

As for the settlement procedure, the *Beypazarı and Kınık* case of 2022 is noteworthy as it constitutes the first example of the leniency and settlement procedures applied together. In this respect, the undertakings had penalty reductions under both the leniency and settlement procedures. The case concerned an investigation into Beypazarı and Kınık on the grounds of information exchange. An example of the leniency procedure applied is the case concerning door-to-door transport services for the health sector. An investigation opened on the grounds that the undertakings (Biopharma, Transorient and Tunaset) entered into agreements between themselves regarding customer allocation and established an indefinite non-compete obligation towards the allocated customers. While Transorient and Tunaset were fined, the TCB decided to not impose an administrative fine on Biopharma pursuant to the Leniency Regulation.

vi Trends, developments and strategies

Cases this year cover IT and platform services; media, advertising and publishing; agriculture and agricultural products; food industry; healthcare services; chemistry and mining; banking, capital markets, finance and insurance services; machinery industry; logistics, warehousing and mail services; culture, art, entertainment, leisure, sports, games of chance and education; textiles and ready-to-wear garments; and the automotive industry and vehicles in terms of competition probes. Other cases include telecommunications; infrastructure services; leather

and leather products, rubber and plastic; vocational, scientific and technical operations; real estate services; construction; industry sector; forestry and wood-based industries; jewellery; and accommodation, travel and tour operators.

The trend where price increases in various sectors were looked into following the fluctuation of the Turkish lira continued throughout 2022. The TCA monitored undertakings' behaviour to determine whether any price increases stemmed from incremental costs or anticompetitive activities. In addition, e-platforms and labour markets are also prominent within the TCA's agenda.

vii Outlook

The TCA will closely watch critical markets such as healthcare, transport, consumer goods, automotive, financial services, travel and tour operators, digital platforms and consumer electronics, and use its powers proactively.

In fact, the TCA is conducting investigations into almost all the above-mentioned markets. While supermarkets and their suppliers are a clear priority, digital platforms and tourism markets are also under scrutiny. Moreover, the TCA is investigating an alleged gentleman's agreement between undertakings in the labour market.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Article 4 of the Competition Law sets out the main rules governing the horizontal and vertical relations between the undertakings and prohibits any agreement, decision and practice preventing, distorting or restricting competition in the relevant markets.

Restrictive agreements may be exempted from the application of Article 4 of the Competition Law. The TCB has issued block exemption communiqués covering vertical restraints, research and development agreements, specialisation agreements and technology transfer agreements. Moreover, the motor vehicles and insurance industries have sector-specific block exemption communiqués. Restrictive agreements that do not benefit from block exemption communiqués may be exempt from the application of Article 4 of the Competition Law, provided that they:

a ensure new developments or economic or technical improvements in the production or distribution of goods and in the provision of services;
b benefit the consumer;
c do not eliminate competition in a significant part of the relevant market; and
d do not restrict competition more than necessary to achieve the goals set out in points (a) and (b).

A dominant position means that one or more undertakings in a particular market has the power to determine economic parameters such as price, supply and the amount of production and distribution, by acting independently of their competitors and customers. It is not in itself an infringement for an undertaking to hold a dominant position and undertakings are allowed to become more prominent competitively as a result of their internal efficiencies. However, Article 6 of the Competition Law prohibits any practice that may harm consumer welfare by dominant undertakings exploiting the advantages provided by their market power. In this respect, dominant undertakings are considered to have a 'special responsibility' not to allow their conduct to restrict competition.

Article 6 of the Competition Law states that the abuse, by one or more undertakings, of a dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited. Abuse of dominance is also considered a violation in terms of fining methodology. Although it is not indicated under Article 6 of the Competition Law, excessive pricing is a theory of harm in the TCA's practice akin to Article 102(a) of the TFEU.

It should be reiterated that the legislation regarding restrictive agreements and abuse of dominance complies with EU competition legislation.

i Significant cases

In terms of vertical restrictions, the TCB completed its investigation into Digiturk, a paid television broadcaster, on whether it had violated Articles 4 and 6 of the Competition Law by restricting passive sales of its resellers as well as abusing its dominant position in the market for paid television broadcasting of Turkish Super League and First League matches. While Digiturk was not found responsible for abusing its dominant position, the TCB came to the conclusion that the undertaking violated Article 4 of the Competition Law by restricting sellers from conducting active and passive sales outside the regions they were allocated. As a result, an administrative fine of 7 million liras was imposed on Digiturk.

In terms of the abuse of dominance, in April 2022 the TCB finalised its investigation into NadirKitap, a popular platform service in Turkey for the sale of secondhand books. The investigation was initiated on the grounds that NadirKitap abused its dominant position by means of complicating competitors' activities by not providing data about member sellers who wanted to market their products through competing broker service providers. As a result of the investigation, the TCB found NadirKitap to be in a dominant position and that it had abused its dominance by preventing access to and portability of book data uploaded to its website by sellers. An administrative fine of nearly 347 thousand liras was imposed on NadirKitap.

Likewise, the TCB fined Meta Platforms 346 million liras for violating competition rules by abusing its dominant position in personal social networking services and online video advertising to obstruct competitors through data collected from its core services, Facebook, Instagram and WhatsApp.

ii Trends, developments and strategies

The TCA's enforcement in relation to restrictive agreements covers a variety of services, with no obvious specific priority for the authority. However, the TCA seems to have adopted a stricter approach to vertical restrictions, especially resale price maintenance and sales restrictions.

The TCA's investigations have shown that digital markets are its priority in terms of abusive practices and it was much faster to investigate alleged abusive practices of digital platforms than the European Commission. This indicates that the TCA wants to be seen as a reputable competition authority in the area of enforcement in digital markets.

In this respect, the TCA has focused on digital markets while monitoring traditional markets constantly. Having published its sector inquiry report concerning e-marketplace platforms, the TCA initiated a full investigation into newly established Martı, a leading e-scooter rental firm, as new markets give rise to new competition concerns arising from technological changes.

iii Outlook

In 2022, the TCB made conflicting decisions regarding the hindrance of on-site inspections. In this respect, it appears that the TCA is confused as to which circumstances are grounds for hindering on-site inspections. For example, Hepsiburada, a multi-category e-commerce company, was subject to two different on-site inspections within the scope of two different investigations, where the TCB ruled that Hepsiburada's actions constituted a violation during only one of them, even though the hindrance in question seems to have been the same.

In addition, the TCB started an investigation into EssilorLuxottica alleging that its behaviour complicated and excluded the activities of its competitors in the optical markets and thus allegedly violated the Competition Law.

Furthermore, the TCB's decision about NadirKitap reveals that it is prioritising data-related practices. In April 2022, the TCA concluded its investigation into NadirKitap, a popular platform service for the sale of secondhand books, on the grounds that the company abused its dominant position by not providing data about member sellers, and therefore was found to be responsible. The TCA initiated a similar probe into Sahibinden, an online advertising platform for renting and selling vehicles and real estate.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The TCA has the power to conduct market studies. For instance, in its Final Report on E-Marketplace Platforms, the TCA evaluated the need for further work on the legal framework and secondary legislation for powerful digital platforms, their merchant fulfilled network (MFN) and exclusivity practices, as well as excessive data collection and privacy concerns. Moreover, the report states that e-marketplaces represent only one side of the targeted digital actors; in this respect, legislative work aimed at identifying digital platforms with significant market power and determining the obligations and behaviour to be avoided by the platforms as a precursor is currently under way within the TCA and is planned to be concluded soon. The report also emphasises that it would be appropriate to review the relevant secondary legislation to clarify the framework for the MFN and exclusivity practices of digital platforms. It also concludes that an area in which the secondary legislation needs to be strengthened is the exploitative practices of the platforms. Regarding excessive data collection and privacy concerns, the final report indicates that actions have been taken for data merging and processing within the scope of the current legislative work. In addition, in terms of the concern about information asymmetry and manipulation, the Sector Report considers that the obligation to ensure platform transparency brought by the legislation study largely will constitute a solution. In addition to these issues, the report signals that an additional secondary legislation study could be conducted within the TCA to clarify the determination of undertakings with significant market power and the obligations expected to be brought to these undertakings and the application conditions of the upcoming legislation.

The TCA also published in March 2022 the Final Report on Fresh Fruit and Vegetable Market. The report covered determination of the market structure, activities of undertakings and previous TCB decisions regarding the market, along with giving foreign agricultural policies as an example to provide broad scanning of the sector. To provide a better understanding, the opinions and practices of competition authorities in different countries were examined, taking into account organic factors such as behavioural changes of consumers and separation of the activity structures of market participants.

V STATE AID

Even though the primary legislation of the Turkish competition law regime regarding state aid is mainly harmonised with the EU, secondary legislation for the implementation of this regime has not yet been adopted. Therefore, there are no state-aid decisions within the scope of Turkish competition law.

VI MERGER REVIEW

The main legislation on merger review is Article 7 of the Competition Law and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board. Following the amendment made in Article 7 of the Competition Law, to harmonise with EU legislation, the significant impediment to effective competition (SIEC) test was adopted by the Turkish competition law system, replacing the 'dominant position' test for mergers or acquisitions.

Significant changes were introduced in Communiqué No. 2010/4 in March 2022. Pursuant to new revisions, a concentration shall be deemed notifiable in Turkey if:

a the aggregate Turkish turnover of the transacting parties exceeds 750 million liras and the Turkish turnover of at least two of the transacting parties each exceeds 250 million liras; or

b the asset or business subject to acquisition in acquisition transactions, and at least one of the parties to the transaction in merger transactions, has a turnover in Turkey exceeding 250 million liras and the other party to the transaction has a global turnover exceeding 3 billion liras.

In line with these newly introduced amendments, transactions regarding the acquisition of technology undertakings operating in the Turkish geographical market or having R&D activities or providing services to users in Turkey shall be subject to notification to the TCA regardless of the above-mentioned 250 million liras turnover thresholds. In this regard, technology entities are defined as undertakings or related assets operating in the fields of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals, and health technology under the relevant communiqué.

In addition, there are amendments regarding the methods used for calculating the turnover of financial institutions. Another amendment concerns the submission of notification forms to the TCA via the e-government portal. While the TCA had accepted the notification forms via the e-government portal prior to the amendment, with this addition, the actual practice has also been included in the written legislation.

Last, the provision in Article 13(2) of Communiqué No. 2010/4 that states 'mergers and acquisitions that lead to a significant impediment of competition by creating or strengthening a dominant position shall be prohibited' has been amended to 'mergers and acquisitions that lead to a significant decrease in competition particularly by creating or strengthening a dominant position shall be prohibited'. The purpose of the added word 'particularly' is to emphasise that a concentration will not be permitted if it significantly restricts competition, even if it does not create a dominant position. This is in line with the relevant amendment to the Turkish Competition Law in 2020 when the SIEC test was introduced officially into Turkish merger control. This newly introduced amendment merely harmonises the secondary legislation with the Competition Law.

i Significant cases

The TCA has published its first decisions on acquisitions targeting technology undertakings. The decisions came amid some uncertainties regarding the newly added definition in the merger notification rules of technology undertakings, which are defined as undertakings active in the areas of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals and health technologies.

Following the recent amendments that set lower notification thresholds for technology undertakings that are active or have R&D activities in the Turkish geographic market or that provide services to customers in Turkey, the TCA concluded that several transactions were subject to authorisation under the new rules and cleared these transactions on the basis that they did not lead to a significant reduction to effective competition. For example, in the acquisition of Airties through P8 Holding, the TCB concluded that due to the software services that Airties provides, it is considered as a technology undertaking.

ii Trends, developments and strategies

In 2022, 245 mergers and acquisitions (M&A) and privatisation transactions were examined by the TCA. There was a decrease in the number of M&A transactions examined by the TCA in 2022 compared with 2021. Of these, the most transactions and the highest transaction value in which the target company originated in Turkey were reported in the field of 'generation, transmission and distribution of electrical energy' with a total value of 5.1 billion liras in eight transactions.

iii Outlook

With the recent legislative amendments, the TCA aims to protect innovation-based competition by introducing the definition of technology undertakings in terms of M&A control. Indeed, the TCA, with the amended lower thresholds, embraces a broader approach to bring the acquisitions of technology undertakings under a greater degree of control and to prevent stopping acquisitions of such undertakings. In particular, the tendency for large-scale incumbent undertakings to take over nascent competitors is to be controlled to avoid restricting effective competition.

VII CONCLUSIONS

The TCA maintained its approach in 2021 and actively initiated investigations into the digital and FMCG markets in 2022. Following a record fine of 2.7 billion liras in 2021, in 2022 the FMCG sector was once again in the spotlight and suppliers operating in this sector were fined 878.6 million liras for their engagement in the hub-and-spoke cartel and resale price maintenance. In addition, the investigations initiated in 2021 into labour markets were also at the focus of allegations and several similar investigations were started in 2022. The number of new investigations in 2022 gives a strong signal that the TCA will focus on investigations into the labour market in coming years. At the same time, the TCA has also relied on settlement and commitment procedures adopted from EU competition law in many cases and concluded many investigations through these mechanisms, clearly showing that EU competition law is not only followed but also actively used in Turkish competition law.

Appendix 1

ABOUT THE AUTHORS

BAHADIR BALKI

ACTECON

Bahadır Balkı is known for his excellent work discipline together with his intriguing and effective defences. In the past 10 years, he has been involved in virtually every significant cartel and abuse of dominance investigation launched by the Turkish Competition Authority, concerning insurance, banking, iron and steel, the automotive industry, cement, telecommunications, broadcasting rights, ro-ro transportation, FMCG, alcoholic beverages, media audit, port services, etc. Clients have also benefited from Mr Balkı's extensive experience in global merger cases, especially in Phase II procedures, in a variety of industries (e.g., eyewear and lenses, titanium dioxide, crop protection business, iron and steel, FMCG, ground-handling, aviation, port management services, ro-ro transport, cement, film theatres).

He conducts comprehensive competition compliance programmes focusing on the details of the relevant market structure, and provides legal consultancy services on day-to-day business for his clients.

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Caner K Çeşit provides legal assistance to national and multinational clients for all matters of competition law, personal data protection law and regulatory projects. Caner focuses on investigations, negative clearance and exemption applications, merger control filings and day-to-day competition law issues, as well as conducting follow-on competition litigation. He holds a bachelor's degree from Istanbul University faculty of law and was admitted to the Istanbul Bar Association in 2014. Caner received his master's degree in capital markets and commercial law from Bahçeşehir University in 2019. He wrote his dissertation on the intersection between competition law and fintech development. Before joining ACTECON in 2020, Caner worked at a reputable competition law-orientated boutique law firm.

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