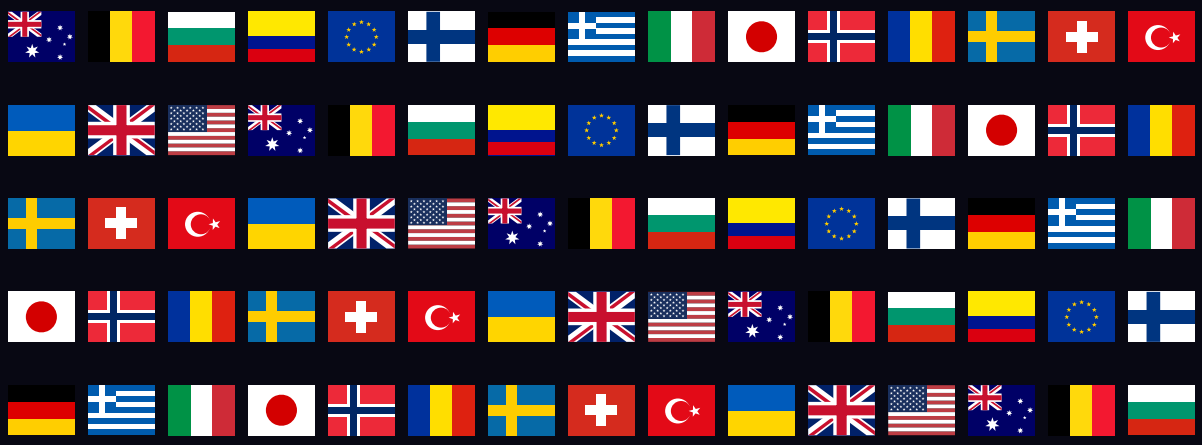
COMPETITION COMPLIANCE

Turkey



LEXOLOGY
Getting The Deal Through

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Competition Compliance

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Quick reference guide containing side-by-side comparison of local insights into Competition Compliance, including key legislation; standards and guidance for compliance programmes; how to demonstrate commitment to competition compliance; risk identification, assessment and mitigation; compliance programme review; managing risk in horizontal and vertical arrangements; market dominance; merger control; joint venture agreements; leniency programmes; investigations; settlement mechanisms; corporate monitorships; and recent trends.

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LEGAL AND REGULATORY FRAMEWORK

Key legislation

What key legislation governs competition in your jurisdiction?

Law No. 4054 on the Protection of Competition (the Competition Law) has been in force since 1994 and governs competition law in Turkey. The Board of the Turkish Competition Authority (TCA) has issued block exemption communications covering vertical restraints, research and development agreements, specialisation agreements and technology transfer agreements. Moreover, the motor vehicles and the insurance sectors have sector-specific block exemption communications. The TCA has published several regulations, communications and guidelines as well.

Law stated - 14 March 2022

Enforcement

Which authorities are charged with enforcing competition law in your jurisdiction and what is the extent of their powers?

The TCA was established in 1997. The Board is the decision-making body of the TCA. The Board is vested with special powers to enforce the competition rules regarding restrictive practices, abuse of dominance and mergers as well as drafting and enacting secondary legislation (ie, regulations, communications and guidelines) as to the implementation of the Competition Law, providing opinions on amendments to be made to the legislation with regard to the competition law, and monitoring legislation, practices, policies and measures of the other countries concerning agreements and decisions limiting competition. The TCA can enforce against local and multinational undertakings.

Law stated - 14 March 2022

Consequences of non-compliance

What are the consequences of non-compliance with competition law?

As per article 16(3) of the Competition Law, undertakings, or associations of undertakings that commit behaviour prohibited in article 4 and 6 of the Competition Law (which are the equivalent of article 101(1) and 102 of the Treaty on the Functioning of the European Union) can be subject to administrative fines of up to 10 per cent of annual gross revenue generated by the end of the financial year preceding the decision, or the financial year closest to the date of the decision if the previous year's results cannot be used. The fine is determined by the Board of the TCA.

Article 16(4) of the Competition Law provides that managers or employees of undertakings or associations of undertakings who are found to have had a decisive influence on the violation may be fined up to five per cent of the fine given to the infringer undertakings, or associations of undertakings, pursuant to article 16(3).

The Board takes the characteristics of the violation into account when determining the percentage of the fine to be imposed, and thus the consequences of an infringement depend on the facts of the specific behaviour. However, the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position set forth that the Board is entitled to impose a base fine of:

- between 2 per cent and 4 per cent for cartels; and
- between five per thousand and 3 per cent for other violations of the undertaking's turnover.

After reviewing the mitigating and aggravating factors, the Board is entitled to increase the fine's percentage up to a maximum 10 per cent of the company's turnover achieved within the previous year of the decision.

Mitigating factors include:

- providing assistance to the investigation of the violation beyond the fulfilment of legal obligations;
- that the undertaking was encouraged by public authorities or coerced by other undertakings into taking part in the violation;
- the voluntary payment of damages to those harmed;
- the termination of other violations; and
- the violation only affected a very small share within annual gross revenues.

Aggravating factors include:

- recidivism of the violation;
- maintaining the cartel after the notification of the investigation decision;
- not satisfying 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 with the investigation into the violation; and
- coercing other undertakings to take part in the violation.

In principle, the Board imposes fines on only companies participating in an infringement. The nature of proceedings is civil.

Law stated - 14 March 2022

Guidance

Do the authorities issue guidance on compliance with competition law?

The TCA welcomes and encourages the competition compliance efforts of undertakings. A competition compliance programme (CCP) is regarded by the TCA as an indicator of good faith and stands out as an effective tool in complying with competition law.

In 2011, the TCA announced the standards for compliance programmes on its website through the document titled ' Competition Law Compliance Programme '. The document aims to provide undertakings with clarification to a certain extent on the issues and concepts of competition compliance, such as the purpose and scope of CCPs, check-lists for compliance with competition legislation, the content of CCPs, corporate guides, training, regular assessment and monitoring of CCPs, and supportive practices. The document assists and provides insight to all undertakings in the process of developing their own CCPs. It has largely been inspired by EU competition law and provides advice to local businesses with structured requirements to ensure that their CCP is sound and workable. Guidelines, employee responsibility, a confidential hotline, sanctioning or rewarding mechanisms, and regular reporting are among the 'must-have' features listed in the document.

Law stated - 14 March 2022

Other legislation and relevant practices

Do any other laws outside the main competition legislation regulate competition in your jurisdiction, including any sector-specific regimes? Do they cover any other anticompetitive practices not caught by the main legislation?

Regulations that apply to the regulated markets (eg, energy and telecommunications) do not definitively exclude the application of competition rules on possible anticompetitive behaviour in event of sector-specific regulations and the competition rules overlapping. However, behaviour that contradicts sector-specific regulation will be analysed in the context of the sector-specific regulation, even if it is a conduct that can be investigated under the Competition Law. A behaviour arising from the requirements of another law may not be viewed as an infringement of the Competition Law.

Law stated - 14 March 2022

COMPLIANCE PROGRAMMES

Commitment to competition compliance

How does a company demonstrate its commitment to competition compliance?

A company may demonstrate its commitment to competition compliance through the meaningful and effective implementation of a competition compliance programme (CCP) that contains the following procedures:

- the establishment of regular dawn raid simulations and training sessions for current and future employees;
- drawing up a general checklist for all employees or departments according to their position and workflow;
- reviews and assessments of past and current practices in light of competition rules;
- the appointment of an in-house compliance officer or an external consultant responsible for the implementation of the CCP and allocation of the tasks;
- the receipt of written commitments from employees with regard to the fulfilment of their responsibilities in line with Law No. 4054 on the Protection of Competition (the Competition Law);
- the adoption and implementation of disciplinary actions for employees' breaches of the Competition Law or the CCP;
- competition law tests to measure the awareness of employees; and
- the execution of an incentive system (eg, a helpline or hotline) that encourages employees to inform the relevant person in charge, and rewards employees who contribute to the detection in advance and prevent a potential violation.

Furthermore, to increase their compliance levels, companies may prefer to design a technological infrastructure enabling them to detect communications that raise competition law concerns. The infrastructure may require a list of keywords that must be designed and updated in line with the structure of the relevant market.

In particular, the undertaking's management showing that the CCP and compliance have their complete support is a significant factor in developing a culture of compliance among team members.

Law stated - 14 March 2022

Government compliance standards

Is there a government-approved standard for compliance programmes in your jurisdiction?

There is no government-approved standard for compliance programmes in Turkey.

Law stated - 14 March 2022

Risk identification

What are the key features of a compliance programme regarding risk identification?

The CCP helps in identifying risks (legal, financial and reputational) by outlining simple and clear 'dos and don'ts' lists for employees and management. Risk identification entails at least the following essential features:

- conducting market research, paying special attention to the recent decisions of the Board of the Turkish Competition Authority (TCA);
- familiarisation with the structure of the markets in which the company operates and the competition law concerns in those markets; and
- keeping track of past and current competition law investigations in Turkey and abroad.

Law stated - 14 March 2022

Risk assessment

What are the key features of a compliance programme regarding risk assessment?

A risk assessment process would typically start with a meeting of the companies' management regarding the identification of risky areas that may be associated with the companies' practices. The following actions are also significant:

- the enhancement of communications with employees on the risks related to anticompetitive practices;
- a review of companies' agreements or practices (eg, exclusivities, pricing policies, non-compete obligations, duration and potential impact on the market);
- an assessment of companies' activities, along with their affiliates' practices and current and future business channels from the perspective of both the product and the territorial scope;
- categorisation of the identified risks in accordance with the priority level (ie, low, medium or high); and
- the preparation and presentation of a report focusing on the main findings and risk mitigation strategies.

An appointed compliance officer or an established compliance department should monitor and oversee the risk assessment process.

A company's method of handling findings that are deemed sensitive from a competition law perspective is key to this process as it indicates a company's devotion to its compliance efforts. The CCP documents published by the TCA encourage businesses to end infringing practices and notify the competent authorities.

Law stated - 14 March 2022

Risk mitigation

What are the key features of a compliance programme regarding risk mitigation?

Risk mitigation typically involves monitoring, reporting and training protocols, namely:

- dawn raid simulations, which entail both a review of communications and a brief educational session for employees about how the TCA dawn raids can be dealt with;
- general competition law training, which includes, among other things, sector-specific examples of how competition rules may be encountered in daily practice;
- a CCP report, which consists of a strength, weaknesses, opportunities, and threats analysis; and
- a helpline or hotline through which employees may request advice from a competition law perspective and inform a person in charge of a potential violation.

Employees making written commitments to carry out their activities in compliance with the CCP may also be useful in increasing their awareness.

Furthermore, regular assessment of the compliance level by competition law consultants and updating of the CCP (eg, on the basis of amendments to the applicable laws and developments in the TCA's approach) are essential. The participation of the company's competition law consultants in the company's executive meetings or meetings of the association of which the company concerned is a member, or those including consultants' evaluations on the agenda of those meetings, will also be beneficial in minimising any risks associated with competition rules.

If the management becomes aware of a potential infringement of the competition rules, it should immediately end the violating practice, comprehensively assess the case and inform the TCA if necessary (a leniency application or full active cooperation with the TCA may be considered for eliminating or minimising the risk of facing a fine).

Law stated - 14 March 2022

Compliance programme review

What are the key features of a compliance programme regarding monitoring and review of business practices?

A review encompasses features such as:

- assessing the level of competition law awareness of employees (eg, through monitoring employees' activities with or without a prior notice); and
- amending the CCP rules and procedures in line with developments in the competition law.

Regular simulations of dawn raids (particularly conducted without notice) by competition law consultants are essential in ensuring employees' compliance with competition rules and in assessing the established compliance culture.

Law stated - 14 March 2022

Effect on penalties

Will an established competition compliance programme have any effect on penalties?

The Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position provides a non-exhaustive list of mitigating factors that apply to the assessment of a fine's amount. The implementation of a CCP is not listed among them. The TCA practice shows that, although CCPs are encouraged (and in some cases may be regarded as the undertaking's endeavour to act in compliance with competition law or accepted as a behavioural remedy in merger cases), the mere existence of a CCP cannot be regarded as the sole indicator of an undertaking's compliance with competition law. Moreover, as referred to in the Industrial Gas and Banking decisions, the TCA stated that the mere presence of a CCP does not constitute a mitigating factor in the determination of the amount of administrative monetary fines. Therefore, having a CCP will not de jure affect fines to be imposed by the TCA; however, a CCP may have a positive influence on the TCA in the course of its evaluations regarding the infringement allegation.

In its Eczacıbaşı Baxter/Genzyme decision, for the contract which included Eczacıbaşı's acquisition of the right to distribute a product belonging to Genzyme, it has been stated that within the framework of the CCP, to which Eczacıbaşı Baxter was party aimed to audit competition law risks. Thus, according to the CCP, in order not to take legal risks, the application for negative clearance or exemption, which was the subject of the decision, was made. As a result, no significant fine was rendered. In its Unilever decision in 2012, the TCA showed a positive approach to Unilever's competition compliance efforts. During dawn raids as part of the investigation into alleged exclusivity practices in the ice cream market, the TCA found a document with reference to Unilever's CCP and regular competition law training. The existence and content of the document illustrated Unilever's endeavour to act in compliance with competition law, and to some extent served as grounds for the TCA's decision not to initiate a fully-fledged investigation. The TCA took similar approaches in its Efes decision in 2012 and its Frito Lay decision in 2013, emphasising that CCPs constitute one of the TCA's significant requirements, however, the mere existence of CCPs cannot be regarded as a sole indicator of an undertaking's compliance with competition rules.

Law stated - 14 March 2022

HORIZONTAL DEALINGS

Arrangements with competitors

How does competition law govern arrangements with competitors?

Arrangements between competitors are more likely to attract the attention of the Turkish Competition Authority (TCA) regardless of their object or effect. Law No. 4054 on the Protection of Competition (the Competition Law) prohibits agreements that restrict competition either by object or by effect. In this context, agreements are defined very broadly regardless of the form or whether the parties explicitly or tacitly agree. The most common examples of anticompetitive agreements are cartels involving setting prices, restricting output, allocating markets or customers, or bid rigging.

Additionally, the direct or indirect exchange of competitively sensitive information (such as sales conditions, pricing policies, customers, production levels, costs and capacity) is also considered to be in the scope of the aforementioned prohibition as it reduces or removes uncertainty regarding the current or future behaviour of competitors.

Therefore, any communication or business with a competitor shall carefully be carried with the assistance of competition law consultants of the undertaking concerned.

Law stated - 14 March 2022

Exchanging information

Can a company exchange information with its competitors?

Exchanges of competitively sensitive information among rivals may be deemed anticompetitive under certain circumstances (undertakings carrying out such behaviour may also be considered to be cartelist, if their objective is to fix prices or quantities).

Commercial information (eg, prices, quantities, customers, costs, turnover, sales, purchases, capacities, product characteristics, marketing plans, risks, investments, technologies, and research and development programmes) is considered to be competitively sensitive. Exchanges of aggregated data (when it is sufficiently difficult to identify individual data of a particular undertaking) or historical data (as opposed to current or future data) are much less likely to lead to a competition concern.

An undertaking may exchange information with its competitors if the exchange leads to efficiency gains that are passed on to consumers and outweigh the restrictive effects on competition.

The framework for information exchange among competitors is also shaped by the many precedents of the TCA in different industries and forms. These detailed precedents are the outcome of negative clearance and exemption applications to the TCA (which have mostly been submitted by industry associations).

Law stated - 14 March 2022

Cartel behaviour

What form must behaviour take to constitute a cartel?

Cartels are normally defined as agreements restricting competition or concerted practices between competitors involving fixing prices, allocating customers, providers, territories or trade channels, restricting the amount of supply or imposing quotas, and bid rigging (as listed under the Regulation on Fines and the Leniency Regulation).

According to the Guidelines on Horizontal Cooperation Agreements by the TCA, the exchange of competitively sensitive information among rivals (eg, prices, output or sale amounts) is also generally considered as cartel conduct if this action is aimed at fixing prices, quantities or both. On the other hand, there are precedents whereby the exchange of such information was not deemed to be cartel conduct and was categorised under other infringements.

In practice, cartels are very unlikely to be formed in writing. Any act or concerted action between competitors preventing or restricting competition, including any (even unsuccessful) attempts to run a cartel shall be regarded as a cartel if there is sufficient evidence of a solid intention to commit to the action. The issue of whether an anticompetitive agreement has (fully or partially) been implemented may only be relevant in determining the gravity of the fines to be imposed on the parties, rather than whether article 4 of Law No. 4054 on the Protection of Competition (the Competition Law) has been violated.

To give an example, the TCA imposed its highest fine on five biggest supermarket chains and one supplier. The investigation was started in 2020 over food and hygiene products price increases. In October 2021, Turkey's five biggest supermarket chains (BİM, Migros, Carrefour, Şok and A101) and one supplier (Savola) were fined a total of 2.7 billion lira for violating competition law rules. It was alleged that the undertakings had coordinated their prices directly or via suppliers in a manner that was against the interests of consumers and had entered into cartel-like agreements or coordinated actions.

Another significant cartel case is the Novartis and Roche decision a fine of 278.5 million lira was rendered for colluding to promote the usage of eye treatment Lucentis over its cheaper alternative Altuzan. Novartis and Roche were also

fined 182.6 million euro and 444 million euro by the Italian Competition Authority and the French Competition Authority, respectively. Furthermore, a separate investigation into agreements between Novartis and Roche for eye treatment drugs was conducted by the Spanish Competition Authority.

Law stated - 14 March 2022

Suggested precautions

What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

The following precautions may be taken:

- informing the internal compliance officer in charge or external competition law consultants;
- reviewing and assessing the concerned arrangement from a competition law perspective;
- avoiding exchanges of sensitive information when attending any meeting with competitors (especially without a pre-examination of the agenda);
- preparing meeting notes and clearly identifying the issues that have been discussed with competitors;
- assessing the level of the risk associated with the concerned arrangement; and
- applying to the TCA for negative clearance or an exemption.

Law stated - 14 March 2022

Exemptions and defences

What exemptions, defences or other circumstances will allow otherwise anticompetitive agreements with competitors to escape sanction?

Cartels may be exempted from sanctions following the leniency application if certain conditions under the Leniency Regulation are satisfied. In those cases, the lenient party may benefit either from full immunity or from a reduction in fines.

Applying for leniency is possible until the investigation report by the TCA is served. The first undertaking to submit its application along with the evidence disclosing a cartel, before the investigation report is served, may benefit from full immunity unless the applicant coerced other undertakings to participate in the cartel. All subsequent applicants for leniency may only benefit from a reduction in fines. In this context, active cooperation with the TCA should last until its final decision and, thus, is indispensable.

Accordingly, the leniency applicant shall:

- immediately end its involvement in the cartel (except when the case team on the ground requests otherwise, for example, if detecting the cartel would be complicated);
- submit information and evidence in respect of the cartel, including:
  - all types of books, documents, information and other resources that may be used to substantiate the meetings concerning the cartel, including invoices, notes, organisers, meeting minutes, internal and external letters, travel records, reports, working texts tables, electronic records, computer printouts, credit card statements, and detailed phone records; and
  - products affected by the cartel, duration of the cartel, names of the undertakings participating in the cartel, dates, locations and the participants of cartel meetings;
- keep its application confidential;

- actively cooperate with the TCA throughout the entire procedure and in line with the TCA's instructions; and
- not conceal or destroy information or evidence related to the alleged cartel.

In terms of the individual exemption, the arrangement between competitors must:

1. ensure new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services;
2. ensure consumers must also benefit from them;
3. not eliminate competition in a significant part of the relevant market; and
4. not limit competition by more than what is required for achieving the goals set out in (1) and (2).

Law stated - 14 March 2022

VERTICAL DEALINGS

Vertical agreements

How does competition law govern vertical arrangements with commercial partners?

Article 4 of Law No. 4054 on the Protection of Competition (the Competition Law) is the equivalent of article 101(1) of the Treaty on the Functioning of the European Union. It sets forth 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. Vertical agreements mean agreements concluded between two or more undertakings operating at different levels of the production or distribution chain, with the aim of purchasing, selling or reselling particular goods or services.

Resale price maintenance and online sales ban raise the biggest risks of non-compliance with the Competition Law. The Guidelines on Vertical Agreements contains explanations regarding vertical restraints.

In the recent years, Groupe SEB violated article 4 of the Competition Law by determining the resale prices of the final sales points and restricting the sales made on the internet sites. Another breach of article 4 that can be mentioned is when DYO received an administrative fine of 21 million lira since it determined resale prices and restricted customers and regions.

Vertical restraints in agency agreements may not restrict competition in case necessary conditions are satisfied. Since the limitations placed on the agency concerning the agreements it mediates or concludes on behalf of its client are not generally under the scope of article 4 of the Competition Law, they are, in principle, not a subject of the exemption regime. The fact that the agreement signed is called an agency agreement does not, by itself, mean that the agreement in question is not covered by article 4 of the Competition Law. In this situation, the factor which determines whether or not the relationship between the undertakings falls under article 4 of the Competition Law is whether the agency takes a commercial or financial risk in relation to the activities assigned to it by its client. In case the agency does not assume any financial or commercial risks due to the agreement it concludes or mediates, then the relationship between the agency and its client is beyond the scope of article 4 of the Competition Law. In such a case, the buying or selling activities of the agency is considered part of its client's activities. The client undertaking, as a result of the agency service it receives, will gain the right to determine the economic activities of the agency in this area, in exchange for taking the financial and commercial risks. In the opposite situation, the agency undertakes all of those risks itself and therefore would need to freely set its own marketing strategy in order to ensure a return of its investments. Under those circumstances, the agreement in question may fall under article 4 of the Competition Law and may be assessed under the Communiqué.

Agency contracts generally also include provisions which regulate the relationship between the agency and the client.

These agreements can include restrictions which prevent the client from appointing another agency for the relevant transactions at the customer or regional level (exclusive agency clause) or prevent the agency from serving as an agency or distributor for competing undertakings (non-competition clause). Exclusive agency clause only concerns intra-brand competition and does not generally lead to anti-competitive effects. However non-competition obligations, including those related to the period following the termination of the agreement, concern inter-brand competition and may lead to anti-competitive effects if they create a foreclosure effect in the relevant market where the contracted goods and services are being sold; as a result, this provision may fall under article 4 of the Competition Law.

Law stated - 14 March 2022

Exemptions and defences

What exemptions, defences or other circumstances will allow otherwise anticompetitive vertical agreements or restrictions to escape sanction?

Vertical agreements, which enable undertakings to establish the production and distribution process in the best possible way and which, as a result, ensure an increase in inter-brand competition in the market, are among the main groups of agreements that should be exempt from the prohibition of article 4 of the Competition Law. Vertical arrangements may be exempted from sanctions if they fall within the scope of one of the relevant block exemption communications, namely those on vertical agreements, research and development agreements, vertical agreements and concerted practices in the motor vehicles sector, and technology transfer agreements. Alternatively, an individual assessment of the exemption under article 5 of the Competition Law shall be conducted.

In terms of the individual exemption, the arrangement must:

1. ensure new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services;
2. ensure consumers must also benefit from them;
3. not eliminate competition in a significant part of the relevant market; and
4. not limit competition by more than what is required for achieving the goals set out in (1) and (2).

If there is uncertainty on which of the exemptions could be granted, it is highly recommended to approach the TCA to avoid any risk of being fined. The TCA published in November 2021 its Communiqué No. 2021/4 on the Amendments on the Block Exemption Communiqué (No. 2002/2) for Vertical Agreements which narrowed the vertical block exemption's scope. The vertical block exemption regime exempts certain vertical agreements from the scope of article 4 of the Competition Law depending on (1) the lack of hardcore restrictions and (2) the supplier's or buyer's market share. The previous version of vertical block exemption would apply on the condition that the market share held by the supplier does not exceed 40 per cent of the relevant market on which it sells the goods or services. The limit of 40 per cent was lowered to 30 per cent. Besides that, for vertical agreements that provide for exclusive supply obligations, the exemption will apply as the market share held by the buyer does not exceed 30 per cent of the relevant market on which it purchases the contract goods or services. Since this amendment will deprive undertakings that have a market share between 30 per cent and 40 per cent in the relevant market from the security provided by the previous legislation, the TCA will grant these undertakings a transition period of six months.

There is no obligatory prior notification mechanism regarding vertical agreements in Turkey.

In its decision in 2017, the TCA fined Booking.com approximately 2.5 million lira for violating the Competition Law for its 'best price guarantee' and wide most-favoured-nation (MFN) practices. It was found that agreements (particularly MFN clauses) concluded between Booking.com and accommodation facilities were outside the scope of the Block

Exemption Communiqué on Vertical Agreements, owing to the market share threshold. An individual exemption could not be granted either as the practices did not meet the exemption conditions set out by article 5 of the Competition Law. In 2021, since the Holiday Package Sales Cooperation Agreement concluded between Turkish Airlines and Erka Turizm meet the condition of article 5 of the Competition Law, the TCA granted individual exemption to the application regarding the presentation of holiday packages to consumers, which will be created by Erka Turizm by using a holiday package brand to be created by Turkish Airlines throughout the contract period.

Law stated - 14 March 2022

DOMINANT POSITION

Determining dominant market position

Which factors does your jurisdiction apply to determine whether a company holds a dominant market position?

The following factors are applied by the Turkish Competition Authority (TCA) to determine if a company holds a dominant position:

- the market shares of the undertaking concerned and its competitors (the TCA's established practice is to consider undertakings with less than 40 per cent of the market share as less likely to be dominant);
- barriers to entry and expansion in the relevant market;
- legal and administrative barriers;
- economic barriers;
- barriers stemming from the characteristics of the undertaking in question (eg, possession of key inputs and access to special information);
- conduct in the market (eg, large-scale investments, which existing or potential competitors would have to match); and
- buying power.

Law stated - 14 March 2022

Abuse of dominance

If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance?

The following behaviour may constitute abuse of market dominance:

- excessive or predatory pricing and complicating competitors' activities via pricing policy;
- price or margin squeezing;
- tying;
- exclusivity rebates;
- exclusivity or single branding arrangements;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby discriminating;
- limiting production, markets or technical development to the prejudice of consumers;
- restricting or cutting off the supply of goods to customers or competitors without reasonable grounds;
- preventing other undertakings from entering into the market and complicating their activities in the market by using financial, technological or IP superiority in a market; and
- most-favoured customer (MFC) practices.

This list is not exhaustive. The basis of the evaluation by the TCA in this respect is whether the behaviour of the dominant undertaking leads to actual or potential anticompetitive foreclosure.

The TCA's decision taken in 2016 in relation to the popular Turkish online food-ordering platform Yemeksepeti stated that the undertaking abused its dominant position because of its MFC clauses, which prevented competitors from providing better or different conditions (eg, prices, discounts, promotions, menus, payment options and delivery regions), as well as preventing advertisements of competing platforms by offering promotions to restaurants in return for refusing to work with competing platforms. The undertaking was fined 427,977 lira and was ordered to remove MFC clauses from the agreements.

The TCA's decision taken in 2017 in relation to the raki (a traditional alcoholic drink) producer Mey İçki is another example of abuse of dominance. Providing financial benefits in relation to the shelf positioning and product layout of the raki category within the traditional channel sales points and loyalty rebates, in addition to other practices, were deemed as exclusionary. The company was fined 155,782,969 lira, corresponding to 4.2 per cent of Mey İçki's turnover. The decision lists in detail a number of actions that the dominant company needs to undertake or refrain from.

The TCA determined another abuse of dominance in 2017 in relation to the branded sunglasses wholesaler Luxottica. Luxottica was fined 1,672,647 lira for abuse of dominance through rebate practices foreclosing the market to its competitors.

The TCA published its decision in February 2018 in relation to the electricity sector and imposed a total fine of 38 million lira on the following undertakings for abuse of dominance.

In its decision of 1 October 2018, the TCA fined Sahibinden.com (an online platform service provider) 10,680,425.98 lira for abuse of dominance via excessive pricing in the markets for online platform services for real estate sales and rentals and online platform services for vehicle sales. However, this decision was annulled by the Sixth Chamber of Ankara Administrative Court on the basis that the TCA should conduct a thorough analysis of the substitutability, the market structure, the level of competition in the digital markets and welfare standards as well as the cost price. The Court further referred to the Council of State with regard to the standard of proof and emphasised that any violation should be based on proof that is explicit and beyond any doubt.

The TCA delivered two abuse of dominance decisions that are both related to the economic integrity comprising Google LLC, Google International LLC and Google Reklamcılık ve Pazarlama Ltd Şti (Google). In its Android decision in September 2018, the TCA imposed an administrative fine amounting to 93,083,422.30 lira on the basis that Google abused its dominant position by tying Android with its search and WebView services as well as concluding agreements (revenue share agreements) with device manufacturers to incentivise the exclusive usage of those services. Google was also required to comply with a set of obligations to end Google's anticompetitive conduct within six months. Subsequently, Google made two submissions (a general draft of the measures to be taken to eliminate the infringing conducts and a compliance package); however, the TCA concluded in its decision on 7 November 2019 that Google's compliance package was not sufficient for the fulfilment of its obligations and to be fully compliant with competition rules. Accordingly, the TCA decided to impose a daily fine of 0.05 per cent of the tech company's turnover generated in Turkey, starting from the end of the six-month period. Google was obliged to pay daily fines until it meets all the obligations fully. In this context, Google submitted a revised compliance package, which has been deemed sufficient to meet the obligations referred to in the Android decision. That said, the TCA has not refrained from imposing a daily fine for the period between 7 November 2019 and 6 January 2020 (60 days) in its decision of 9 January 2020.

In its decision in February 2020, the TCA decided to impose an administrative fine amounting to 98,354,027.39 lira on Google for its abuse of its dominant position in the general search services market and comparison-shopping market by placing its competitors' shopping comparison services in a disadvantaged position, complicating the activities of its competitors, and distorting competition in the shopping comparison services market.

In 2021, Unilever was fined of approximately 480 million lira for creating a de facto exclusivity by preventing the sale of competing products at its final sale points which resulted in the violation of article 4 and article 6 of Law No. 4054 on the Protection of Competition (the Competition Law). Since Unilever has a dominant position in the industrial ice cream, impulse ice cream and take-home ice cream markets, by using a discount system, imposing a non-compete obligation previously prohibited by the TCA and imposing an exclusivity clause in the loan agreements regarding the use of Unilever freezers, Unilever abused its dominant position.

Finally, conventional markets such as port management services were also investigated by the TCA which resulted in a fine of 12 million lira to operator Antalya Port for abusing its dominant position by imposing excessive prices in the container handling market.

Law stated - 14 March 2022

Exemptions and defences

What exemptions, defences or other circumstances will allow a dominant company's otherwise abusive conduct to escape sanction?

In the application of article 6 of the Competition Law, the TCA will take into consideration any claims put forward by a dominant undertaking that its conduct is justified. Claims of justification examined by the TCA may be classified under the categories of objective necessity and efficiency.

When assessing an objective necessity justification, the TCA will first see whether the conduct protects a legitimate benefit and whether the conduct is indispensable for achieving the relevant benefit. As well, in order to consider the examined conduct objectively necessary, this conduct of the dominant undertaking must be caused by external factors (such as health and safety requirements set out by relevant public authorities) and the undertaking must not restrict competition more than necessary when protecting the benefit in question. The burden of proof for demonstrating that the conduct under examination is indispensable for protecting a legitimate benefit lies with the dominant undertaking.

Law stated - 14 March 2022

MERGER CONTROL

Competition authority approval

Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

The Turkish Competition Authority (TCA) must be notified of concentrations between undertakings that will lead to a lasting change of control and that exceed certain turnover thresholds. 'Control', which could be acquired on a de jure or de facto basis, is defined as the possibility of exercising decisive influence on an undertaking through rights, agreements or any other means. Recently the TCA amended its merger legislation and the turnover thresholds have been modified. In fact, on 4 March 2022 the TCA issued the Communiqué No. 2022/2 which modified the Communiqué No. 2010/4. With the introduction of the Communiqué No. 2022/2, the new thresholds are as follows:

- the aggregate Turkish turnover of the transaction parties exceeding 750 million Turkish lira and the Turkish turnover of at least two of the transaction parties each exceeding 250 million Turkish lira; or
- the asset or business subject to acquisition in acquisition transactions, and at least one of the parties of the transaction in merger transactions have a turnover in Turkey exceeding 250 million Turkish lira and the other party of the transactions has a global turnover exceeding three billion Turkish lira.

In addition to the new thresholds the TCA introduced an exception to these notification thresholds for the acquisitions of 'technology undertakings' according to which 'the TRY 250 million thresholds that are mentioned under (a) and (b) in the first paragraph, is not applicable in the acquisitions of 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 Turkey'. Technology undertakings are defined as undertakings active in areas of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals and health technologies. Since the article specifically refers to the '250 million thresholds', for the transaction to be notifiable, we are of the opinion that the turnover of the acquirer will be checked to see whether it exceeds the '750 million Turkish turnover' threshold in (a) or the '3 billion global turnover' threshold in (b).

The average buying exchange rate of the Central Bank of Turkey for the financial year in which the turnover is generated is taken into consideration in the calculation of the turnover.

For the purpose of calculating turnovers, transactions executed between the same persons, parties or undertakings or by the same undertaking in the same relevant product market (creeping acquisitions) are considered to constitute a single transaction if they are realised within three years.

The calculation of turnovers must be based on net sales, however there are specific rules regarding the calculation of financial institutions' turnovers, including banks and insurance, factoring and financial leasing companies. The parties to the concentration or their representatives can file the notification jointly or separately. If separately, the notifying party must inform the other party a notification has been issued.

Finally, the notification form regarding mergers and acquisitions has been rearranged to be converted into electronic format. In the near future, it will be possible to complete and submit the form completely electronically. With this arrangement, it is planned to significantly reduce the stationery burden in notifications consisting of written forms and comprehensive annexes, but also to complete the missing information identified in the notifications and requested by the TCA in a more practical and rapid manner through the same electronic platform, and to shorten the permit process for undertakings. The second fundamental change in the notification form is that the information requested in the form is classified under the headings of transaction-related information, information about the parties, information about the market and joint ventures. By bringing together related information, it is aimed that the notifying parties complete the necessary information in a more systematic way, and on the other hand, the Institution experts who will evaluate the form will more easily identify the information they are looking for. Finally, some requested information is detailed in order to make the notification completely and thus shorten the permit process. Footnotes and explanations are included where necessary in order to ensure that the parties making the notification can complete the form in the desired manner and level.

In 2021, the TCA conditionally cleared the merger between Obliet.com and Biletal.com which are two undertakings operating in the online comparative ticket sales market. As for the food industry, CLA Milk and Dairy Products was authorized to take over assets related to the factories producing SEK branded milk and dairy products belonging to Tat Gıda. Finally, in the online platforms industry, Getir started partnership negotiations for the shopping platform N11 in August 2021. In the beginning of 2022, the TCA has approved the purchase of some of the shares of N11 with a capital increase which paved the way for Getir to purchase an undisclosed portion of N11.com.

Law stated - 14 March 2022

Timing

How long does it normally take to obtain approval?

The TCA review procedure consists of two stages: a preliminary review (Phase I) and an investigation (Phase II).

Phase I consists of a preliminary review that lasts one to two months. The Board of the TCA may either approve the concentration or order further investigation into the transaction at the end of Phase I. Following receiving the notification, the TCA will begin a preliminary examination within 15 calendar days, after which it will decide to clear the transaction or to further examine its possible effects by initiating a Phase II investigation. Within the 15-calendar day period, the TCA may request information from the transaction parties or third parties. The 15-calendar day period restarts following the receipt of the requested information.

If the Board does not issue a notification about its decision nor take any action with regard to the notified transaction within 30 calendar days of the notification date, it is considered to have implicitly approved the transaction.

A Phase II investigation is initiated if the notified transaction would result in a significant reduction of effective competition within a market for goods or services in the entirety or a portion of Turkey, particularly in the form of creating or strengthening a dominant position. A notification that a Phase II review is to be carried out is sent to the parties involved within 15 calendar days following such a decision. The parties then have 30 calendar days to submit their first written defence. The TCA must issue its Phase II report within six months (which is extendable for another six months) after initiating a Phase II investigation. In practice, the TCA generally issues Phase II reports within the first six months.

After receiving a Phase II report, parties have 30 calendar days (extendable by 30 calendar days) to submit a second written defence. The TCA issues its additional opinion within 15 days (extendable by 15 calendar days) of receiving the second written defence. The parties may respond to the additional opinion within 30 calendar days (extendable by 30 calendar days), and this closes the investigation stage. Unless an oral hearing is held, the Board renders its decision within 30 calendar days from the conclusion of the investigation stage. The Board generally decides whether a Phase II transaction shall be cleared or not within a year of a transaction being notified of the investigation. In this regard, the best timing for filing a notification depends on the specific circumstances and conditions of the transaction.

Law stated - 14 March 2022

Impact of merger clearance

Does merger clearance by the authority constitute confirmation that the terms in the documents comply with competition law?

The TCA's clearance also covers ancillary restrictions that are proportionate, directly related and necessary for the concentration, and only restrict the parties involved (eg, non-compete, confidentiality and non-solicitation clauses). If, following the clearance, the restraints are found not to be directly related and necessary, the company concerned may face an investigation.

Law stated - 14 March 2022

Exchanging information before completion

Are there limits on the information that can be exchanged with the other party before completion of a merger?

Although there is no specific limitation, the sharing of competitively sensitive information before approval might be considered an element of gun-jumping. Therefore, the parties should avoid exchanging detailed information between themselves.

Law stated - 14 March 2022

Failure to file

What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any notable recent cases?

The amount of an administrative fine for failing to file or delaying in filing varies depending on whether the transaction is found to result in a significant reduction of effective competition within a market for goods or services in the entirety or a portion of the country, particularly in the form of creating or strengthening a dominant position. If the result is a significant reduction, a fine of up to 10 per cent of the turnover generated by the end of the preceding fiscal year is issued. If there is no significant reduction, a fine of 0.1 per cent of the turnover generated by the end of the preceding fiscal year is issued.

If the TCA is not notified of a transaction that is subject to its authorisation and it violates article 7 of the Law No. 4054 on the Protection of Competition, the Board of the TCA will order the concerned transaction to be terminated and the situation prior to the transaction to be restored. In this regard, the Board is empowered to:

- order the return of all the seized assets within a certain time period or, if this is not possible, the assignment and transfer to third parties of the seized assets;
- prohibit the acquiring persons from taking part in the management of the acquired undertakings until the assignment of the seized assets; and
- take any other measure deemed necessary.

The fine is imposed on both parties in mergers and on the acquirer in acquisitions. In transactions in which a joint venture is established, all parties are deemed as acquirers, and fines are imposed accordingly.

Examples of the TCA's decisions with regard to the closing of the transaction before the submission of notification or failure to do so are as follows:

- Total/Cepsa decision in 2006;
- CVR Inc/Inco Ltd decision in 2007;
- Tekno İnşaat decision in 2012;
- DSG European Investment Ltd decision in 2013;
- Labelon Group/A-Tex Holding decision in 2016;
- Johnson Controls International plc/Brookfield Asset Management Inc. decision in 2020; and
- the creation of IONITY Holding GmbH & Co. KG by BMW AG, Daimler AG, Ford Motor Company and Dr. Ing. h.c. F. Porsche Aktiengesellschaft decision in 2020.

Law stated - 14 March 2022

JOINT VENTURES

Competition authority approval

Are joint ventures required to seek clearance from the competition authority?

The formation of a joint venture that would permanently fulfil all of the functions of an independent economic entity constitutes an acquisition transaction, and the undertakings involved are required to seek clearance for the transaction from the Turkish Competition Authority (TCA) if the relevant turnover thresholds will be exceeded.

Law stated - 14 March 2022

Joint venture arrangements

When will joint venture arrangements fall within the scope of competition law?

The full-functionality criterion is the basic requirement for the application of the Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board on joint ventures established by the parties in cases where the joint venture is created as a greenfield operation or the parties contribute assets to the joint venture which they previously owned individually. In other words, in these circumstances, the joint venture must fulfil the full-functionality criterion in order to constitute a transaction under article 7 of Law No. 4054 on the Protection of Competition (the Competition Law). In order to be considered full-function, a joint venture must have the following characteristics:

- have sufficient resources to operate independently;
- the ability to undertake activities beyond one specific function for the parents;
- independence from the parent companies in sales and purchase activities; and
- operate on a lasting basis.

A non-full-function joint venture agreement might be considered to be under the scope of article 4 of the Competition Law (article 4 is the equivalent of article 101(1) of the Treaty on the Functioning of the European Union).

Law stated - 14 March 2022

LENIENCY

Leniency programmes

Is a leniency programme available to companies or individuals who participate in a cartel or other anticompetitive conduct in your jurisdiction?

Cartelist may be exempted from sanctions following an undertaking's application for leniency if certain conditions under the Regulation on Active Cooperation for Detecting Cartels (the Leniency Regulation) are satisfied. In those cases, the lenient party may benefit either from full immunity or from a reduction in fines.

A leniency application may be made at any time before the investigation report by the Turkish Competition Authority (TCA) is served. The first undertaking to submit its application along with the evidence disclosing a cartel, before the investigation report is served, may benefit from full immunity unless it coerced other undertakings into participating in the cartel. All subsequent applicants for leniency only benefit from a reduction in fines. In this context, an undertaking should actively cooperate with the TCA until the authority's final decision is made, thus making it indispensable.

Accordingly, the leniency applicant should:

- immediately end its involvement in the cartel (except when the assigned unit on the ground requests otherwise, for example, if detecting the cartel would be complicated);
- submit information and evidence in respect of the cartel, including:
  - all types of books, documents, information and other resources that may be used to substantiate the meetings concerning the cartel, including invoices, notes, organisers, meeting minutes, internal and external letters, travel records, reports, working texts, tables, electronic records, computer printouts, credit card statements and detailed phone records; and

- products affected by the cartel, duration of the cartel, names of the undertakings participating in the cartel, dates, locations and the participants of cartel meetings;
- keep its application confidential;
- actively cooperate with the TCA throughout the entire procedure and follow the TCA's instructions; and
- not conceal or destroy information or evidence related to the alleged cartel.

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

Law stated - 14 March 2022

Beneficiaries of leniency

Can the company apply for leniency for itself and its individual officers and employees?

As stated under the Guidelines on Active Cooperation, in the case of an application by an undertaking, all managers and employees of the applicant who admit to the existence of the infringement and enter into active cooperation may benefit under the Regulation. Therefore, it is not necessary for an undertaking to submit a list of managers and employees who can benefit from immunity from or a reduction in fines.

Accordingly, there are no barriers for previous managers and employees benefiting from an application filed by an undertaking that was their employer.

Law stated - 14 March 2022

INVESTIGATION

Commencement of investigation

How is an investigation into a suspected breach of competition law started?

Within 10 days following the case team submitting a preliminary inquiry report to the Board of the Turkish Competition Authority (TCA), the Board convenes in order to evaluate the information obtained and make a decision and decides on whether or not to open an investigation. If the Board decides that an investigation shall be conducted, it designates the rapporteur or rapporteurs who shall conduct the investigation under the supervision of the head of the department concerned. The TCA notifies the parties concerned of the investigation within 15 days of issuing the decision of the initiation of an investigation and requests that the parties submit their first written pleas within 30 days. In order to initiate the first written plea period granted to the parties, the TCA is required to send this notification letter to the parties concerned, accompanied by adequate information as to the type and nature of the claims.

Please note that the TCA may order a full-fledged investigation without conducting a preliminary inquiry.

Law stated - 14 March 2022

Limitation period

What are the limitation periods for investigation of competition infringements?

As competition law infringements are classified as misdemeanours, the Turkish Misdemeanor Act's eight-year limitation period applies.

On the other hand, the TCA must conclude investigations within six months. If it is deemed necessary, the TCA may

grant a six-month extension, on a one-time-only basis.

Law stated - 14 March 2022

Information-gathering powers

What powers does the competition authority have to gather information?

The TCA has the following information-gathering powers.

Requests for information

The TCA may send requests for information (RFIs) to undertakings under investigation, other undertakings or public institutions to collect additional information regarding the investigated undertakings' activities or regarding the sector in general. It is crucial to respond correctly and properly to these RFIs since these answers will have an influence on the TCA's opinion and evaluation. In case incomplete, false or misleading information or document is provided, or information or document is not provided within the specified time or at all, the Board shall impose on undertakings an administrative fine by 0.1 per cent of annual gross revenue of undertakings which generated by the end of the financial year preceding the decision and which would be determined by the Board.

Conducting dawn raids

The TCA has the right to conduct dawn raids on the undertakings' premises to obtain further information over the investigated matter. Overseeing the inspections and managing this process should be carried out carefully to prevent misunderstandings and fines that may arise from hindering the dawn raids (by 0.5 per cent of their gross revenue).

Evaluating additional comments by the undertakings

Undertakings may submit additional comments and arguments to the TCA's attention, where necessary, with a view to providing them with a clear picture of the matter under scrutiny. Additional comments are particularly important to prevent misunderstandings that may negatively affect the TCA's opinion over the investigated matters, as well as the collected documents.

Law stated - 14 March 2022

Dawn raids

For what types of infringement will the competition authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

The TCA frequently carries out dawn raids regardless of the nature of the alleged infringement. Unannounced on-site inspections are used both at the pre-investigation and investigation stages.

The TCA may search the premises of the undertaking subject to investigation. The TCA officials do not need authorisation from a court, but they must obtain authorisation from the TCA's president defining the scope of the investigation. An administrative fine will be imposed if incorrect information is provided. Authorisation from the court is required only if the undertaking concerned refuses to allow the dawn raid.

The TCA's officials may, under article 15 of Law No. 4054 on the Protection of Competition (the Competition Law):

- enter the undertakings' premises and means of transport;

- access electronic devices, such as computers, mobile phones and laptops;
- examine and take copies of the books and other business records; and
- ask any representative or employee for explanations about facts or documents.

The Guidelines on the Examination of Digital Data during On-Site Inspections explains the procedure to be applied during the examination process for digital data.

Law stated - 14 March 2022

Dawn raids – rights and obligations

What are the company's rights and obligations during a dawn raid?

During a dawn raid, an undertaking is obliged to allow the TCA officials to access the premises and conduct the examination if a formal decision is made by the TCA. There is no such obligation in the absence of a formal decision, and the undertaking concerned may refuse the inspection without specifying any particular reason. If the undertaking voluntarily decides to allow the inspection, it will not be able to change its decision later. If a formal decision has been made by the TCA, undertakings must allow the inspectors to conduct the dawn raid. Those concerned are obliged to provide copies of information, documents, books and other instruments requested by TCA representatives.

During the inspection, the undertaking is responsible for preventing interference with the data being inspected as well as with the environment where the data is stored. Employees must provide full and active support in matters regarding IT systems when so requested by the TCA's officials. For example, the undertaking will be under certain obligations, such as providing information about the software and hardware related to the information technologies used, providing system administrator privileges, enabling remote access to the email accounts of the undertaking's personnel, isolating computers and servers from the network environment, limiting the access of users to their corporate accounts and restoring backed-up corporate data.

Finally, in 2021, the TCA published its Guidelines on the Examination of Digital Data during On-Site Inspections. This clarifies the powers of the inspectors and the item that can be inspected. It also encompasses the importance that the undertaking shall prevent any interference with the data and is obliged to provide full support on matters requested by the inspectors. It is seen that the TCA places importance on these principle since penalties for hindering the on-site inspections have come to the fore this year.

Law stated - 14 March 2022

Refusal to cooperate

What are the penalties and other consequences for refusing to cooperate with the authorities during an investigation?

Refusal to cooperate with the TCA may take the form of obstructing the inspection, making it difficult to perform the on-site inspection, or failing to duly respond to information requests. For obstructing an on-site inspection, the TCA may impose an administrative fine of 0.5 per cent of the undertaking's annual gross revenues of the preceding financial year, whereas, in the case of failing to respond duly to information requests or providing false information, the TCA may impose an administrative fine of 0.1 per cent of the undertaking's annual gross revenues of the preceding financial year.

One of the most significant decisions of the TCA regarding the obstruction of a dawn raid is the TTNET decision taken in 2013, where it was found that an employee deleted certain documents during a dawn raid, which led to the TCA imposing a fine of 15,512,258 lira, corresponding to 0.5 per cent of the TTNET's turnover.

Additionally, the TCA through its Unilever decision dated 7 November 2019, ruled to impose an administrative fine against Unilever amounting to 0.5 per cent of its turnover in Turkey in 2018 due to hindrance of the on-site inspection. One of Unilever's employees stated that they needed to consult Unilever Global for permission regarding the examination, and the permission required for the inspection through eDiscovery was obtained at 5.45pm, delaying the inspection by approximately 7.5 hours.

In its Siemens decision in November 2019, when the TCA's case handlers intended to carry out an inspection within specific dates and using keywords concerning the email accounts of all of Siemens employees during a dawn raid, Siemens employees stated that Siemens Global's permission would be required to initiate the inspection. Since the authorisation was not obtained during the on-site inspection, the inspection was not carried out on that day. However, Siemens contacted the TCA six days after the on-site inspection and stated that Siemens is searching for ways to grant the TCA access so it may perform the requested inspection and proposed a procedure for an on-site inspection. The on-site inspection was eventually conducted on 2 October 2019. The TCA concluded that the benefit expected from the on-site inspection could not be obtained because of the inability to use eDiscovery, even though the email accounts of the company employees, which were considered to be related to the file subject claims, were not available. In this respect, the TCA imposed two different administrative fines on Siemens: the first being by 0.5 per cent of Siemens' annual gross revenue that was generated by the end of 2018 financial year, and the second being 0.05 per cent of Siemens' annual gross revenue generated in 2018 for each of the 12 days between 3 October 2019 (the date following the day of conduct) and 15 October 2019 (the date of enabling the TCA to conduct an on-site inspection) (12 multiplied by 0.05 per cent of the annual gross revenue). Finally in 2020, Groupe SEB was also fined 0.5 per cent of its turnover in Turkey in 2018 for hindering the on-site inspection that took place in the end of 2019.

Moving back to failing to respond duly to information requests, for instance, in its Poultry decision in March 2019, the TCA resolved to impose fines corresponding to 0.1 per cent of the previous year's turnover on Bakpiliç for failure to provide requested information and documentation as part of an investigation and Tad Piliç for providing false or misleading information.

Law stated - 14 March 2022

SETTLEMENT

Settlement mechanisms

Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

A settlement mechanism was introduced within the amendments made to Law No. 4054 on the Protection of Competition (the Competition Law) in 2020.

After initiating an investigation, the Turkish Competition Authority (TCA) may, on the request of 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 issuing a notification of the investigation report, the TCA 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 an administrative fine.

Where an investigation concludes with a settlement, the parties to the settlement may not take the administrative fine and the provisions of the settlement text to court. In other words, the parties to the settlement cannot appeal the settlement in the administrative court.

It should be noted that the settlement mechanism can also be applied to violations other than cartels. The secondary legislation regarding the settlement mechanism has been adopted in July 2021. As for relevant case law, the Turkish

Philips decision constitutes the first example of the settlement practice in Turkish competition law after the amendments to the Competition Law as of June 2020.

The commitment procedure was incorporated into the Competition Law with the amendments of June 2020. Accordingly, the TCA can decide to end an investigation without an infringement decision, if the undertaking under investigation voluntarily submits commitments to eliminate the competition concerns. Both the TCA and the investigated undertakings quickly adapted to this new but long-awaited procedure. On 16 March 2021, Communiqué No. 2021/2 on Commitments for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position which clarifies the rules and procedure to be followed in commitment decisions, came into force. According to the Communiqué, investigated undertakings can submit their willingness to propose commitments within three months following their receipt of the investigation notice. According to the Communiqué, the commitment procedure is not applicable for hardcore competition law restrictions. The Communiqué specifies that anticompetitive information exchange and resale price maintenance are considered as hardcore restrictions alongside price fixing, territory/customer sharing and supply restriction agreements between competitors. Exclusion of information exchange agreements and resale price maintenance from the commitment procedure's scope may narrow down the suitable cases to a great extent. The commitment procedure is providing opportunities to the TCA and undertakings under investigation to effectively remedy alleged infringements of the Competition Law at an early stage, without the need to allocate resources for lengthy investigations.

In the Singer decision an investigation was opened on the grounds that Singer's practices in the sewing machine supply market violated articles concerning ‘anti-competitive agreements, concerted practices and decisions’ and ‘abuse of dominant position’. Singer, due to its position, simultaneously applied for the settlement and the commitment procedures.

Law stated - 14 March 2022

Impact of compliance programme

What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

The TCA case law on settlement procedures is not clear yet, but it may take existing competition compliance programmes into consideration during a settlement procedure.

Law stated - 14 March 2022

Corporate monitorships

Are corporate monitorships used in your jurisdiction?

Corporate monitorships are not used in Turkey.

Law stated - 14 March 2022

Statements of facts

Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

Although the TCA case law on settlement procedures is not clear yet, agreed statements of facts in a settlement with the TCA might be admissible as evidence in actions for private damages.

Law stated - 14 March 2022

UPDATE AND TRENDS

Recent developments and future reforms

What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for competition law reform in your jurisdiction?

During the covid-19 outbreak, the Turkish Competition Authority (TCA) has been focusing on innovation-driven industries, and price hikes and market distortions, both of which are in line with the global trends. Technology has advanced rapidly and penetrated all sectors, which has increased the share of intelligence-intensive sectors in global competition and made innovation an important parameter of competition. Furthermore, the 'internet of things' and 'big data' have gained importance in many sectors, especially in segments close to consumers, such as retail, and have become one of the determinants of market power.

On 30 January 2020, the TCA announced that it has started working on the Digitalization and Competition Policy Report. Furthermore, to ensure that the TCA can act proactively by closely monitoring the digital economy and potential competition law violations that platforms can create, additional responsibilities are included for the Strategy Development Department Presidency of the TCA. The TCA published the FinTech Report. In the report, the reasons for the emergence of the FinTech industry, its effects on the industry, the difficulties faced by the players in marketing their products and services, the barriers to innovation and competition in the market, the exclusionary effects and actions from both the market and incumbent enterprises were evaluated. On behalf of the development of the FinTech ecosystem, suggestions are given from the perspective of competition, taking into account the dynamics of the sector. It has been stated that the fact that FinTech companies are largely dependent on the banking infrastructure in their activities creates a vertical relationship between FinTech companies and banks, and in the absence of service from banks, it is not possible for most products and services developed by FinTech companies to meet with consumers. It has been evaluated that FinTech companies receive services from banks in the upper market and compete with banks in the lower market, and this market structure has similar characteristics to markets such as telecommunication and retail.

In addition, the TCA published a preliminary sector inquiry report concerning e-marketplace platforms. The final section of the preliminary report includes policy recommendations such as strengthening relevant secondary legislation; creation and implementation of a platform code of conduct to address the current imbalance of bargaining power between vendors and e-marketplaces; and imposing requirements such as the determination of certain standards for the market behaviour of the undertakings.

The TCA also published, in February 2021, the 'Turkish FMCG Retail Sector Review Preliminary Report'. Within the scope of the report, the determination of the market structure, the activities of the undertakings, the previous Board decisions regarding the market and the opinions and practices of other competition authorities in different countries were examined by taking into account the organic factors such as the behavioural changes of consumers in the sector and the separation of the activity structures of the players in the market.

In recent years, there has been an increasing view that the market power of employers in labour markets causes wages to decrease or suppress and working conditions to remain below competitive levels. Employers prevented the transfer of employees between undertakings through direct and 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 the mobility of the labour factor among the enterprises and the artificial inability to find the real value of the wages in return for the labour. In this context, the preliminary investigation conducted ex officio in order to determine whether Law No. 4054 on the Protection of Competition (the Competition Law) was violated was decided by the TCA in April 2021, and an investigation was opened initially against 32 undertakings throughout Turkey

due to the alleged gentleman's agreements regarding the labour market.

The TCA imposed its highest fine on five biggest supermarket chains and one supplier. The investigation was started in 2020 over food and hygiene products price increases. In October 2021, Turkey's five biggest supermarket chains (BİM, Migros, Carrefour, Şok and A101) and one supplier (Savola) were fined a total of 2.7 billion lira for violating competition law rules. It was alleged that the undertakings had coordinated their prices directly or via suppliers in a manner that was against the interests of consumers and had entered into cartel-like agreements or coordinated actions.

The TCA maintained its tough stance against resale price maintenance and imposed a record fine on fuel distributors. The TCA asserted that some documents and findings obtained during the on-the-spot inspections carried out at the premises of the concerned undertakings created suspicion that those undertakings determined the pump sales prices of their dealers. Furthermore, when the Energy Market Regulatory Authority was notified it compared the minimum and ceiling prices of the concerned undertakings and their dealers and determined that the pump sale prices set by the dealers were nearly equal to the recommended prices set by the concerned undertakings. Consequently, in March 2020, the TCA imposed a fine amounting to approximately 1.5 billion lira in total on four undertakings operating in the fuel distribution sector in Turkey: BP, OPET, PO and Shell. The fine imposed on OPET was annulled by the administrative court.

On the other hand, abuse of dominance by undertakings was also on the TCA's radar. The TCA concluded two investigations into services offered by Alphabet Inc's Google subsidiaries. In the first one, the TCA decided that Google violated article 6 of the Competition Law by disadvantaging competitors offering shopping comparison services, complicating the activities of competing undertakings, and distorting competition in the shopping comparison services market. The TCA consequently issued a fine amounting to 98 million lira. On 29 July 2020, Google announced that starting from 10 August 2020, it will be removing shopping ads (or 'the Shopping Unit') from its search pages in Turkey. According to the tech giant, the decision was taken because of the uncertainties surrounding the fate of the remedy package that it proposed to comply with the TCA's decision.

In the second case, the TCA fined Google 196.7 million lira, after ruling that Google was abusing its dominance in the general search services market. The main allegations in the decision were that Google hindered the activities of other undertakings by abusing its dominant position through its updates to general search services and unfairly using AdWords. The TCA ruled that Google had placed paid advertisements on top of search results that did not clearly carry the characteristics of advertising. In addition to the monetary fine, Google is obliged to submit remedial measures to terminate its anticompetitive behaviour and ensure fair competition within six months upon the receipt of the reasoned decision and must continue to present compliance measures and annual reports for five years.

Conventional markets, such as port management services, were also investigated by the TCA. After the port management services investigation, the TCA decided that the operator of Antalya Port was abusing its dominant position by imposing excessive prices in the container handling market. Therefore, the TCA imposed a fine amounting to approximately 12 million lira.

Law stated - 14 March 2022

Jurisdictions

Australia	Piper Alderman
Belgium	Fieldfisher
Bulgaria	EY Law Partnership
Colombia	Holland & Knight LLP
European Union	O'Melveny & Myers LLP
Finland	Eversheds Sutherland (Finland)
Germany	SCHULTE RECHTSANWÄLTE. Rechtsanwaltsgesellschaft mbH
Greece	Law Offices Papaconstantinou
Italy	Ashurst LLP
Japan	Mori Hamada & Matsumoto
Norway	CMS Kluge
Romania	MPR Partners
Sweden	Advokatfirman Cederquist KB
Switzerland	Niederer Kraft Frey
Turkey	ACTECON
Ukraine	Vasil Kisil & Partners
United Kingdom	Winston & Strawn LLP
USA	Winston & Strawn LLP