

THE PUBLIC  
COMPETITION  
ENFORCEMENT  
REVIEW

FOURTEENTH EDITION

Editor  
Aidan Synnott

THE LAWREVIEWS

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# PREFACE

In the reports from around the world collected in this volume, we continue to see international overlap among the issues and industries attracting government enforcement attention. In the past year, we have also seen the emergence of cooperative policy efforts among several enforcement authorities. Two areas in particular – digital markets and pharmaceutical markets – have been the focus of cross-border initiatives. The G7 – Canada, France, Germany, Italy, Japan, the United Kingdom and the United States – along with Australia, India, South Africa, South Korea and the European Commission participated in a Digital Competition Enforcers Summit, which was hosted by the UK Competition and Markets Authority (CMA) in November 2021. Earlier in the year, the United States Federal Trade Commission, certain state attorneys general, the European Commission, the Canadian Competition Bureau and the CMA established a multilateral pharmaceutical working group.

In many jurisdictions, merger review and enforcement activity remain robust. Indeed, the United States agencies are dealing with an exceptionally high number of merger filings, reflecting a marked increase in deal activity. Meanwhile, in France, the Competition Authority (FCA) also saw a significant increase in merger activity and blocked a merger in the pipeline industry. According to our authors, this is only the second time the FCA has blocked a merger. Merger reviews were also up in Brazil. At the same time, however, the report from the United Kingdom notes that expectations for an increase in merger review activity at the CMA have so far not been realised and ‘there is no evidence, as yet, of the expected Brexit boom in notifications’. In Japan, the Fair Trade Commission (JFTC) ‘maintained a steady level’ of merger enforcement activity.

The policing of cartels continues to be a focus of several competition agencies around the globe. Many jurisdictions with active anti-cartel enforcement programmes have seen the return of dawn raids, which had been largely suspended in several countries after the onset of the covid-19 pandemic. For example, dawn raids in Japan targeted the utilities sector, which, as we read in that country’s submission, appears to be an area of focus for the JFTC. In Portugal, 2021 was ‘record year for dawn raids’, according to our authors. Authorities there targeted the financial, energy, healthcare and information services sectors. The Swedish Competition Authority conducted a dawn raid related to alleged price-fixing for covid-19 PCR tests. Our authors from Greece note that in the second half of 2021, authorities there conducted dawn raids on companies in ‘an impressive range of markets’.

Digital platforms have continued to attract scrutiny and regulatory action worldwide. In the United Kingdom, the CMA is establishing a Digital Markets Unit and has proposed legislation aimed at digital companies with ‘strategic market status’. Similarly, the European Commission has proposed a Digital Markets Act to regulate that sector in the European Union; and competition authorities of Member States have been involved in the negotiation

of that legislation. Numerous legislative proposals introduced in the United States are aimed at digital platforms, and the agencies here are continuing with litigation against several platform companies. Numerous other jurisdictions are engaged in legislative and enforcement activity in this area, including Japan, where the Digital Platform Transaction Transparency Act recently came into force. Companies operating in digital markets were also the subjects of enforcement activity in several other jurisdictions, including Argentina, Canada, France and Turkey. In addition to digital platforms, pharmaceutical companies are also seeing attention from competition enforcement authorities around the globe, including in the United Kingdom, the United States and Japan.

A number of agencies have continued to bring actions against resale price maintenance (RPM). Indeed, as we read in the chapter from the United Kingdom, it is clear that RPM (particularly as it relates to online pricing restrictions) remains a top priority for the CMA. Indeed, following several fines imposed in 2020, the CMA issued a statement of objections to a lighting company. Swedish authorities also fined a lighting supplier. Elsewhere, French authorities fined eyewear manufacturers and companies involved in video surveillance, and Turkish authorities levied fines on fuel distributors. It is also notable that enforcement activity in labour markets appears to be increasing in several jurisdictions, including in the United States. The Turkish Competition Board and the Portuguese Competition Authority are also examining labour market issues.

In the coming year, we will watch with interest to see how competition regulation and enforcement continues to evolve around the globe.

**Aidan Synnott**

Paul, Weiss, Rifkind, Wharton & Garrison LLP

New York

March 2022



# TURKEY

*Bahadır Balkı, Ertuğrul Can Canbolat, Caner K Çeşit and İdil Gizay Doğan<sup>1</sup>*

## 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 2021, the TCB rendered a total of 460 decisions, including 74 competition law infringement claim decisions, 302 merger and acquisition decisions, seven privatisation decisions, 22 negative clearance and exemption decisions, nine decisions rendered following a court decision and 46 other decisions. Of the 74 competition law infringement claim decisions, 40 concerned infringements of Article 4 of the Competition Law (on agreements, decisions and practices preventing, distorting or restricting competition in relevant markets), 23 concerned Article 6 violations (abuse of dominant position) and 11 concerned both these Articles. Fines in 2021 totalled 4,355,666,695.86 Turkish lira. These cases concerned a range of industries, including information technologies and platform services, the food industry (packaged product production, wholesale and retail, alcoholic and non-alcoholic beverages, food and beverage services), accommodation, travel and tour operators, 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) and health services (drugs, hospitals, health equipment and supplies).

Furthermore, the TCA launched an investigation into the labour market, initially looking at whether 32 undertakings had breached competition rules in the market through gentleman's agreements regarding the transfer of employees. In addition, the TCA has recently focused more on the innovation-driven industries, and on price hikes and market distortions during the covid-19 outbreak, both of which are in line with global trends. The

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<sup>1</sup> Bahadır Balkı is a managing partner, Ertuğrul Can Canbolat is a counsel, Caner K Çeşit is a senior associate and İdil Gizay Doğan is an associate at Actecon.

TCA also launched an investigation into the fast-moving consumer goods (FMCG) sector, in the course of which Turkey's five biggest supermarket chains and one supplier were fined a record total of 2.7 billion lira for coordinating their prices directly or through suppliers in a manner that was against consumers' interests, and for entering into cartel-like agreements or coordinated actions.

As regards digital developments, 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 these technologies have become key determinants of market power. On 30 January 2020, the TCA announced that it had started working on the Digitalisation 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 job descriptions have been included as part of the TCA Strategy Development Department's remit.<sup>2</sup> In addition, the TCA published a preliminary sector inquiry report concerning 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 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. In addition, the TCA announced in March 2021, that it had launched a sector inquiry for the online advertising industry. The TCA published in December 2021 the 'Analysis Report on Financial Technologies in Payment Services'. The study sought to stress the potential benefits of the radical transformation in the financial sector in Turkey and the importance of fostering inter-institutional cooperation in this field. Also given emphasise in the report were topics such as support for the development of financial technologies, exclusionary actions of incumbent undertakings, the regulatory framework, market dynamics and market entry of large technology companies.

The TCA has published its Guidelines on the Examination of Digital Data during On-Site Inspections, which clarifies the powers of the inspectors and items that can be inspected. The Guidelines also state the importance of undertakings cooperating and preventing any interference with the data, and their obligation to provide full support on matters requested by the inspectors. Notably in this context, penalties for hindering on-site inspections have come to the fore this year.

The TCA also published the *De Minimis Communiqué*,<sup>3</sup> the *Commitments Communiqué*,<sup>4</sup> and the *Settlement Regulation*.<sup>5</sup> Furthermore, commitment and settlement mechanisms have been implemented and decisions imposing extremely large penalties have

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2 TCB decision No. 20-23/307 dated 7 May 2020. <https://www.rekabet.gov.tr/en/Guncel/competition-board-puts-digital-economy-u-3ea6ef4d5993ea11811a00505694b4c6>.

3 Communiqué No. 2021/3 on Agreements, Concerted Practices and Decisions of Associations of Undertakings That Do Not Significantly Restrict Competition.

4 Communiqué No. 2021/2 on Commitments for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position.

5 Regulation on the Settlement Procedure to be Applied to Investigations on Anticompetitive Agreements, Concerted Practice, Decisions and Abuse of Dominant Position.

been rendered during 2021. In addition, the market share threshold in the Block Exemption Communiqué on Vertical Agreements<sup>6</sup> was lowered to 30 per cent and Turkish legislation has been brought into line with European Union legislation.

## 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: 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.

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6 Communiqué No. 2002/2: Block Exemption Communiqué on Vertical Agreements.

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<sup>7</sup> and aggravating<sup>8</sup> 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.

### **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;

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7 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.

8 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.

- 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.

### **iii 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.

### **iv Significant cases**

The most significant case in cartel enforcement was against the five biggest supermarket chains and one supplier. In 2020, the TCA initiated an investigation into food and hygiene product 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 companies had coordinated their prices directly or through suppliers in a manner that was against consumers' interests and had entered into cartel-like agreements or coordinated actions.

The Novartis and Roche decision can also be mentioned as a significant cartel enforcement case. The TCB fined local businesses of both Novartis and Roche a total of 278.5 million lira for colluding to promote the use of eye treatment Lucentis over the cheaper alternative Altuzan. The case is very significant because of its international nature. Indeed, Novartis and Roche were fined €182.6 million and €444 million by the Italian competition authority and the French competition authority respectively for similar practices. Furthermore, a separate investigation into agreements between Novartis and Roche regarding eye treatment drugs was conducted by the Spanish competition authority.

In another development, The TCB looked at the labour market. 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, in April 2021, the TCB decided to conduct a preliminary investigation *ex officio* to determine whether the Competition Law has been violated. Initially, the investigation was opened into 32 enterprises throughout Turkey because of alleged gentleman's agreements in the labour market.

As for the settlement procedure, the *Philips Turkey* case of August 2021 constitutes the first example of the settlement practice in Turkish competition law following the amendments to the Competition Law of June 2020. The case concerned an investigation into Philips Turkey and its authorised dealers.

Finally, another example for the settlement procedure, is the *Singer* case of September 2021. An investigation was opened on the grounds that Singer's practices in the sewing machine supply market violated articles concerning 'anticompetitive agreements, concerted practices and decisions' and 'abuse of dominant position'. In view of its situation, Singer applied for the settlement and commitment procedures. Accordingly, in this case the TCB decided that the highest rate of settlement-mechanism discount permitted, 25 per cent, would be applied to the penalty amount imposed on Singer.

#### **v Trends, developments and strategies**

The cases this year cover banking, capital markets, finance and insurance services; information technologies and platform services; food industry; construction; chemistry and mining; accommodation, travel and tour operators; culture, art, entertainment, leisure, sports, games of chance and education; logistics, warehousing and mail services; machinery industry; jewellery; forestry and wood-based industries; the automotive industry and vehicles; health services; telecommunications; agriculture and agricultural products; and textiles and ready-to-wear garments.

There was a trend this year was for price increases in various sectors following the fluctuation of the Turkish lira. The TCA monitored undertakings' behaviour to determine whether any price increases stemmed from incremental costs or anticompetitive activities. Furthermore, the TCA used its powers to protect competitive market structures after the spread of covid-19 pandemic. In particular, the automotive industry and the labour markets featured on the TCA's agenda.

#### **vi Outlook**

Needless to say, the TCA will closely watch critical markets such as healthcare, transportation, consumer goods, automotive, financial services, travel and tour operators, digital platforms and consumer electronics, and use its powers proactively.

As a matter of 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 restrictive horizontal agreements, in January 2021, the TCB fined 34 companies operating in the wheat flour market a total of 25 million lira following an investigation carried out on the grounds that they ‘increased prices together’ thus violating Article 4 of the Competition Law.

Moreover, the TCB 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 the suspicion that those undertakings determined the pump sales prices of their dealers. Furthermore, when (1) the ceiling prices notified to the Energy Market Regulatory Authority and their dealers by the concerned undertakings and (2) minimum prices applied by their dealers are compared, it was determined that the pump sales prices of the dealers were equal to the recommended prices set by the concerned undertakings. Consequently, in March 2020, the TCB imposed a hefty fine amounting to approximately

1.5 billion lira in total on four undertakings operating in the fuel distribution sector, namely BP, OPET, PO and Shell. However, in January 2021, the Ankara Administrative Court annulled the fine against OPET on the grounds of lack of concrete evidence.

During an investigation into Henkel, some correspondence was obtained and the investigation committee considered that a violation determination could not be made on the basis of this correspondence. However, the TCB did not agree and decided that the correspondence constituted a resale price maintenance violation, infringing Article 4 of the Competition Law. This decision was confirmed by administrative courts. Hence, the undertaking filed an appeal with the Council of State. In July 2021, the Council of State reversed the decision, stating that the claim that the undertaking had violated Article 4 by determining the resale price of its products could not be proved within the framework of clear and concrete data and evaluations, therefore the TCB decision was not in compliance with the law.

Investigations regarding vertical restrictions were carried out separately into Groupe SEB and DYO. It was decided that by determining the resale prices at final sales points and restricting sales made on internet sites, Groupe SEB violated Article 4 of the Competition Law and therefore received an administrative fine. As for the DYO case, the TCB decided that by determining resale prices and restricting customers and regions, DYO also violated Article 4 and the company received an administrative fine of 21 million lira.

As to abusive practices, in March 2021, following allegations against Unilever that it created a *de facto* exclusivity by preventing the sale of competing products at its final points of sale, resulting in the violation of Article 4 and Article 6 of the Competition Law, a fine of approximately 480 million lira was imposed. Unilever has a dominant position in the industrial ice cream, impulse-buy ice cream and take-home ice cream markets. Unilever was found to have abused its dominant position by using a discount system, imposing a non-compete obligation previously prohibited by the TCA and imposing an exclusivity clause in its loan agreements regarding the use of Unilever freezers.

The TCA concluded two investigations into Google as an economic unity. In the first, the TCB 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 TCB consequently issued a fine amounting to 98 million lira. On 29 July, Google announced that starting from 10 August, it would remove shopping ads (or the 'Shopping' unit) from its search pages in Turkey. According to the tech giant, the decision was taken because of uncertainties over the prospects for the remedy package it had proposed to comply with the TCB decision.

In the second case, the TCB 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 TCB ruled that Google had placed paid advertisements at the top of search results that did not clearly carry the characteristics of advertisements. In addition to the monetary fine, Google was obliged to submit remedial measures to terminate its anticompetitive behaviour and ensure fair competition within six months and must continue to present compliance measures and annual reports for five years.



In addition, conventional markets such as port management services were also investigated by the TCA. After the investigation, the TCB decided that operator of Antalya Port abused its dominant position by imposing excessive prices in the container handling market. Therefore, the TCB fined it approximately 12 million lira.

## **ii Trends, developments and strategies**

As regards the block exemption regime, in November 2021, the TCA published its Communiqué No. 2021/4 Amending the Block Exemption Communiqué on Vertical Agreements, narrowing the scope of the vertical block exemption. The vertical block exemption regime exempts certain vertical agreements from the scope of Article 4 of Competition Law, depending on (1) the absence of hardcore restrictions, and (2) the supplier's or buyer's market share. The previous version of the vertical block exemption was conditional on the market share held by the supplier not exceeding 40 per cent of the relevant market on which it sells the goods or services. That limit of 40 per cent has been lowered to 30 per cent. Other than that, for vertical agreements that include exclusive supply obligations, the exemption will apply as long 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. Because under this amendment undertakings with a market share of between 30 per cent and 40 per cent in the relevant market will be deprived of the security provided by the previous legislation, the TCA will grant these undertakings a transition period of six months.

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.

Obviously, 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.

## **iii Outlook**

There are certainly unresolved issues on the TCA's agenda. For instance, the TCA considered the information, documents and findings it obtained during the preliminary investigation into Sahibinden.com sufficient and serious enough to open an investigation into whether there was an abuse of dominant position by preventing data transfers for online platform services. In addition, the TCA 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 TCA's investigation into Facebook and WhatsApp reveals that it is prioritising data-related practices. In September 2021, the TCA initiated an investigation into Trendyol, an allegedly dominant online marketplace in Turkey, and imposed interim measures to terminate its use of algorithms to leverage the shopping units under its control.

In areas other than the digital sector, the TCA is also examining possible exclusivity practices undertaken by Diageo's subsidiary, Mey İçki, following allegations that it abused its dominant position.

#### **IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES**

The TCA has the power to conduct market studies. For instance, in its ‘Analysis Report on Financial Technologies in Payment Services’, the TCA evaluated the reasons for the emergence of the fintech industry, its effects on the payment services industry, the difficulties faced by participants in marketing their products and services, the barriers to innovation and competition in the market, and the exclusionary effects and actions of both the market and incumbent enterprises. The report also considers the development of the fintech ecosystem, with suggestions given from the competition perspective and taking into account the dynamics of the sector. It has been stated that the principal dependence of fintech company activities on the banking infrastructure 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 reach consumers. Fintech companies are perceived as receiving services from banks in the upper market and competing with banks in the lower market, and this market structure has characteristics similar to those in telecommunications 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’. The report encompassed the determination of the market structure, activities of undertakings and previous TCB decisions regarding the market. Opinions and practices of other competition authorities in different countries were examined by taking into account organic factors such as the behavioural changes of consumers in the sector and the separation of the activity structures of the market participants.

As regards the regulated markets, such as energy and telecommunications, the application of the competition rules to possible anticompetitive behaviour is not categorically excluded where sector-specific regulations and competition rules overlap. However, where a type of behaviour is contrary to sector-specific regulations, it may be assessed in the context of that sector-specific regime, even if it is reviewable within the scope of the Competition Law. Additionally, behaviour sanctioned by another law may not constitute an infringement of the Competition Law. In these circumstances, the TCA carries out its duty to undertake competition advocacy and provides opinions to the other public administrations.

#### **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.

### i Significant cases

The scope of the SIEC test encompasses effects that may arise as a result of merger and acquisition transactions and these are evaluated in terms not only of creating or strengthening a dominant position but also of significantly reducing competition. The latter effects are also prohibited, although they may not cause a dominant position to be created or strengthened. Following application of the SIEC test to the proposed acquisition of 50 per cent of the shares and sole control of Marport by Terminal Investment Limited Sàrl, the TCB concluded that the transaction would result in a significant reduction in competition. The TCB concluded that the market had a narrow oligopolistic structure and the transaction (port management for container handling services) could have negative effects on both terminal and line operations. The decision shows that a more detailed competition analysis will be carried out for those M&A transactions that would have been considered less risky before the amendment to the Competition Law, with the SIEC test being one of the most important factors in this approach. With this test, the TCB will now use the new analysis system to significantly prevent the reduction of effective competition, instead of focusing only on those transactions that would create or strengthen a dominant position.

The TCB conditionally accepted the merger between Obliet.com and Biletal.com, two undertakings operating in the online market for ticket sales comparison. As for the food industry, CLA Milk and Dairy Products (CLA Süt ve Süt Ürünleri Gıda) was authorised to take over assets, including real estate, designated machinery and equipment, brands and other intellectual property rights, domain names and social media accounts, and stock agreed by the parties, in relation to the factories producing SEK branded milk and dairy products belonging to Tat Gıda. Finally, in the online platforms industry, maintaining its rapid growth both in Turkey and abroad, Getir started partnership negotiations for the shopping platform N11 in August 2021. At the beginning of 2022, the TCA approved the purchase of some N11 shares through a capital increase, paving the way for Getir to purchase an undisclosed portion of N11.com.

### ii Trends, developments and strategies

In 2021, a total of 309 mergers and acquisitions (M&A) and privatisation transactions were examined by the TCA. There was an increase in the number of M&A transactions examined by the TCA in 2021 compared with 2020. Of these, the most transactions in which the target company originated in Turkey were reported in the field of ‘generation, transmission and distribution of electrical energy’ (14 transactions), and the highest transaction value was reported in the field of ‘manufacturing of plastic packaging materials’, at approximately 3.7 billion lira.

### iii Outlook

Following the amendment of the Competition Law, a stricter approach from the TCA is to be expected. The adoption of the SIEC test will allow the TCA to have a voice in international M&A transactions with potential to affect Turkish markets. In particular, M&A transactions in oligopolistic markets will be carefully examined by the TCA, owing to their capacity to significantly reduce effective competition.

## VII CONCLUSIONS

In a year in which many plans and initiatives were disrupted by the covid-19 pandemic, the main message of 2021 was that competition must be preserved, especially in, for example, the digital market and the FMCG sector. The TCB was also seen to be more stringent in applying administrative sanctions, imposing fines of about 2.7 billion lira in one decision alone, for the first time. In addition, the TCB investigation into the labour market represents a new area to be considered within the scope of the TCA. Also of note is the alignment of Turkish competition law with European principles, as new guidelines, communiqués and sector inquiries are being published that diminish the problem of legal uncertainty and clarify certain legal standards. New mechanisms such as the *de minimis* principle and the commitment and settlement mechanisms have been implemented, which further underlines the harmonisation of Turkish and European competition law. The most recent dawn raid obstruction cases show the TCB's responsiveness in the event of any irregularities in dawn raids, particularly its policy of zero tolerance for any data wiping during on-site inspections.

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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 (i.e., eyewear and lenses, titanium dioxide, crop protection business, iron and steel, FMCG, ground handling, aviation, port management services, ro-ro transportation, cement, film theatres).

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