

**Amendments to the  
Turkish Competition Law:  
SIEC Test and More**

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Allegations against  
Huawei and Samsung**

**Investigations into  
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**Google Finally Reached to a  
Compliance Decision in Turkey**







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Dear reader,

**W**e keep updating you on competition, international trade and regulatory developments via our quarterly *The Output*.®

Turkey finally adopted long-awaited (and debated) amendments to Law No 4054 on Protection of Competition (“Turkish Competition Law”). The main changes concern the “settlement” mechanism and the substantive test for assessing concentrations. The reform aims at providing and/or clarifying the legal basis of the practices that have already been implemented de facto by the Turkish Competition Authority.

The COVID-19 pandemic has brought certain changes to the legal scene in Turkey just as in other parts of the World. To name a few, the Turkish Competition Authority has launched several COVID-19 related investigations, the European Commission reconsiders the assessment of business cooperation projects during the pandemic, as well

as emphasizes on the consequences of the virus on anti-dumping and anti-subsidy investigations in the EU, while the Turkish Data Protection Authority has extended the deadline to register with the Data Controllers’ Registry due to the COVID-19. The laws and regulations are being adjusted to the new challenges of our reality.

We also would like to draw your attention to several interesting reasoned decisions of the Turkish Competition Authority (some reviewed by the courts), which clarify its approach towards abuse of dominance (Mey İçki), exclusivity (Huawei and Samsung), labour markets and fixing wages of truck drivers, using WhatsApp as evidence in antitrust investigations, resale price maintenance (RedBull), as well as commitments (Google). More details are inside...

Stay healthy!

Sincerely,

ISSN 2687-3702

**Published by**

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Çamlıca Köşkü Tekkeci Sk.  
No:3-5 Arnavutköy Beşiktaş  
34345 Tel: 90 212 211 50 11

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**Type of Publication**

Periodical

**Graphic Design**

EKOLOGOS  
Sürdürülebilirlik Yönetim ve  
İletişim Hizmetleri Ltd. Şti.  
Tel: +90 216 349 40 97- 98

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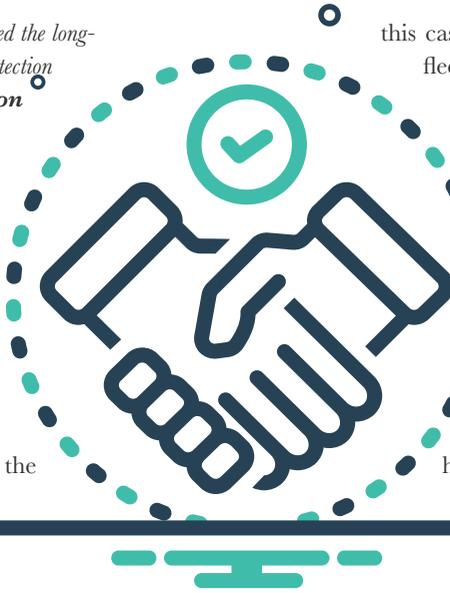
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## Amendments to the Turkish Competition Law: SIEC Test and More

On 16 June 2020 the Turkish Parliament approved the long-awaited amendments to Law No. 4054 on the Protection of Competition (“**Turkish Competition Law**”). It came into force on 24 June 2020. The main novelties are: (i) the “settlement” mechanism and (ii) the significant impediment of effective competition (SIEC) test. The issues other than these amendments aim at providing / strengthening / clarifying the legal basis of the practices that have already been implemented de facto by the Turkish Competition Authority (“TCA”).

- The settlement mechanism between the TCA and the companies within the scope of an investigation is available now officially. A company may settle by applying to the TCA until the notification of the investigation report admitting that it has committed a violation within the ongoing investigation. In return for this, the amount of the administrative fine may be reduced by up to 25%.
- The SIEC test replaces the “dominance test” in Turkey for the assessment of the notifiable concentrations.
- The commitment mechanism (similarly to EU Article 9 commitment decisions) is now also envisaged under the Turkish Competition Law. The companies concerned can benefit from the commitment mechanism by making commitments to address current competitive concerns. In



this case, the TCA may decide not to initiate a full-fledged investigation or to terminate investigations conducted against companies.

- Behavioral and structural remedies for anti-competitive conduct may be imposed by the TCA. Structural remedies can be applied only in cases where the behavioral remedies imposed previously did not yield results.
- On-the-spot inspections cover the digital assets of a company concerned. The TCA already has been able to examine the company servers and correspondences made via WhatsApp. The legal basis of this inspection power is strengthened by clarifying the wording in the relevant provision of the law.
- De minimis is introduced in Turkey. Except for hard-core violations such as price-fixing, market or customer allocation, the TCA will not initiate a full-fledged investigation against violations not exceeding the market share and turnover thresholds that will be announced with a forthcoming Communiqué.

The amended Turkish Competition Law brings more compliance with the EU competition rules and eliminates uncertainties and respective discussions arising from the Turkish Competition Law. Certain provisions are amended to ensure more certainty and explicit legal basis for the already applied practices by the TCA.

## TCA’s Two Covid 19 Related Investigations

In May 2020, the TCA launched two separate investigations, one into a total of 29 undertakings engaged in production and trade of food and cleaning/hygiene products and another into 10 undertakings in the protective face mask market.

Following the TCA’s public announcement on 23 March 2020, stating that the price increases were being followed closely and referred as “opportunistic”, by also adding that anticompetitive practices shall face the highest fines allowed by the Turkish Competition Law during the Covid-19 pandemic, two full-fledged investigations were announced in the previous week.

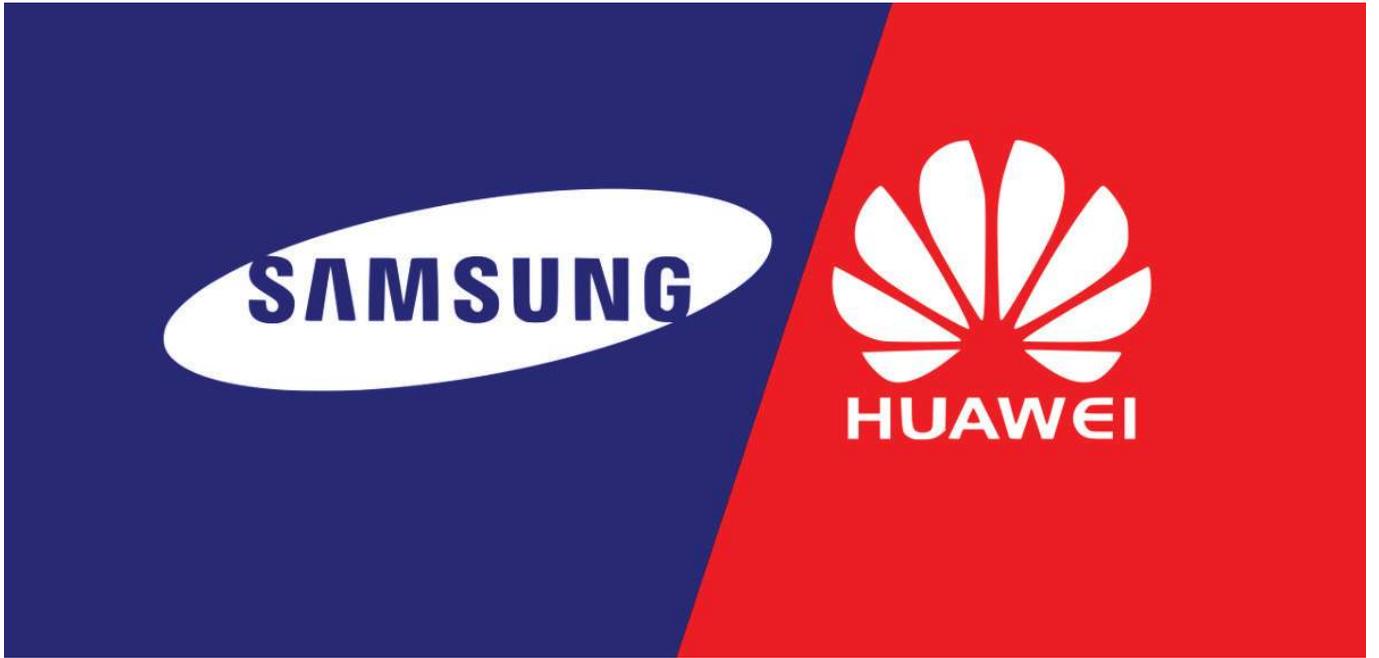
Regarding the investigation concerning the protective face masks industry, the TCA reportedly request the unit costs, unit prices, sales volume, import and export volume of the face masks under protection level breakdowns (i.e. FFP1, FFP2, FFP3, surgical mask, etc.) from each undertaking, concluding the anticompetitive practices as serious price increases shall be investigated in order to prevent the negative consequences of such actions. It is important to underline that the investigation is still not announced on the website of the TCA yet, is widely announced on the media.

About the other investigation concerning the supermarket chains



operating in the markets of food and cleaning/hygiene products; the TCA underlined the fact that a strong opinion was shaped from the practices, especially extreme price increases, by some of the undertakings, leading its preliminary inquiry to turn into a full fledged investigation.

# The TCA Disregarded the Allegations against Huawei and Samsung



On 2 June 2020 the TCA published its decision No. 19-46/791-338, which initiated a preliminary investigation into Huawei Telekomünikasyon Dış Ticaret Ltd. Şti. (“**Huawei**”) and Samsung Electronics İstanbul Paz. ve Tic. Ltd. Şti (“**Samsung**”) to determine whether they had violated the Turkish Competition Law through conduct leading to *de facto* exclusivity.

*Consumer electronics sector overview.* The TCA provided general information on the consumer electronics sector which includes mobile phone and smartphone sales. The TCA noted the dynamic structure of this sector, shaped by user preferences and technological development and innovation, which caused changes in the leading or primary manufacturers in the market over the course of years (from the conventional phone manufacturers such as Nokia to smartphone manufacturers, i.e., Samsung, Apple, and Huawei). Furthermore, the TCA observed that Samsung and Huawei had significant market shares in comparison with their competitors, whereas Apple’s market shares had decreased over the course of previous years and there were new entries to the market such as Oppo.

*The relevant market.* The TCA noted that as smartphone devices use advanced mobile operating systems, they are far more advanced than conventional devices due to their hardware and operating systems enabling the use of various and simultaneous applications and features, which are similar to the functions of computers. In this context, the TCA noted that although smartphones and conventional phones have the same goals in terms of basic communication features such as making phone calls, the devices differed from each other in terms of technological development as well as usage purposes. Hence, the TCA concluded that these products constituted separate relevant product markets. That being said, considering that its assessment would not be altered under any plausible market definition, according to paragraph 20 of the Guidelines on the Definition of the Relevant Market, the TCA decided to leave the definition of the relevant product market open and defined the geographical market as “Turkey.”

*Allegations assessment.* As for the assessment of the allegations that Huawei and Samsung violated the Turkish Competition Law through practices leading to *de facto* exclusivity, the TCA indicated that the related behaviours were conducted through vertical agreements related to the purchase, sale, and resale of smartphone devices. Furthermore, within the scope of the alleged *de facto* exclusivity practices, the TCA evaluated (i) whether the premium system applications and the reward and holiday campaigns restricted competition and (ii) whether Samsung and Huawei branded devices were located in the most remarkable location of the stores and the consumers were directed to these devices by the operator dealers, thereby restricting the ability of consumers to access and prefer other brands.

i. The TCA evaluated whether the premium system applications and the reward and holiday campaigns restricted competition. Following its assessment, the TCA noted that these applications were an established practice used by all undertakings as a tool to increase competition between themselves and their sales in the relevant market. Therefore, the TCA indicated that there was no evidence demonstrating *de facto* exclusivity. Despite that, the TCA observed that all operators by taking into account the consumer demand campaigned with all device manufacturers to ensure that every brand was present at each sales point.

ii. The TCA assessed whether Samsung and Huawei branded devices were located in the most remarkable location of the stores and consumers were directed to these devices by the operator dealers, thereby restricting their ability to access and prefer other brands. The TCA requested monthly planograms from operators and concluded that nearly all device brands were placed on the planograms and thus, the relevant allegation did not reflect the present situation.

In light of the information provided above, further to Article 41 of the Turkish Competition Law, the TCA decided not to initiate an investigation against Huawei and Samsung.

# Turkish Court's Ruling on Dominant Alcoholic Beverage Producer (Mey İçki)

On 14 May 2020 the Ankara Regional Administrative Court's 8th Administrative Chamber ("**Regional Court**") annulled the decision<sup>1</sup> of the Ankara 2nd Administrative Court ("**Administrative Court**"), in which a lawsuit against the TCA's Mey İçki decision had been dismissed. The main message here is that dominance should be evaluated separately in terms of each product market, i.e. violations in different product markets (although they arise from the behaviours that are part of the same strategy) should be fined separately. The case brings clarity to the application of *ne bis in idem* principle by the TCA.

In 2017, the TCA conducted two separate investigations into Mey İçki San. ve Tic. A.Ş. ("**Mey İçki**") in order to determine whether it was abusing its dominant position through discount practices implemented in the (i) raki (traditional Turkish alcoholic drink) market and (ii) vodka and gin markets.

In the Mey İçki-1 decision, the TCA concluded that Mey İçki (i) held a dominant position in the raki market and (ii) abused this position through practices aimed at complicating its competitors' activities in this market and thereby had violated Article 6 of the Turkish Competition Law. Mey İçki was fined TRY 155,782,969 (approx. EUR 37.9 million)<sup>2</sup>, an amount corresponding to 4.2% of its turnover achieved during the preceding financial year. The fine was calculated not only on the turnover achieved by Mey İçki in the raki market but on the total turnover achieved from all of its activities.

As for the Mey İçki-2 decision, the TCA concluded that Mey İçki (i) held a dominant position in the vodka and gin markets and (ii) abused this position by means of complicating its competitors' activities in those markets and thereby violated Article 6 of the Turkish Competition Law. The TCA decided that it was not necessary to impose additional administrative fines considering that the practices in question constituted

a unity as a part of the general strategy of the company. The behaviours were conducted in the same period and were of the same nature, which had been considered to be a violation in the raki market, as in the TCA's Mey İçki-1 decision.

Furthermore, while rendering this decision, the TCA took into consideration that the fine imposed in Mey İçki-1 decision was calculated on the total turnover achieved by Mey İçki from all of its activities (without making any distinction between the turnovers achieved in the raki, gin and vodka markets).

However, the Regional Court later annulled the TCA's Mey İçki-2 decision. According to the Regional Court, in the scenario in which the product market was defined "alcoholic beverages market" instead of the raki market or vodka and gin markets, the firm would not be fined for each product included in the same product market. Nevertheless, it was pointed out that the said products had been evaluated in the different product markets in the case at hand. In this regard, violations in different product markets (although they arose from the behaviours that were part of the same strategy) should be fined separately and thus the approach adopted in the TCA's Mey İçki-2 decision was found unlawful.

The Regional Court's decision has drawn a better-defined framework as to the application of the *ne bis in idem* principle by emphasizing that the TCA must separately assess the violations in different product markets and must not rely on the *ne bis in idem* principle in this regard. Although the TCA decided not to impose a new administrative fine by using its discretion, it actually agreed with the Regional Court's opinion that *ne bis in idem* principle could not be applied in the case at hand.

1. No 17-34/537-228 dated 25.10.2017

2. In 2017, the year-end average exchange rate was EUR 1=TRY 4,11.



# Labor Market Subject to Turkish Competition Law Enforcement, while WhatsApp May Play against You

On 6 May 2020 the TCA published its reasoned decision that concerns an agreement between 47 undertakings dealing with land transportation of containers to/from ports about the fixing of wages of truck drivers. The TCA's decision has various interesting aspects. First, it is one of a handful of its decisions related to the labor markets. Second, the TCA relied on WhatsApp communications (the third time in the last two years), taking these communications as evidence. Last, although the TCA established the violation, it did not impose any fines and rather instructed the concerned undertakings to stop the identified anti-competitive practices.

*WhatsApp communications as evidence.* The TCA carried out dawn raids at the premises of the undertakings and found WhatsApp conversations related to fixing truck drivers' wages. The communications indicated that the officials from the investigated undertakings settled on a wage-fixing agreement. The TCA relied on WhatsApp communications and accepted them as evidence to substantiate the wage-fixing agreement.

This proves that the TCA will continue to inspect and rely on WhatsApp communications realized between undertakings. Previously, in the Orthodontic Products Decision, published in mid-2018, the TCA indicated that its case-handlers during the dawn raids had inspected WhatsApp conversations. Within the scope of the decision, the TCA conducted raids on the premises of nine undertakings allegedly involved in price-fixing practices. The findings of the raids revealed that the TCA had inspected the employees' WhatsApp conversations on the company computers linked to the company GSM lines. The TCA found no violation as a result of its preliminary investigation.

A few months after this decision, the TCA published its Mosaş Decision, where we saw another example of TCA reliance on WhatsApp communications during an inspection. In this case, during the dawn raid conducted by the TCA on Mosaş's premises, one of the case handlers realized that the employees were communicating during the raid through a WhatsApp group chat named "Mosaş." The TCA accessed the WhatsApp group chat and found texts revealing that the employees had intentionally cut the electricity, disconnected the internet, and deleted e-mails, which led to an administrative fine for hindering the on-the-spot inspection.

*Labor market in competition law enforcement.* The TCA established that the labor market is subject to competition law enforcement and that the case at hand was a buying cartel that took place in the labor market, which constituted a *per se* violation.

The labor market as a subject to competition law enforcement was established in: (i) the TV Series Producers Decision (2005), in relation to the producers' alleged agreement to fix the actors' / actress' wages; (ii) the Henkel Decision (2011), in relation to the alleged gentlemen's agreement to non-poach each other's employees among the competitors; (iii) the Private Schools Decision (2011), in relation to some private schools alleged agreement to fix teachers' wages; and (iv) the Bfit Decision (2019), in relation to non-compete obligations of the franchisees towards the franchisor, and non-poaching agreements between franchisees/ franchisor and its competitors.



In the present case, however, the TCA did not fine the companies and went on to assess the impact of the wage-fixing at hand in the preliminary investigation phase.

*Assessing the effects.* Unlike in EU practice, the Turkish practice does not have a *de minimis* rule to provide a safe harbour for agreements that do not have an appreciable effect on the competition. The TCA, however, established by case law that where the effect of an anti-competitive agreement is minor, the TCA may refrain from initiating a full-fledged investigation and rather send a notice to the undertakings to cease their identified anti-competitive practices.

The TCA found that the previous three years' average of the net and gross wages paid by each undertaking was generally very close to the minimum wage allowed by Turkish legislation. The TCA established that, regardless of whether a wage-fixing arrangement existed, the wages for the truck drivers would be close to minimum wage. The TCA then stated that although around 200 undertakings operated in the land transportation of containers to/from ports in the nearby locations (Izmir and neighbouring cities), only 47 of them were a part of the wage-fixing agreement. Therefore, it was found that the wage-fixing agreement was not likely to create significant buyer power in the labour market. Last, the TCA found a significant number of driver transfers between the undertakings, which demonstrated that the wage-fixing agreement did not prevent the drivers from changing the undertakings for which they worked.

In light of these assessments, the TCA established that the wage-fixing in question did not create an appreciable effect in the labour market and decided not to initiate a full-fledged investigation against the undertakings, and to send a notice instead to cease their identified anti-competitive practices.

*To sum up,* the decision reiterates that the labour market is indeed subject to competition law enforcement and wage-fixing agreements are not different from a customer allocation or a price-fixing agreement, each considered a *per se* violation. Additionally, the decision demonstrates that the TCA decisively continues its practice of inspecting the WhatsApp communications of undertakings under investigation and using them as evidence.

## Red Bull's RPM and de facto Exclusivity in Turkey

On 21 April the TCA published its reasoned decision on resale price maintenance (“RPM”) and de facto exclusivity conducts focusing on practices carried by Red Bull Gıda Dağıtım ve Pazarlama Tic. Ltd. Şti. (“Red Bull”). The decision analyses the standard contractual clauses between Red Bull and its distributors, assesses Red Bull’s “perfect store” as well as premium systems to come to the conclusion that there was no violation of the competition law by Red Bull.

The investigation into Red Bull conducted in 2019 was aimed at establishing whether the company had violated the Competition Law by applying resale price maintenance practices and creating de-facto exclusivity in the energy drink market. Among the main allegations made by the complainants, former distributors of Red Bull were the following: (i) determining distributors’ minimum resale prices and discount rates they were to offer to retailers; (ii) obliging distributors to use the mobile sales distribution computer system in which it determined the distributors’ resale prices and confirmed the discounts and did not allow discounts to be set in the system without its approval; (iii) forcing certain sales points, especially at bars and night clubs, to sell only Red Bull’s products in its refrigerated display cabinets by procuring its cabinets under the terms of its safekeeping agreements; and (iv) creating de facto exclusivity via certain discounts applied in the market.

*RPM allegations.* In assessing the RPM allegations, the TCA primarily drew attention to a clause contained in the standard contracts signed between Red Bull and its distributors, that “in any case, the Dealer is free to set resale prices for the Products at their sole discretion.” Furthermore, in accordance with the information obtained from Red Bull’s five largest customers, although there was a resale price recommended by Red Bull, it did not interfere with the distributors concerning prices.

The TCA analyzed the “perfect store” system, i.e., Red Bull’s business model applied at the sales points to improve its marketing and sales operations, to determine whether the compliance with the recommended price criteria in the respective system indirectly resulted in resale price maintenance. As it appears from the respective system, the perfect store measurement is performed within a considerably limited portion of Red Bull’s sales. Furthermore, the share of compliance with the recommended price criteria constitutes five out of 100 points, where 70 out of 100 is sufficient for a store to be deemed a perfect store. In this regard, the TCA pointed out that it is quite possible to be a perfect store without getting any points from compliance with the recommended price criteria. Accordingly, the TCA considered that compliance with the recommended price criteria is not determinant for becoming a perfect store. Having said that the stores applying prices under the recommended price also get full points from the

respective criteria according to the information provided by Red Bull, the TCA concluded that it is not possible to postulate that the respective system and criteria are designed with the purposes of determining, punishing or rewarding stores which do not comply with the respective criteria.

As regards the allegations that Red Bull determines discount rates offered by its distributors to retailers, the TCA expressed that from the examination of the “Panorama Sales Information System” and its respective design documents, it was understood that both Red Bull’s central operator and distributors’ operator had the authority to identify and change both prices and discounts regarding Red Bull products at their own discretion. In light of the foregoing, the TCA concluded that the respective allegations did not reflect reality.

*Exclusivity allegations.* As regards the allegations regarding the creation of de facto exclusivity in the market, the TCA first stated that according to the information obtained within the scope of the case, there was no exclusivity provision in any contract Red Bull signed with the undertakings, including bars and nightclubs. The TCA further expressed that the top 10 on-site consumption channel customers and top 5 retail chain customers of Red Bull stated that Red Bull did not force them or suggest that they sell its products exclusively and that they currently sell the products of its competitors in their stores as well.

The TCA also determined that the sizes of Red Bull’s refrigerated display cabinets were smaller than those of its competitors, and at some sales points, Red Bull products could only be displayed in Coca Cola’s cabinets. Additionally, it examined Red Bull’s discount systems and concluded that the discounts offered to both retail chains and distributors were generally flat-rate and transparent, and did not bear the qualifications to create any de facto exclusivity, except for three premium systems which were further examined in more detail:

- turnover premium (those were not conditioned to any purchase goals),
- performance premium (mostly available to large chains operating on a national scale and selling the products of Red Bull’s competitors as well), and
- shelf space expansion premium (rates and amounts applied within the scope of the shelf space expansion premium were significantly lower compared to foregoing turnover and performance premiums).

Therefore, the respective premium systems applied by Red Bull did not restrict the competition in the relevant market through the creation of a de facto exclusivity.

In conclusion, the TCA found no violation of competition law by Red Bull and decided to close the investigation without imposing any administrative fines on Red Bull. However, this decision also shows that the TCA closely monitors the FMCG markets and is willing to investigate any claims. It is important to mention that during the investigation phase, Red Bull decided to remove the compliance with the recommended price criteria from the perfect store system completely, to leave no room for doubt and show full commitment to competition law compliance.



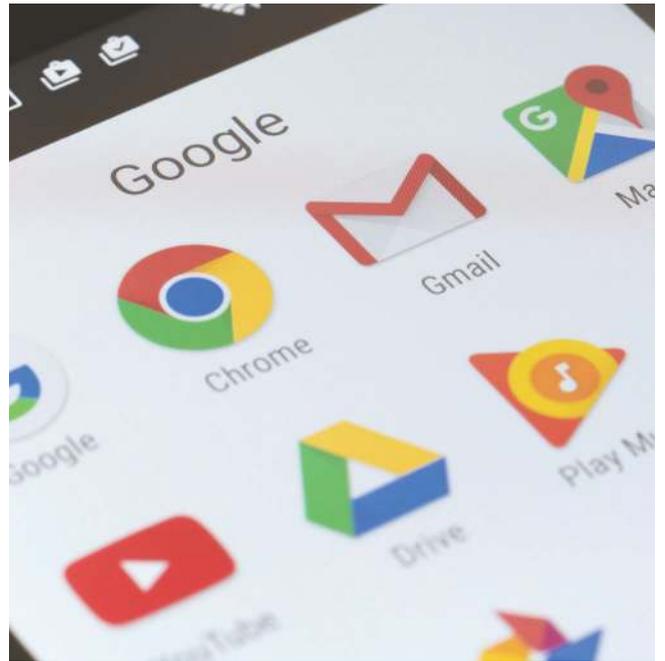
# Google Finally Reached to a Compliance Decision in Turkey

On 20 March 2020 the TCA published its reasoned decision on Google/Android (No. 20-03/30-13 or “**Compliance Decision**”), which reviewed the remedies submitted by Google to comply with the obligations set forth in the TCA’s infringement decision dated 19 September 2018 (No 18-33/555-273).

*Infringement decision.* The TCA initiated an investigation to assess whether Google had violated Articles 4 and 6 of the Turkish Competition Law through practices concerning the provision of the mobile operating system and mobile application services as well as agreements concluded with OEMs. The TCA decided that Google had violated Article 6 of the Turkish Competition Law (i) by tying Android with its search and Webview services and (ii) concluding agreements (i.e. Revenue Share Agreements or RSAs) with device manufacturers to incentivise the exclusive usage of the said services. Therefore, an administrative monetary fine amounting to TRY 93,083,422.30 (approx. EUR 12,6 million as of the Investigation Decision’s date of issue) was imposed. Google also was required to comply with the obligations presented in the Infringement Decision within six months starting from the delivery of the reasoned version of the Infringement Decision to put an end to Google’s anti-competitive practices.

*Non-compliance decision.* The reasoned version of the Infringement Decision was officially received by Google on 06 February 2019 and thus, the six months period for the submission of the remedies by Google started on 06 February 2019 and ended as of 06 August 2019. Within this period Google made its first submission of the compliance package on 20 May 2019, but the relevant submission did not constitute a final version of Google’s intended remedy actions but was merely a draft. The TCA assessed the remedies through its decision dated 07 November 2019 (No. 19-38/557-245 or the “Non-Compliance Decision”) and concluded that Google had not implemented the required changes to its agreements and therefore decided to impose a daily administrative monetary fine corresponding to five per ten thousand of Google’s turnover generated in Turkey for the financial year of 2018 (for a total of 60 days) starting from 07 November 2019 to 06 January 2020 (the date when the relevant compliance proposals as explained below were entered into the TCA’s record).

*Compliance decision or Google’s three separate remedy submissions.* Further to the Non-Compliance Decision, Google made three separate submissions. The first submission, dated 16 July 2019, consisted of informing the TCA of the notification made by Google to all Mobile Application Distribution Agreement (MADA) partners that Google would no longer approve new devices to be distributed in Turkey under the current MADA and Android One agreements pursuant to the Infringement Decision. The second and third submissions, made on 25 December 2019 and 06 January 2020, contained template (i) Turkey Mobile Application Distribution Agreement (TMADA), (ii) Turkey Revenue Share Agreement (TRSA), and (iii) Turkey Google Widget Placement Agreement, which will be signed with device partners for devices to be distributed



in Turkey. As a result of these remedy submissions, the TCA through its Compliance Decision, assessed whether Google had fulfilled the obligations implemented within the Infringement Decision.

The commitments submitted by Google to the TCA comprised of the following:

- Provisions concerning the Google Search widget were removed from the licensing agreements. Instead, a separate agreement by which an OEM could decide whether to include the relevant widget in return for a fee was introduced;
- Provisions concerning Google Search points to be set as default on mobile devices were removed from the licensing agreements;
- Provisions concerning Google Webview component to be set as default on mobile devices were removed from the licensing agreements. However, other in-app web page converters shall provide a secure environment at least as much as Google’s Webview component;
- Provisions preventing (i) Google Search’s competitors to be pre-installed into mobile devices, and (ii) OEM’s to select Google Search’s competitors as default in any of the search points of their mobile devices were removed from the RSA and other agreements to be concluded with the OEMs.

Hence, based on the commitments submitted with the letters dated 25 December 2019 and 06 January 2020 as well as provided above, the TCA concluded that the obligations set forth under the Infringement Decision had been fulfilled. In addition, the TCA further required a submission to see whether the amendments and recommendations are incorporated within the agreements within two months from the notification of the reasoned version of the Compliance Decision.

## Investigations into Apple in the EU

Upon complaints by Spotify in 2019 and by an e-book/audiobook distributor in 2020, on 16 June 2020 the European Commission (“EC”) launched an investigation into Apple’s rules for mobile application developers for the distribution of applications via its AppStore. In particular, the investigation focuses on the compliance with EU competition law of the obligatory use of Apple’s own proprietary in-app purchase system and the ability of developers to inform users of alternative purchasing possibilities outside of the apps.

Apple has certain restrictions in its agreements with distributors of apps for users of Apple devices. Two of them, in particular, are subject to the investigation:

- Requiring the use of Apple’s in-app purchase system for the distribution of paid digital content. A 30% commission is charged by Apple for all subscription fees through such system; and
- Preventing developers from informing users about (cheaper) purchasing possibilities outside the apps.

The above rules in Apple’s license agreements cause concerns that they may distort competition in the market for music streaming services, as well as e-books and audiobooks.

A parallel investigation has been launched into Apple Pay



systems in merchant apps and websites as well as in physical stores. Similarly, there are concerns that Apple’s terms, conditions, and other measures related to the integration of Apple Pay for the purchase of goods and services may distort competition and reduce choice and innovation.

## The CJEU’s Judgement in the Power Cable Cartel (NKT vs EC)

On 4 May 2020 the Court of Justice of the EU (“CJEU”) delivered its judgement in Case C-607/18 P partially annulling the ruling of the General Court (“GC”) and reducing the fine imposed by the EC on the participants of the power cable cartel. The majority of the EC’s cartel findings were upheld by the CJEU though. The CJEU emphasized once again the importance of due compliance with the right to defence in the course of the antitrust investigations.

A years-long power cable cartel saga seems to have finally come to an end for NKT companies (the cases were lodged in 2011 by the EC against a dozen companies in the power cable industry). The CJEU had a final say in the case: it reduced a price-fixing fine imposed on the power cable maker NKT’s entities of EUR 200 thousand to EUR 3,687 million on the grounds that the EC could not punish the undertaking for cartel sales outside the EU/EEA.



As regards the NKT’s liability for the infringement that concerns conduct related to sales in countries outside the EU/EEA, the CJEU decided to annul the part of the decision that imposed liability on the companies (para 298). This is mostly because the companies were not afforded the opportunity to use their right to defence properly during the statement of objections phase as regards the aspect of the infringement at issue.

The CJEU also annulled the decision in part of the companies’ liability for the infringement that concerned a collective refusal to supply accessories and technical assistance to competitors not participating in the cartel. This is due to the EC’s failure to establish in the decision that the companies were aware of that aspect of the infringement or could reasonably have foreseen it (para 299). The EC also failed to identify any evidence that would demonstrate that the companies had participated in the underground power cable projects allocation in the EEA in the period from 3 July 2002 to 21 November 2002 (para 300).

In other words, the CJEU emphasized that the companies concerned could not be held liable for (i) anticompetitive practices related to sales in countries that are not members of the EU/EEA, (ii) collective refusal to supply accessories and technical assistance to competitors not participating in the cartel, and (iii) the allocation of underground power cable projects in the EEA from 3 July to 21 November 2002. On these grounds, the CJEU considered it appropriate to reduce the amount of the fine (para 306).

# EC Assessment of Business Cooperation Projects during COVID-19 Pandemic



As of 8 April 2020, the EC applies the Communication on Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 pandemic. It clarifies the EC's policy towards the assessment of business cooperation projects. The self-assessment system may be supplemented with informal feedback from the EC on specific practices, while exchanges of business-sensitive information may become a necessity, rather than a problem, in such circumstances. It is important that companies document all information exchanges and agreements between them and make them available to the EC upon its request.

**Self-assessment.** Regulation (EC) No. 1/2003 provides for a self-assessment system of the legality of their agreements, i.e., undertakings can no longer notify their agreements to the EC to receive an individual exemption from Article 101 of the Treaty on the Functioning of the EU (“TFEU”). During the COVID-19 outbreak cooperation between undertakings might be more necessary and frequent than usual since it may help to address the shortage of essential products and services. Considering this, companies might need specific guidance on their cooperation initiatives to facilitate their self-assessment. The EC provides for the possibility of obtaining ad hoc feedback on the legality of specific cooperation practices to effectively tackle the COVID-19 outbreak, on the compatibility of such initiatives with EU competition law. Such informal guidance on specific initiatives may be sought via a dedicated webpage (<https://ec.europa.eu/competition/antitrust/coronavirus.html>) and a mailbox (COMP-COVID-ANTITRUST @ec.europa.eu).

**Cooperation.** The procompetitive cooperation aimed at addressing the COVID-19 challenges is encouraged by the EC. Cooperation is critical particularly in the health sector in view of the risk of shortages of hospital medicines to treat COVID-19

patients. According to the EC, entrusting a trade association/independent service provider/public body to coordinate joint transport for input materials, aggregate production and capacity information without exchanging individual company information, share aggregate supply gap information, and asking participating companies whether they can fill the supply gap to meet demand, etc., shall not raise antitrust concerns if such cooperation is subject to EC guidelines on the applicability of Article 101 of the TFEU. As regards the imperative request from public authorities to companies to temporarily cooperate in response to COVID-19 by way of organizing production and delivery to meet an urgent need of healthcare, such cooperation is not prohibited.

**Info exchanges.** While emphasizing that no individualized company information must flow back to competitors, the EC admits that exchanges of commercially sensitive information and coordination may be required by measures to adapt production, stock management, and distribution in the health industry. In normal circumstances, this is problematic from the competition law perspective, but in the current force majeure, such measures would not be problematic and would not lead to the EC's enforcement priority to the extent that such information exchange would be (i) objectively necessary to increase output to address/avoid shortage of supply of essential products/services that are used to treat COVID-19 patients; (ii) temporary (i.e., during the COVID-19 outbreak); (iii) proportional (not exceeding what is necessary to achieve the objective of such info exchanges).

It is important that companies document all information exchanges and agreements between them and make them available to the EC upon its request.

## Turkish Hot-Rolled Steel Products Under the EU's Scrutiny Again: Anti-Subsidy Proceedings

Upon the European Steel Association EUROFER's (the "Complainant") complaint on behalf of producers representing more than 25% of the total EU production of certain hot-rolled flat products of iron, non-alloy or other alloy steel ("products concerned"), on 12 June 2020 the EC initiated an anti-subsidy investigation concerning imports of the products concerned originating in Turkey.

The Complainant asserted that the Turkish producers receive subsidies through (i) direct transfer of funds, (ii) waiver and non-collection of government revenues that are due, and (iii) government provision of goods or services for less than adequate remuneration. Indeed, the Complainant alleged that the Turkish producers of the concerned product receive financial contributions through subsidy practices such as the provision of preferential export credit subsidy programmes by the Export Credit Bank of Turkey (EXIMBANK), incentives for R&D operations and investment, electricity price support, investment incentives, social security premium incentives, deductions from taxable income for export revenue, property tax exemption, and government provision of iron ore mining rights, coal, natural gas, electricity, and water for less than adequate remuneration.



It has been alleged further that the volume and prices of the concerned imports have had a negative impact on the EU domestic industry's prices and resulted in injury to the overall performance and financial and employment situations of the relevant industry. Should the Commission's conclusion concerning subsidy and injury be affirmative, it will examine whether the imposition of an anti-subsidy measure would be in the interest of the European Union.

## New Customs Duties in Turkey

Through four presidential decrees published on 18 April 2020, and two presidential decrees published on 21 April 2020, Turkey modified the (additional) customs duties to imports of certain products or imposed new additional customs duties.

Presidential Decree No. 2425 increased the rates of the additional customs duties (to between 20-30%) imposed on the imports of more than 50 products such as synthetic stable fibres, woven fabrics, cotton fabrics, synthetic filament yarns, men's/woman's apparel and clothing accessories, medicaments, pile fabrics originating in least developed countries, special incentive countries and countries that benefit from Turkey's GSP system. That being said, the EU, Turkey's FTA partners, Malaysia, and Singapore are exempted. Through Presidential Decree No. 2422, while imports of sunflower seeds from Kosovo and Bosnia-Herzegovina are subjected to 0% of customs duties, imports of the same products from Singapore are subjected to 9% of customs duties until 31 May 2020.



With Presidential Decree No. 2423, the customs duties imposed on a large number of iron and steel products (such as slab and billets, flat-rolled products, alloyed products, sections and stainless sheets) have been increased temporarily until 15 July 2020. Indeed, as the global demand has decreased with the COVID-19 pandemic, the Turkish government intends to prevent a trade diversion that could adversely affect employment and productivity in the iron and steel industries. Again, the EU and Turkey's FTA partners are exempted. Moreover, Presidential Decree No. 2424 imposed additional customs duties ranging between 5-50% on imports of a large number of products such as prepared glues, plates, sheets, film, foil and strip, articles of plastics, vulcanized rubbers, coach screws, air or vacuum pumps, cutting machines used in book printing, machine tools, electrical transformers, loudspeakers, headphones, microphones, oscilloscopes, wrist watches and pocket watches, and video game consoles and machines.

Last, two presidential decrees published on 21 April 2020 established temporary additional customs duties. While Presidential Decree No. 2429 imposed such duties ranging between 5-50% on imports of textile, garment and leather products, and shoes, Presidential Decree No. 2430 brought in additional customs duties ranging between 5-45% on imports of various industrial products such as chemicals, piston engines, pumps, cables, wares, and iron and steel products. Those measures will remain in force until 30 September 2020 and will not be applied on imports from the EU and Turkey's FTA partners.

# On the Consequences of COVID-19 on Anti-Dumping and Anti-Subsidy Investigations in the EU



On 16 March 2020 the EC published its Notice of the consequences of the COVID-19 pandemic on anti-dumping and anti-subsidy investigations in the EU (the “**Notice**”). The EC stresses that the safety measures due to the threat of virus transmission may impact trade defence investigations in two main ways: (i) on-spot verifications, and (ii) deadlines within which interested parties have to respond to the EC’s information requests. The Notice applies to all parties involved in trade defence investigations located or closely interlinked with the areas affected by the virus.

As regards the *on-spot verifications*, the EC decided to suspend all non-essential travel to the affected areas and to postpone all face-to-face meetings with visitors from these areas. Instead, the EC endeavors to consider the information properly submitted by the parties and to cross-check such information with other information available if feasible. Alternatively, it will have to base its findings only on the verified or other proven facts on the

record of the investigation. In this respect, the highest degree of cooperation will be required from the interested parties.

As for the *time limits*, since the COVID-19 pandemic is an unforeseen event constituting force majeure likely to impede the affected companies from complying with the relevant deadlines for submission of information, an extension of 7 days or more may be granted. The requesting parties must explain in detail how the measures linked to the COVID-19 affect their capacity to provide the requested information.

The approach described in the Notice will apply until the areas affected by COVID-19 have been deemed safe to travel or no restrictive prevention measures applying to parties located in those areas or otherwise affected by the measures linked to COVID-19 remain.

## New Monitoring System for Steel and Aluminum Imports into the EU



The EC introduced a new monitoring system for steel and aluminium imports into the EU with the view to allowing rapid analysis of import trends (ahead of the official Eurostat statistics). Application of the system began as of 15 May 2020.

The new monitoring system replaced the “prior surveillance” system introduced for steel in 2016 and aluminium in April 2018. It is a completely transparent system based on actual import statistics available two weeks following the actual imports. The previous system was based on import intentions. The new monitoring system is expected to better respond to the needs of the steel and aluminium industries through improved assessment of the import situation.

## Deadline to Register with the Data Controllers' Registry (VERBIS) Extended

The Turkish Data Protection Authority (“**Authority**” or “**Turkish DPA**”) on 23 June 2020 announced that the deadline to register with the Data Controllers' Registry (“**VERBIS**”) was extended (to 30 September 2020 for most data controllers) due to the COVID-19 pandemic. This is the 3rd extension decision announced by the Authority, following the original deadline of 30 September 2019.

The deadline to register with VERBIS was extended due to the difficulties faced by companies because of the COVID-19 pandemic. The Authority emphasized that many companies have been closed or their employees have been working remotely due to the pandemic, which affects their ability to prepare the data processing inventories required for the registration. Considering also the requests thereof of the Union of Chambers and Commodity Exchanges of Turkey (“**TOBB**”) and other sector representatives, the Authority decided to extend the deadlines to register with the VERBIS. The new deadlines are as follows:

- For the data controllers that have more than 50 employees or more than TRY 25 million annual financial balance: 30 September 2020 (the previous deadline was 30 June 2020),



- For data controllers established outside of Turkey: 30 September 2020 (the previous deadline was 30 June 2020),

- For data controllers with fewer than 50 employees and less than TRY 25 million annual financial balance but whose main business is processing sensitive personal data (e.g. ethnic origin, religion, health data): 31 March 2021 (the previous deadline was 30 September 2020),

- For public institutions: 31 March 2021 (the previous deadline was 31 December 2020).

## Non-Compliance with the DPA's Previous Instructions

The Turkish DPA (decision No. 2020/86<sup>4</sup>) fined a data controller active in online ticket sales (name not disclosed) TRY 50,000 for not taking the required administrative measures and not complying with the DPA's previous instructions.



In previous decisions (decision No. 2019/48), the Turkish DPA had instructed a data controller active in the field of online plane ticket sales that it should respond to data subjects' requests efficiently and in good faith as per the Turkish Data Protection Law (“**DPL**”), which may include the request of removal of personal data or of being informed as to the personal data being processed by the data controller.

The Turkish DPA found that the data controller did not fulfill its obligation to respond to a data subject within 30 days. It was established that although the Turkish DPL does not foresee a fine to be imposed on the data controllers in the case of failure to respond in time, the DPA may fine the data controller if such data controller fails to comply with the DPA's previous instructions. As the same data controller had previously been instructed by the DPA on the same matter, the data controller was fined TRY 50,000.

<sup>4</sup> <https://kvkk.gov.tr/Icerik/6732/2020-86>

## Requesting Explicit Consent as a Condition of Providing Services

Upon a complaint filed by a website user who claimed that the website was requesting e-mail information as a condition to view the website's content, the Turkish DPA evaluated whether such request was lawful (decision No. 2019/206).

The Turkish DPA evaluated whether this constituted a violation, which is generally referred to as requesting explicit consent as a condition to provide services. It first found that the website had not been providing the services directly, but rather had been acting as an intermediary between the providers and their clients and further offering advantages to the clients purchasing the products (or services) through its website. Considering that the related products and services were not provided

by the website, and the website was providing advantages to individuals who signed up, the concerned practice did not violate the Turkish DPL.

However, the Turkish DPA recommended that the concerned website update its Privacy Policy to comply with the Communiqué on Principles and Procedures to be Followed in fulfillment of the Obligation to Inform stated. To do so, the website was instructed to clarify the grounds for its data processing activities and not to base its data processing activities on explicit consent so long as there existed other data processing conditions. The Turkish DPA further mentioned in its summary decision that the website was instructed to carry out its obligation to inform and explicit consent practices separately from each other.

### Opening a Bank Account without Knowledge of Accountholder

*The Turkish DPA fined a bank (name not disclosed) TRY 210,000 for opening a bank account without the knowledge of the account holder (decision No. 2020/103<sup>5</sup>).*



The data subject visited the bank concerned in 2018 to open a bank account and learned that he/she already had a bank account opened in 2016. The data subject was further informed that the bank account had been opened in a branch which he/she had never visited, or where he/she had never carried out any kind of transaction. It was then understood that the personal data used to open the said account had been obtained through a third-party company, with which the bank had previously been engaged, to extend its customer portfolio. As the data subject was not aware of such action, he/she had never signed the “Banking Services Agreement.”

Therefore, the bank had never activated the account.

The issue was brought before the Turkish DPA. The DPA stated that although the Turkish DPL was not in force in January 2016, the bank still had the personal data of the data subject in 2018, when the data subject got in touch with the bank. The bank, however, had not taken the necessary

actions in compliance with the Turkish DPL. The DPA stated that this could have been realized by, for instance, (i) obtaining explicit consent from the data subject or (ii) satisfying one of the data processing conditions foreseen under the Turkish DPL. The bank had not realized these and kept the personal data in their system. The bank was fined TRY 210,000.

5 <https://kvkk.gov.tr/Icerik/6733/2020-103>

### Obtaining Employees' Data Unlawfully May be Subject to Turkish Criminal Code

*The Turkish DPA evaluated a complaint submitted by an employee claiming that screenshots of his/her WhatsApp conversations had been obtained and shared with third persons unlawfully by his/her employer (name not disclosed) (decision No. 2019/138).*

The employee claimed in his/her complaint that his/her employer had read, taken photographs and/or saved screenshots of his/her WhatsApp conversations without consent. As a result of the assessment of the employee's complaint, the Turkish DPA concluded the following:

- The subject matter of the complaint was evaluated under Article 135-140 of the Turkish Criminal Code No. 5237 and not under the Turkish DPL;
- It was understood that a criminal complaint had already been filed with the prosecutor;
- The claimed violation could not be assessed within the scope of the data protection rules and as such was subject to prosecution as per Turkish Criminal Code No. 5237.

The DPA stated that obtaining personal data by unlawful means is subject to criminal prosecution, which may result in prison sentence for up to six years as per Article 136 and 137 of Turkish Criminal Code No. 5237.

Requesting Explicit Consent as a Condition of Providing Services

### Using the Data Subject's Phone Number for a Different Purpose than the Initial Processing Purpose

*A call center (name not disclosed) was fined TRY 18,000 on the ground that the call center had used the data subject's phone number for a different purpose than the initial processing purpose (decision No. 2020/34).*

It is understood from the decision that the data subject initially had provided his phone number for a subscription to a sports club's magazine, and the related data had been processed on such legal ground



between 2013 and 2015. However, the data subject was called by the call center for advertising regarding marketing activities of the data controller with regards to food products, and this was found to constitute a different purpose by the Turkish DPA. It was further stated that the data subject had applied to the data controller to be informed as to how his/her phone number had been obtained. The data subject had been informed that the phone number should have been deleted from the system after the subscription had ended. Instead, however, the phone number had been maintained in the call center's system due to a malfunction. The data controller assured that the data subject's phone number had been removed from the system.

As a result, the Turkish DPA concluded that the phone number should have removed from the system after the purpose of processing the data had ended and decided that advertising does not comply with the principle of “relevant, limited and proportionate process of the data” and does not base on any of the data processing activities set forth under the Turkish DPL. The data controller, therefore, was fined in the amount of TRY 18,000.

EVENTS



Competition Rules and Competition Authorities' Reflexes in Times of Crisis

Our managing partner Bahadır BALKI took part as a speaker in Young Managers and Businessman Association's ("GYİAD") "Competition Rules and Competition Authorities' Reflexes in Times of Crisis" on-line meeting which were held on 8<sup>th</sup> of June.

Competition Based Breaches in Times of Crisis

Our managing partner M. Fevzi TOKSOY made an online presentation on 8<sup>th</sup> of May, titled "Competition Based Breaches in Times of Crisis" in an on-line meeting organized by Turkish Ethics and Reputation Society ("TEİD"). The subject of TEİD's meeting was "Ability to Manage Ethics and Compliance Risks during Coronavirus Days".



ACTECON's latest publications (<https://www.actecon.com/en/news-articles>)

Amendments to the Turkish Competition Law



Recent Regulation on the Unfair Price Assessment Board: How the Board Will Function?



The Turkish Competition Authority Investigates the Allegations on Leading Energy Drink Company (Red Bull)



Turkish Competition Authority Reiterates: Labor Market is Subject to Competition Law Enforcement



Turkish Competition Watchdog Initiates its First Pandemic-Related Investigation



The Regional Administrative Court Found the Turkish Competition Authority's Decision concerning Mey İçki Unlawful: Abuse of the Dominance Should Be Evaluated Separately in terms of Each Product Market!



## ACTECON's latest publications

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Liberalization & Restriction of International Trade Amid COVID-19  
- Update of Turkey's Measures on Imports and Exports



How Will Turkey Deal with Unfair Practices During COVID-19 Outbreak?: Establishment of the Unfair Price Assessment Board



TCA is Acting Heavy-Handedly during Covid-19 Outbreak



The Role of Standard of Proof in Competition Law: Sahibinden.com Decision



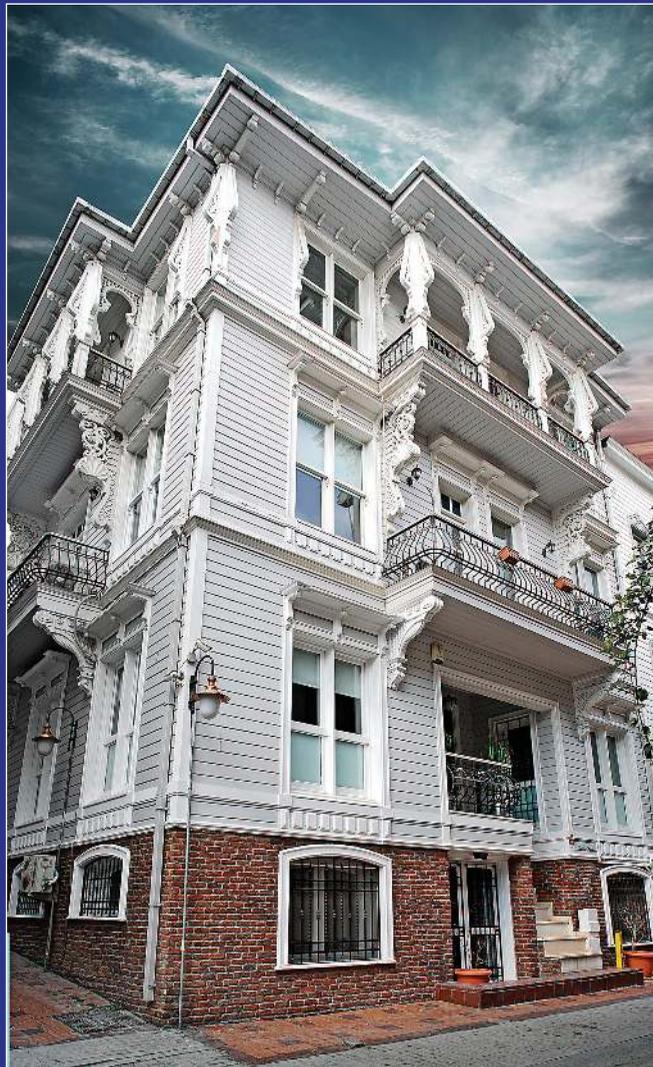


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