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Selected Essays 2019

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The Output® Selected Essays provides regular update on competition law, international trade and regulation developments with a particular focus on the Republic of Turkey and practice of the Turkish Competition Authority, as well as the European Commission. The Output® Selected Essays cannot be regarded as a provision of expert advice and should not be used as a substitute for it. Expert advice regarding any specific competition, international trade & regulatory matters may be obtained by directly contacting ACTECON.

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FOREWORD

Dear reader,

We are happy to present you The Output® – Selected Essays 2019 with the highlights of some interesting developments in competition law, international trade, as well as regulation and data protection.

Section I of the book focuses on the three pillars of the competition law. Among the numerous cases reviewed by the competition authorities in the EU and Turkey in 2019, we would like to emphasize the investigations in the energy, telecommunications and poultry sectors, Google, as well as Facebook saga, predatory pricing cases, refusal to supply and MFN practices.

Section II of the book is on international trade developments in Turkey. The Turkish Ministry of Trade dealt with numerous anti-circumvention and safeguard measures. The main message taken is that the cooperation with the Ministry of Trade in any investigation can be beneficial for the party(s) concerned.

Section III of the book is devoted to regulation/data protection issues. There were some developments in this area as well, i.e. new commercial electronic message management system in Turkey, valid consent for cookie usage, etc.

We hope you will find our selected essays useful.

Sincerely,

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LIST OF ABBREVIATIONS

AAC	Average Avoidable Cost
ACM	Dutch Antitrust Authority
Additional Data	User Data In Other Facebook Services
Administrative Court	Ankara 15th Administrative Court
AI	Artificial Intelligence
Amendment	Law No. 7190 on Amending the Customs Law and other Certain Laws
Android	Android Operating System
APIs	Application Programming Interfaces
ATC	Average Total Cost
AVC	Average Variable Cost
AYESAŞ	Enerjisa İstanbul Anadolu Yakası Elektrik Perakende Satış A.Ş.
Bakpiliç	Entegre Tavukçuluk A.Ş.
BGB	German Civil Code
BTK	The Information and Communications Technologies Authority
Bupiliç	Bupiliç Entegre Gıda San. Tic. A.Ş.
BWB	Austrian Federal Competition Authority
CJEU	Court of Justice of the EU
Commercial Android	Commercial Version Of Android That Includes Google Play Store And Google Play Services
Competition Law	Law of Turkey No. 4054 on the Protection of Competition
Decision No 1/95	Decision No. 1/95 of the EC–Turkey Association Council
DP Law	Turkish Personal Data Protection Law No.6698
DPA	Data Protection Authority

Dusseldorf Court	Higher Regional Court of Dusseldorf
Düzey	Düzey Tıbbi Sistemler Bilgisayar ve Kimyevi Ürünler İnşaat San. Tic. Ltd. Şti
EC or Commission	European Commission
ECJ or CJEU	Court of Justice of the EU
EDSA	Electricity Distribution Services Association
EM Amendment	Regulation on the Amendment of the Regulation on Commercial Communication and Commercial Electronic Messages
EMRA	Energy Markets Regulatory Authority
EPİAŞ	Turkish Energy Exchange
ePrivacy Directive	Directive 2002/58/EC
EU	European Union
EUMR	EU Merger Regulation
EV	Electric Vehicle
FAS	Federal Antimonopoly Service of the Russian Federation
Fitbit	Fitbit Inc.
Game Cartridge	Game Software
GANs	Generative Adversarial Networks
GCEU	General Court
GDPR	General Data Protection Regulation (EU)
GLANBIA	Glanbia Besin Ürünleri Pazarlama ve Tic. Ltd. Şti
Google	Google LLC or Google Inc.
Guideline	Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings
HABAŞ	Habaş Sınai ve Tıbbi Gazlar İstihsal Endüstrisi A.Ş.

HEF DURFERRIT	Hef-Durferrit Gmbh
HIPAA	Health Insurance Portability and Accountability Act
HUAWEI	Huawei Telekomünikasyon Dış Ticaret Ltd. Şti.
IAP	In-App Purchase System
IESs	Independent Electricity Sales Companies
Infringement Decision	TCA's decision dated 19 September 2018 and numbered 18-33/555-273
IRESCs	Incumbent Retail Electricity Sales Companies
IYS or System	Commercial Electronic Message Management System
JV	Joint Venture
Kaspersky Lab	Kaspersky Laboratory
KSK	Kaspersky Safe Kids
LRAIC	Long-Run Average Incremental Cost
MADA	Mobile Application Distribution Agreement
MDM	Mobile Device Management
Ministry	Turkish Ministry of Trade
Network	Network Servisleri A.Ş.
P2B Regulation	EU Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediation Services
PC	Personal Computers
PSN	PlayStation Network
R&D	Research and Development
Radontek Medikal	Radontek Medikal İthalat İhracat San. ve Tic. Ltd. Şti.
Regional Court	Ankara Regional Administrative Court's 8th Administrative Chamber

Regulation	Regulation on the Prevention of Unfair Competition in Imports
Report	Mergers and Acquisitions Overview Report 2019
RSA	Revenue Share Agreement
SG&A	Selling, General and Administrative
SHA	Shareholders Agreement
SONY EURASIA	Sony Eurasia Pazarlama A.Ş
Tad Piliç	Tad Piliç Fenni Yem San. ve Tic. Ltd. Şti.
TCA	Turkish Competition Authority
TFEU	Treaty on the Functioning of the EU
TL	Turkish Lira
TS ISTANBUL	Techniques Surfaces İstanbul Yüzey İşlem San. ve Tic.
TTNET	TTNET A.Ş.
TÜRK TELEKOM	Türk Telekomünikasyon A.Ş.
TURKCELL	Turkcell İletişim Hizmetleri A.Ş.
Turkish Customs Law	Customs Law No. 4458
UCC	Union Customs Code
VODAFONE	Vodafone Telekomünikasyon A.Ş.
Yandex	Yandex Limited Liability Company

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CHAPTER 1

COMPETITION LAW

An Evaluation of Competition Law Developments in the EU and Turkey in 2019

By Fevzi Toksoy, Bahadir Balki and Hanna Stakheyeva

1. Introduction

2019 was busy and interesting in terms of competition law developments both in the EU and Turkey. On the one hand, it was an ordinary year since the competition authorities of both jurisdictions, as usual, dealt with numerous antitrust cases, disclosed cartels, found dominance, imposed fines, and approved as well as blocked concentrations. On the other hand, 2019 was special as it brought about several landmark cases and practices, spiced with policy discussions on digitalization/data protection and competition law, all of which may shape 2020.

This article looks at some of the key competition law developments/cases both in the EU and Turkey in 2019. Traditionally, we focus on three main pillars of competition law, anticompetitive agreements and cartels, abuse of dominance, and concentration control.

The summary of the key cases on RPM, information exchanges, and procedural irregularities are provided, in addition to the hot topic of 2019, application of competition law in digital markets.

2. Abuse of dominance

The decisions of both the TCA and the EC throughout 2019 served as a (costly) reminder to dominant companies that dominance entails a special responsibility not to abuse their market power by restricting competition, either in the market in which they are dominant or in separate markets.

2.1. Via predation

Both in the EU and Turkey, preparatory pricing by dominant companies is prohibited as abuse of a dominant position[1].

[1] Prices set below average variable costs can be presumed to be predatory because they have no other economic rationale than to eliminate competitors since it would otherwise be more rational not to produce and sell a product that cannot be priced above average variable cost. Where prices are set below average total (but above variable) costs, some additional elements proving the predator's intention need to be established in order to qualify them as predatory, given that other commercial considerations, like a need to clear stocks, may lie at the heart of the pricing policy. // Glossary of terms used in EU competition policy Antitrust and control of concentrations, DG of Competition, 2002, available at

file:///C:/Users/User/Downloads/european_commission_glossary_of_terms_used_in_eu_competition_policy_-_antitrust_and_control_of_concentrations.pdf

The US chipmaker Qualcomm[2] was fined EUR 242 million for abuse of dominance via predatory pricing in the EU. Qualcomm was found to be abusing its dominance via predatory pricing, selling certain quantities of its chipsets below cost to Huawei and ZTE, thus aiming to eliminate its main competitor, Icera. The EC's conclusion finding a violation was based on a price-cost test for the three Qualcomm chipsets concerned and a broad range of qualitative evidence demonstrating the anti-competitive rationale behind Qualcomm's conduct intended to prevent Icera from expanding and building a market presence. No evidence that Qualcomm's conduct created any efficiency that would justify its practice was found.

As regards Turkey, the TCA also dealt with the predatory pricing in 2019. In the Huawei[3] case, it concluded its preliminary inquiry rejecting predatory pricing allegations in mobile network tenders. No full-fledged investigation was launched. The TCA, following the analysis of the market conditions and shares, determined that Huawei was dominant, however profitable in the relevant markets, hence the prices in the mergers were above cost. These findings were sufficient for the TCA to decide that Huawei did not abuse its dominance and close the case.

2.2. By restricting cross-border sales

AB InBev[4] was fined approximately EUR 200 million for abusing its dominant market position in Belgium by pursuing a deliberate strategy to restrict the ability of supermarkets and wholesalers to buy Jupiler beer at lower prices in the Netherlands and to import it into Belgium in order to maintain higher prices in that country.

The decision contributes to the interpretation of Article 102 of the TFEU by covering such illegal practices as (i) change in the packaging of products supplied to retailers and wholesalers in one country to make these products harder to sell in another country, including by changing the design and size of products (beer cans in this case); (ii) limiting the volumes of products supplied to a wholesaler in one country to restrict imports of these products into another country; (iii) refusal to sell a number of products to one retailer unless the retailer agreed to limit its imports of less expensive products; and (iv) making customer promotions for products offered to a retailer in one country conditional upon the retailer not offering the same promotions to its customers in another country.

2.3. By imposing exclusivity on dealers

An interesting case of Turkcell in Turkey where the TCA's decision finding the company in violation of competition law via abuse of dominance by imposing exclusivity on its dealers was supplemented with a judgment of the Council of State stating that Turkcell might have also been involved in the acts of resale price maintenance. Following that, the

[2] Case AT.39711 — Qualcomm (predation), 2019, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52019XC1106(02)

[3] Huawei Telekomünikasyon Dış Ticaret Ltd. Şti. (Huawei) Decision no. 19-20/286-122 dated 30 May 2019.

[4] AT.40134 – AB InBev beer trade restrictions, 2019, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/40134/40134_2872_5.pdf

TCA initiated an additional examination of the Turkcell case, launching a re-evaluation of the information and the documents obtained throughout the investigation while considering the Council of State's judgment. Eventually, the TCA concluded[5] in line with the Council of State's ruling.

The case is an example of intertwined violations committed by one undertaking that are covered by two different pillars of competition law[6].

3. Anticompetitive agreements

3.1. Resale price maintenance (RPM)

This one continues to be a hot topic in both jurisdictions. RPS is the practice whereby a producer determines the prices of its distributors or significantly limits its distributors' freedom of contract. Such practices are prohibited under Article 4 of the Turkish Competition Law as the equivalent of Article 101 of the TFEU. The disputable issue is whether it should be treated as a restriction by object or whether the effect-based analysis should be considered.

In 2018, in the Sony[7] and Henkel[8] decisions the TCA followed the "by object analysis", i.e., did not take the effect of the practices into consideration and ruled on the imposition of administrative fines. However, in 2019 with the Bfit[9] decision and Minikoli[10] decision, the TCA adopted an effect-based approach. The TCA concluded the preliminary inquiry stating that there was no need to initiate an investigation. It was detected that under the agreements franchisees were able to deviate from the list of prices. Additionally, price lists had been created and distributed to the centers by Bfit only in relation to the reformer Pilates services, and they were free to set prices for other services. Although such practices could not benefit from the individual exemption, considering Bfit's low market share and strong competitors, the TCA ruled that the effects of the RPM practices were very limited. It seems that the TCA will continue evaluating various conditions, i.e., market characteristics, market share, and other undertakings concerned and the duration of the practices in the process of assessing the legality of the RPM.

In the EU, as a general rule, the RPM is regarded as a "by object" infringement of competition law. This is because it is very unlikely that RPM will contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefits. At the same time, a company tried to argue an individual exemption in accordance with Art. 101 (3) of the TFEU[11]. In other words, the EU law acknowledges the "potential efficiencies of RPM

[5] Decision No. 19-03/23-10, 2019.
[6] See more on RPM below.
[7] Decision 18-44/703-345 dated 22.11.2018 relates to Sony's RPM practices by interfering with its dealers' online sales in the consumer electronics market.
[8] Decision 18-33/556-274 dated 19.09.2018 related to Henkel's practices of RPM in the markets for beauty and personal care products and laundry and home care products by using various computer program and internal report systems.
[9] Decision 19-06/64-27 dated 7.02.2019.
[10] Decision 19-11/129-56 dated 7.03.2019.
[11] For instance, see CASE AT.40465 – ASUS , 2018; CASE AT.40469 – DENON & MARANTZ , 2018.

which may – albeit rarely – suffice to rebut the presumption of illegality."[12] Hence, the undertakings should only resort to RPM where efficiencies from those may overweight anticompetitive consequences.

3.2. Cartels /Information exchanges

2019 was "fruitful" in terms of discovering cartels. The leniency policy has proved efficient and helpful in this regard.

The EUR 31.6 million canned vegetables cartel[13] involving Coroos and Groupe CECAB, which had lasted more than 13 years, was disclosed upon the leniency application of Bonduelle. The company thereby avoided a fine of approximately EUR 250 million[14]. Two cartels in the spot foreign exchange market[15] involving Barclays, RBS, Citigroup, JPMorgan, and MUFG were revealed following leniency application of RBS, which thereby avoided an aggregate fine of approximately EUR 285 million[16]. Detection of car part cartels continued in 2019 with a focus on car safety equipment this time[17]. The EC fined car safety equipment (seatbelts, airbags and steering wheels) suppliers Autoliv and TRW approximately EUR 368 million in a cartel settlement[18]. Takata obtained full immunity from a fine due to having revealed the cartel. All three perpetrators acknowledged their involvement in the cartel and agreed to settle the case.

Only cartels may be subject to leniency applications. Information exchanges are crucial in determining whether the activity constitutes a cartel. However, the border between such information exchanges and cartels has never been sufficiently clear and uncertainty continues. In 2019 the TCA in its poultry decision[19] refrained from characterizing information exchanges regarding future pricing and production strategies as a cartel. The investigation was conducted into activities of 20 undertakings action in the poultry sector. The TCA decided that nine of the undertakings violated the Turkish Competition Law by way of exchanging information regarding future pricing and/or supply restrictions. The undertakings were fined approximately EUR 26 million, corresponding to 0.75% and 1.125% of their turnover in 2018. The companies that received higher fines had histories of dealing with the TCA in 2009 (naturally, recidivism as an aggravating factor). Price lists and other production related information of the competitors found on the premises of certain undertakings were considered insufficient to prove the anti-competitive conduct on their own, in the absence of

[12] https://www.osborneclarke.com/insights/re-sale-price-maintenance-never-say-never/

[13] Case COMP/AT.40127 – Canned vegetables, 2019.

[14] This is the second cartel case related to canned food. In the canned mushrooms cartel case in 2014, the EC fined Bonduelle, Lutèce, and Prochamp a total of around EUR 32 million, and in 2016, the EC fined Riberebro EUR 5.2 million. Common features of the cartels were that the companies set prices, agreed on market shares and volume quotas, allocated customers and markets, coordinated their replies to tenders, and exchanged commercially sensitive information.

[15] Case COMP/40135 – FOREX (ESSEX EXPRESS), 2019.

[16] The information exchanges following the tacit understanding reached by the participating traders had enabled them to make informed market decisions on whether and when to sell or buy the currencies they had in their portfolios.

[17] The decision is part of a series of major car parts sector cartels (e.g., bearings, wire harnesses in cars, the flexible foam used in car seats, parking heaters, air conditioning and engine cooling systems, and lighting systems). Previously, Autoliv and Takata had been fined for participating in cartels regarding the supply of occupant safety systems to certain Japanese car manufacturers, and TWR in one for the provision of hydraulic braking systems to Daimler and BMW. In total, the EC has fined car parts cartels over EUR 2 billion since 2013.

[18] CASE AT.40481 – Occupant Safety Systems (II) supplied to the Volkswagen Group and the BMW Group, 2019. The companies concerned were found to have exchanged commercially sensitive information and coordinated their market behaviour for the supply of car safety equipment to the Volkswagen Group and the BMW Group. The coordination to form and run the cartel took place mainly through meetings on the business premises of the suppliers, in restaurants and hotels, as well as through phone calls and email.

[19] TCA Decision No 19-12/155-70 dated 13.03. 2019.

supporting evidence of contacts among competitors. The TCA did not consider it as a cartel and classified it under "other infringements." The minimum administrative fine for cartels (2-4%) is considerably different from the fines for "other" infringements (0.5–3%).

The detection of cartels is expected to increase with a new eLeniency tool launched by the EC in 2019. The applicants now are able to complete their procedures online and are no longer required to provide oral statements in person. The leniency tool also grants a secure and restricted use to applicants, guaranteeing confidentiality and legal protection, and ensuring that the relevant uploaded information is transferred securely and will not be copied or printed.
In Turkey, no such online tool exists. Parties wishing to submit a leniency application must present the related documents physically to the TCA or give an oral statement on the issue according to the Regulation on Active Cooperation for Detecting Cartels.

4. Concentration control

4.1. Problematic transactions

As regards mergers, 2019 will be remembered as a year of "blocked transactions" mainly due to the failure of the parties concerned to provide adequate remedies. As known, the main rule in relation to remedies is that they must fully address the competition concerns of the competition authority on a lasting basis. In the following cases, this did not happen.

The EC prohibited Siemens' proposed acquisition of Alstom[20] due to the significant impediment of effective competition in markets for railway signalling systems and very high-speed trains. The parties were not willing to offer remedies sufficient to address the EC's competition concerns[21]. In addition, several complaints were received from the customers, competitors, industry associations and trade unions, as well as negative comments from several National Competition Authorities in the EEA. Similarly, the EC said "No" to the creation of a joint venture by Tata Steel and Thyssen Krupp[22] due to the risk of reduced competition in the crucially important steel sector and increased prices for different types of steel. The parties did not offer adequate remedies to address the EC's concerns. Feedback from third parties was crucial for the EC's decision (including at the remedies stage)[23].

[20] M.8677 SIEMENS / ALSTOM, 2019.

[21] The proposed transaction would have combined the transport equipment and service activities of Siemens and Alstom in a new company fully controlled by Siemens and created the market leader in some signalling markets and a dominant player in very high-speed trains.

[22] M.8713 TATA STEEL /THYSSENKRUPP / JV, 2019.

[23] The remedies offered by the parties did not address the EC's competition concerns adequately. The proposed divestment would have covered only a small part of the overlap between the merging companies or did not include adequate finishing assets capable of serving the customers in the geographic areas in which the merging companies mostly compete. Moreover, the remedy proposal included no assets for the production of the necessary steel input to the manufacture of galvanized steel products for the automotive sector. The EC sought the views of market participants about the proposed remedies. The feedback was negative for both areas. As a result, the EC prohibited the proposed transaction.

In Turkey, we would like to mention acquisition of SABMiller plc by Anheuser-Busch InBev (ABI)[24]. The transaction was approved unconditionally by the TCA's 2016 decision, which was subsequently annulled by the administrative court of Turkey upon the competitor's (Turk Tuborg) petition. The court reasoned its ruling by the TCA's failure to examine the market conditions and consider the parties' commitments. The TCA took the transaction to Phase II investigation in July 2019. Considering that the Phase II review may take approximately six months with a possibility of extension for an additional period of up to six months, the expected deadline is 5 July 2020 (at the latest). The TCA's decision will be very interesting to follow, considering that the transaction was implemented a few years ago.

4.2. International cooperation in multijurisdictional cases

Here we would like to acknowledge the acquisition by Nidec Corporation of sole control over Embraco, the compressor-manufacturing branch of Whirlpool, which was approved by the TCA (among other jurisdictions) on condition that the commitments offered to the EC were fulfilled[25]. The case is a great example of a multijurisdictional merger and of effective cooperation between authorities at the merger remedies stage. The TCA decided unanimously that the commitments offered to the EC were sufficient to eliminate horizontal and vertical overlaps in Turkey in relation to sales of household-type reciprocating hermetic cooling compressors, reciprocating hermetic light commercial cooling compressors, and condenser units.

4.3. "Jumping the gun" and other costly non-compliances

The core of the concentration control both in the EU and Turkey is notification requirement and stand-still obligation, violation of which entail sanctions. Additionally, the companies are obliged to provide (correct) information and respond to information requests of the competition authorities. However, in practice, it seems that companies very often forget about this.

The partial implementation of Canon's acquisition of Toshiba Medical Systems Corporation (TMSC)[26] without EC approval cost Canon EUR 28 million. In fact, Canon had notified the EC about the acquisition of TMSC and the transaction had been cleared unconditionally. However, following the analysis of the two-step transaction structure put in place for the acquisition of TMSC it was revealed that, in fact, the actual control had been exercised by Canon before the notification of the EC (which had been submitted at the second step of the transaction). The first and second steps together formed a single notifiable transaction, and, in fact, the first step contributed to the acquisition of final control over TMSC, which occurred with the second step. Thus, Canon had breached both the notification requirement and the standstill obligation[27].

[24] Decision no. 16-19/311-140, 2016.

[25] The transaction was cleared in the EU subject to the following conditions: (i) the divestment of Nidec's refrigeration compressor business for both household and light commercial applications; and (ii) the provision of the purchaser of the divestment business with significant funding for future investments in the facilities. See Case M.8947 — Nidec/Whirlpool (Embraco Business).

[26] M.8179 CANON / TOSHIBA MEDICAL SYSTEMS CORPORATION (Art. 14.2 proc.)

[27] Back in April 2018, the EC imposed a EUR 124.5 million fine on Altice for implementing its acquisition of the Portuguese telecommunications operator PT Portugal before notification of or approval by the EC. M.7993 ALTICE / PT PORTUGAL (Art. 14.2 proc.) . 2018.

The case adds more to the evidence that procedural breach of merger reviews are taken seriously by the EC. In April 2019, the EC imposed a EUR 52 million fine on General Electric for initially providing incorrect information during the investigation of its planned acquisition of LM Wind[28]. GE notified the EC of its proposed acquisition of LM Wind in January 2017, stating that it did not have any higher power output wind turbines for offshore applications in development beyond its existing six-megawatt turbine. However, through information collected from a third party, the EC found that GE was simultaneously offering a 12-megawatt, offshore wind turbine to potential customers. As a result, GE withdrew its notification of the acquisition of LM Wind and shortly thereafter re-notified the same transaction, this time including complete information about its future project. The EC approved the proposed acquisition. The EC later addressed a Statement of Objections to GE, alleging that the company had breached its procedural obligations under the Merger Regulation - as contrary to GE's statements in its first notification, GE had indeed been offering a higher power output offshore wind turbine to potential customers. The decision had no impact on the EC's approval of the transaction, as the clearance was based on rectified information from the second notification.

Under the Turkish merger control regime, providing inaccurate and/or misleading information may lead to a fixed-rate administrative fine in the amount of 0.1% of the relevant undertakings annual turnover. Hence, this is a considerably softer sanction for such infringement as compared with the EU, where the provision of misleading information subjects the undertaking(s) concerned to a fine of 1% of the annual turnover.

5. Procedural

5.1. "Time is money"

In addition to sanctions for violation of procedural formalities under the concentration control rules mentioned above, several other cases in Turkey demonstrated the importance of compliance with the procedural rules and timing. It is important not only to provide information and documents to the competition authority but do so in a timely manner.

For instance, Unilever[29] was fined for hindering on-the-spot inspection to assess whether it was in violation of Articles 4 and 6 of the Turkish Competition Law by means of actual exclusivity via preventing the sale of competing ice-cream products at final sales points. Within the scope of the preliminary inquiry phase, the TCA experts launched an on-the-spot inspection on the premises of Unilever at 10:00. During the on-the-spot inspection, however, Unilever's authorized IT personnel stated that the Office 365 application was used for e-mail correspondences through the eDiscovery platform and that global approval was necessary in order to perform such research within the application. The Unilever employee did not allow the inspection to proceed

[28] M.8436 GENERAL ELECTRIC COMPANY / LM WIND POWER HOLDING (Art. 14.1 proc.), 2019.
[29] Decision No 19-38/584-250 dated 7.11.2019.

until 17:45 on the day, on the ground that the authorization for researching data could not be separated at the global level and in Turkey and therefore they needed a few days to gain access by distinguishing between them. Ultimately, the TCA decided to impose an administrative monetary fine on Unilever amounting to %0.5 of its 2018 turnover generated in Turkey for hindering the on-the-spot inspection.

In another case, the Turkish Pharmacist Association was fined for providing belated responses to information requests of the TCA. Within the scope of the preliminary inquiry conducted against the Turkish Pharmacists' Association and the Istanbul Chamber of Pharmacists, the TCA sent a request for information to the Turkish Pharmacists' Association and stated that the response should be submitted by close of business day 5 July 2019. However, the requested information and documents were not provided within the time specified. On 5 July 2019, even though the Turkish Pharmacists' Association sent a letter stating that the responses would be submitted to the TCA after the request for information had been evaluated by the Central Board at the first meeting, the TCA decided to impose an administrative monetary fine on the Turkish Pharmacists' Association for not submitting the responses to the request for information on time.

Finally, we would mention Google's daily fine for failure to comply with remedies pursuant to its 2018 infringement decision.

As seen, it is important not only to provide information and documents to the TCA, and comply with other obligations but to do so in a timely manner. The above cases confirm this.

5.2. Principle of equal treatment

The CJEU's judgment[30] upholding the General Court in a power cable cartel case and clarifying the principle of equal treatment is an important development that may contribute to the process of calculation of fines for cartel participants. It is also important for Turkey and the TCA, who is following the competition law developments closely to make sure Turkish laws and practices are properly harmonized with the EU standards. The main take away of the judgment is that differences in situation as regards the participation of an undertaking in an infringement of EU competition law may be taken into consideration at various stages in the calculation of the fine and not necessarily solely at the stage of determining the value of sales (para 49 of the judgment).

[30] Case C 590/18 P. Furukawa Electric Co., Fujikura Ltd. and Viscas Corp. lost a case at the Court of Justice of the EU in their attempt to reduce the amount of fines imposed on them by the EC for fixing together with 25 other companies the price of high-voltage power cables sold to energy providers. On 19 December 2019, the CJEU ruled that there had been no violation of the principle of equal treatment by the EC in the process of calculation fines for the EEA and Japanese cartel participants.

5.3. Right to defence in competition proceedings

The CJEU confirmed that the EC's prohibition decision must be annulled due to procedural irregularity. In EC v United Parcel Service[31] it was determined that the EC had infringed UPS's rights to defence. The judgment emphasizes the importance of the rights of defense in competition proceedings, in particularly that parties to transactions must be given sufficient opportunity to comment and respond to the economic/econometric analysis upon which the EC relies in concentration cases. The right of defense entitles the parties to a transaction to make their views/comments/observations to the EC (before the adoption of a decision) on the accuracy and relevance of all the factors on which the EC is about to base its decision. Thus, in this case, the parties should have been given the opportunity to submit their observations on the econometric model according to which the EC based its decision. The EC must not, after disclosure of the statement of objections, modify the substance of an econometric model on which it intends to base its objections without that modification being brought to the attention of the undertakings concerned. Failure of the EC to disclose the final econometric analysis model to the parties could lead to the annulment of the EC's decision where it can be proved that the parties could have defended themselves better otherwise.

The case emphasizes the importance of the right to defense in merger control proceedings and the transparency obligation of the competition authorities.

6. Big Data and Digitalization

This topic has been an area of particular attention among the competition authorities of various jurisdictions. The main point of discussion is whether competition law needs to be revised/adapted in response to the challenges posed by digitalization and Big Data.

The legislative agenda 2019 in the EU started with the conference "Shaping Competition Policy in the Era of Digitalization," hosted by EC Commissioner Margarethe Vestager in January. Some important cases are already in place signalling the approach of the competition authorities to dealing with digital markets. In the EU and Turkey, those are Google decisions with multi-billion Euro fines, as well as a newly opened instigation into Amazon in the EU. We cannot leave aside the Facebook decision of the German competition authority in early 2019, where violation of data protection law was invoked as a ground for finding the company in violation of competition law. The revision of the vertical guidelines in the EU is also caused by the strength of online platforms and the need to favor/protect brick and mortar to some extent. Without a doubt, the internet is vital for single market integration. Another legislative initiative that is likely to emerge from the digital markets discussion is a revision of concentration control

[31] C-265/17 P - Commission v United Parcel Service, 2019.

thresholds with the value of transaction test (which is currently based solely on turnover indicators).

Similarly in Turkey, the issue was at the centre of debates at the Istanbul Competition Forum. The ICF was organized to strengthen cooperation and create a joint platform based on the need for international cooperation and a common understanding in the area of competition. The value of information, especially the value of processable high-volume digital data, is increasing with every passing day and this system has led to the concentration of economic power in a small group of firms due to various reasons including the first-comer advantage and network effects. As a result of this, it was emphasized that while economic power is being concentrated in a few countries, cooperation between developing countries not in the center of this convergence of power has become particularly important for protecting their consumers and the competitive structure of their economies. In this regard, it was stated that developing countries need to collaborate more to benefit from the boons of digitalization.

As regards data protection and competition law, no doubt a strong relationship exists between competition law and personal data protection. As mentioned by the president of the TCA Prof. Dr. Ömer Torlak in his speech "Digital Economy, Big Data, and Competition," the TCA will increase its cooperation with the DPA. In general, the TCA's view on this issue can be summarized as follows: there is a strong relationship between competition law and the protection of personal data, economies are moving from physical places to virtual environments, competition authorities take measures at the macro level to protect consumers, and big data brings big power. Within this framework, it is expected that there will be intensified cooperation between the TCA and the Data Protection Authority, as it is crucial for the proper application of both law regimes.

7. Conclusion

Business will need to adjust to the emerging regulatory changes and understanding the competition authorities. This can be done already by looking at how the concerns and priorities of the competition authorities are changing. Keeping an eye on the developments in the practice is one of the best ways to plan strategies effectively. 2019 clearly emphasized the importance of compliance with the competition law, particularly when it comes to such serious infringements are cartels and respect to procedural powers of the competition authorities, resale price maintenance, abuse of dominance, as well as concentration control requirements. It is also clear that the digital world will continue to be among priority areas of the competition authorities in the EU and Turkey. Certain policy changes are expected to happen in the near future to improve the application of competition law in the modern world.

1.1. Anti-Competitive Practices

1.1.1. New Regulations in the Turkish Electricity Sector in the Disguise of Competition Infringement Decisions (Enerjisa, CK and Bereket)

By Barış Yüksel and Fırat Eğrilmez

In 2018, the TCA issued three landmark decisions regarding the Turkish electricity sector. These decisions concern the largest incumbent companies operating providing electricity distribution and retail sale services in various regions of Turkey, namely CK[32], Enerjisa[33], and Bereket[34]. In these three decisions, the TCA imposed total fines amounting to TRY 230 million (approximately USD 38.5 million) on two electricity distribution companies (AKDENİZ EDAŞ[35] and AYEDAŞ[36]) and six IRESCs that are vertically integrated with the distribution company operating in the same distribution region as themselves (CK Akdeniz EPSAŞ[37], AYEPSAŞ[38], Başkent EPSAŞ[39], Toroslar EPSAŞ[40], AYDEM EPSAŞ[41], Gediz EPSAŞ[42]).

The fines were based on the premise that these companies had abused their dominant positions in various local electricity distribution and retail electricity markets to foreclose the competitive segment of the retail electricity market to IESs. The unilateral practices that led to the imposition of these fines were

- The distribution companies' abuse of dominance in the local distribution market by granting unjust competitive advantage to IRESCs vis-à-vis the IESs (only in CK and Enerjisa decisions), and the IRESCs' abuse of dominance in the local retail electricity markets by:

  » increasing the switching costs of the customers via various practices and

  » using their legal monopoly in the market for the retail sale of electricity to ineligible customers to gain unjust advantages in the competitive segment of the retail market[43] (in all three decisions).

[32] TCA's decision dated 20.02.2018 and numbered 18-06/101-52.
[33] TCA's decision dated 08.08.2018 and numbered 18-27/461-224.
[34] TCA's decision dated 01.10.2018 and numbered 18-36/583-284.
[35] The distribution company operating in Turkey's Mediterranean region, which is controlled by CK.
[36] The distribution company operating in Istanbul's Anatolian side, which is controlled by Enerjisa.
[37] The IRESC operating in Turkey's Mediterranean region, which is controlled by CK.
[38] The IRESC operating in Istanbul's Anatolian side, which is controlled by Enerjisa.
[39] The IRESC operating in Turkey's Central Anatolian region, which is controlled by Enerjisa.
[40] The IRESC operating in Turkey's Southern region, which is controlled by Enerjisa.
[41] The IRESC operating in Turkey's Southern Aegean region, which is controlled by Bereket.
[42] The IRESC operating in Turkey's Northern Aegean region, which is controlled by Bereket.
[43] "Ineligible customers" are customers whose annual electricity consumption is below a certain threshold (1600 kWh a year as of 2019) and who are not allowed to enter into bilateral electricity sales contracts with the IESs and are legally obliged to purchase electricity from the IRESCs in their region under regulated contracts and prices.

Background Information Concerning the Cases

Before moving on, we would like to provide a brief overview of the current competitive framework of the Turkish electricity sector as it is closely related to the TCA's general concerns and the three landmark decisions rendered by the TCA.

The electricity sector in Turkey is only partially liberated and competitive. Electricity transmission services are still provided by a state-owned monopoly (the Turkish Electricity Transmission Company, TEİAŞ) and distribution services are provided by privately owned local monopolies[44]. Although the upstream market for production is fully liberated, there exists a significantly large state-owned enterprise at the production level (the Electricity Generation Company, EÜAŞ), which is also active at the wholesale level. At the retail level, non-eligible consumers may only be served by the retail arm of the electricity distribution company operating in the region in which the customers reside (i.e., IRESC) and the retail prices for these consumers are determined by the EMRA. Finally, the wholesale level is also only partially competitive because IRESCs are obliged to purchase a substantial portion of the electricity they would sell to the non-eligible consumers from EÜAŞ.

Competition in the Turkish electricity sector, especially at the retail level, has been a major concern for the TCA since the privatization of the electricity distribution companies and the liberalization of the sales of electricity. From the very beginning, the TCA has brought up two main issues with respect to the creation and maintenance of a competitive retail electricity sales market. These are:

- the potential competitive edge that may stem from the vertical integration between IRESCs and distribution companies, over the IESs, and

- the IRESC's potential incentives to leverage their legal monopoly in the market for the retail sales of electricity to ineligible customers, as well as their dominance in the competitive section of the market to distort the competition and hinder the activities of the competitors in the latter market.

These concerns led the TCA to initiate preliminary inquiries into certain distribution companies and IRESCs to assess whether they had abused their dominant positions[45]. Although the TCA did identify certain unilateral practices of the distribution companies and IRESCs that may have restricted the competition in various regional markets for the retail sale of electricity, the TCA decided not to initiate full-fledged investigations as it had come to the conclusion that the conduct in question mainly stemmed from structural problems and that EMRA was in a better position to address such problems via sector-specific regulations. Yet, the TCA did warn the companies that the continuation of such practices would lead to the initiation of full-fledged investigations in the future.

[44] The distribution regions are determined by the state and are privatized through tender procedures (Turkey was divided into 21 distribution regions prior to the privatization). Each successful tenderer company operates as a legal monopoly in the concerned region and controls the IRESC that operates in that region.
[45] TCA's decisions; dated 22.10.2014 and numbered 14-42/762-337, dated 22.10.2014 and numbered 14-42/762-338 and dated 03.12.2014 and numbered 14-47/860-390.

Moreover, on 19 January 2015, the TCA published a detailed sector inquiry report that focused exclusively on the competitive and structural problems in the wholesale and retail electricity markets[46]. The report touched upon many issues and indicated structural problems, identifying potential sector-specific regulations that could be implemented to resolve them while also specifying certain types of unilateral conduct that might be problematic from a competition law perspective. Although the practices examined in the previous preliminary inquiries were not the main focus of the report, it did include references to the anti-competitive concerns associated with such practices.

Finally, the opinion issued by the TCA, which was addressed to the EDSA and its members, namely the EDSA Notice, is noteworthy. The EDSA notice, which was sent after one of the preliminary inquiries of the TCA, included a competition law-specific "do and don't list" for the IRESCs and electricity distribution companies. The EDSA Notice is a unique document in the history of Turkish competition law practice that sets forth a long list of unilateral practices that would be deemed anti-competitive[47]. At the end of the notice, all undertakings were asked explicitly to terminate any practices mentioned in the list and they were further reminded that they could otherwise face administrative fines as a result of investigations initiated by the TCA in the future.

It would not be wrong to claim that the EDSA Notice was an ambitious attempt on behalf of the TCA to regulate the retail electricity sales markets. Yet, the recent CK, Enerjisa, and Bereket decisions indicate that the EDSA Notice was ineffective since almost all the practices that were deemed as abuse of dominance in those decisions were among those listed in the EDSA Notice.

Below, we present an assessment of these decisions. Since a significant amount of overlap exists between these decisions both in terms of the practices under scrutiny and the conclusions reached by the TCA, our evaluations regarding these decisions will be presented collectively and differences will be pointed out when necessary.

Landmark Investigations in Turkish Retail Electricity Sales Markets

First of all, it is important to keep in mind that the CK, Enerjisa and Bereket decisions are extremely long (331, 436, and 284 pages, respectively) and include crucial findings regarding a variety of different issues concerning the definition of relevant product and geographical markets, jurisdictional conflicts between the EMRA and the TCA, evaluation of the market structure and consumer behaviours, assessment of dominance, and analysis of allegedly abusive practices. However, this paper does not aim to address all these issues in detail. Our work intends to set forth the general reasoning adopted by the TCA to justify the imposition of some of the largest monetary fines in its history that significantly affect how the distribution companies and IRESCs will have to operate.

[46] https://www.rekabet.gov.tr/Dosya/sektor-raporlari/10-elektrik-toptan-sati (last date of access: 17.05.2019).
[47] The list comprises seven main categories of anti-competitive conduct and very specific practices were listed under some of these categories as examples. The main categories were as follows:

Market Definitions and Dominance

In all three decisions, the TCA assessed how the relevant markets for the distribution and retail sales of electricity should be defined. With respect to distribution, there was no room for discussion and the markets were defined as regional electricity distribution services markets in line with the fact that each distribution company operated as a legal monopoly in its respective regions. Yet, there was a disagreement between the TCA and the investigated parties regarding the market definition in the retail sales of electricity.

After examining a considerable amount of data, the TCA held that the differences between residential customers, commercial customers, and industrial customers[48] would justify defining three separate product markets for retail sales of electricity. Aside from the arguments set forth with regard to the supply-side substitutability[49], probably the most important grounds for TCA's doing so were:

- regulated tariffs, which are set at different levels for each customer type by EMRA (which had crucial impacts on the prices to be offered in the non-regulated or the competitive segment of the market via bilateral contracts),

- different legal rules governing the agreements to be signed with the residential customers (these agreements are subject to a different legal regime as per the Consumer Protection Law), and

- the differences between the relevant customer groups in terms of their awareness levels and perceptions regarding the services purchased from the suppliers[50].

As to the geographical market, the TCA held that the data at hand showed, regardless of the type of the customer, that the conditions of competition in each distribution region were considerably different from one another as the IRESCs had much higher market shares (both in terms of electricity sold and number of customers served), when compared with those of the IESs in their respective distribution regions. Therefore, the TCA defined local geographical markets for retail electricity sales made to residential, commercial, and industrial customers[51].

When it came to the assessment of dominance, once again there was not much debate regarding the dominance of the distribution companies since they were all local legal

[48] The market for retail electricity sales to industrial customers was subdivided further as "retail electricity sales to industrial customers that are connected at the transmission level" and "retail electricity sales to industrial customers that are connected at the distribution level." Yet, as none of the alleged abusive practices concerned the retail electricity sales to industrial customers connected at the transmission level, the presence of such a product market did not have any implications.

[49] While making a demand-side assessment with an effort to determine the relevant product markets, the TCA also evaluated supply-side substitutability between the retail sale activities, focusing different customer groups, notably the daily load curves of different customer groups and their convenience to be used as an instrument to meet the balancing requirements stipulated by the sector-specific regulations.

[50] For example, it was argued that residential customers perceive electricity as a household necessity while industrial customers and some customers included in the commercial segment perceive electricity as an input for their business activities that affect their costs of operation. As a result, the elasticities of demand of the consumer groups differ significantly.

[51] The TCA concluded that the market for "retail electricity sales to industrial customers that are connected at the transmission level" was country-wide as the conditions of competition were very similar in all the regions.

monopolies. With respect to the dominance in local retail electricity sales markets, the TCA pointed out that the market shares of all IRESCs in their respective distribution regions were much higher when compared to those of their closest competitor and emphasized that the currently held market power did not seem transitory due to the presence of high entry barriers and a lack of buyer power. Hence, the TCA concluded that the distribution companies and the IRESCs were in a dominant position in the relevant markets in which they operated[52].

TCA's Jurisdiction to Evaluate the Practices of the Distribution Companies and IRESCs

One of the most significant objections raised by all the parties to the investigations was that the TCA lacked the jurisdiction to evaluate the practices also subject to the EMRA's sector-specific regulations within the scope of the Competition Law.

The parties emphasized that some of the practices (e.g., the interactions between the distribution companies and IRESCs), the legality of which were questioned by the TCA, were already governed by EMRA's regulations with a view to maintaining a competitive market. On that basis, they argued that EMRA had the exclusive jurisdiction to decide whether the distribution companies' and IRESCs' practices were in violation of sector-specific regulations or not. In response to these, the TCA referred to the established case law of the Council of State, which clearly set forth that conduct that constitutes a violation of sector-specific regulations may also be anti-competitive in terms of the Competition Law and that the TCA must conduct its own assessment accordingly. The TCA further added that conduct would not break the Competition Law only because it violated sector-specific regulations but that a competition-law based assessment always would be necessary.

The TCA's Emphasis on Behavioural Economics in Assessing Consumer Behaviour

One of the most exceptional features of the TCA's CK, Enerjisa, and Bereket decisions is its heavy reliance on behavioural economics in evaluating the effects of certain practices on market competition. In all the decisions a lengthy section is reserved specifically for the limits of rational choice theory from a behavioural economics perspective. Most of the concepts of behavioural economics, which were dealt with in Nobel laureate Daniel Kahneman's seminal book, Thinking Fast and Slow, are evaluated from a competition law perspective. Some of these concepts (especially anchoring, availability heuristic, endowment effect, disposition effect, and status quos bias) are directly relied upon when assessing the potential effects of certain practices on the customers led the TCA to decide that such practices are abusive.

At the risk of oversimplification, the outcome of the TCA's evaluations on the basis of behavioural economics can be summarized as follows. In general, the customers in the electricity market are not well informed about their rights, they value the services of the IRESCs (which are their default electricity providers) very highly despite the absence of rational justifications for doing so, they are not capable of comparing the pros and cons of the offers made by various electricity sales companies, they are risk-averse by nature, and they refrain from changing their existing provider in the absence of strong incentives.

Considering the foregoing, the TCA held that the IRESCs abused the bounded rationality of the customers by way of certain practices to increase switching costs and excluding the IES from the retail electricity sales markets.

Practices Examined within the Scope of the Investigations

In all the decisions, the TCA identified two main categories of potentially abusive conduct. All of the specific practices examined by the TCA fell within the scope of one of these two main categories. Very brief explanations concerning all different types of abusive practices identified by the TCA are provided below.

1. **Discriminatory practices that stem from the interaction between the distribution companies and the IRESCs that favour the IRESCs vis-à-vis the IESs**

    a. <u>Distribution companies' sharing of sensitive information with the IRESCs (only CK was fined for this practice)</u>

The TCA held that certain information possessed by the distribution companies, due to their legal monopoly in the upstream market (i.e., the regional market for electricity distribution) is of significance in the downstream market (i.e., the regional market for retail sales of electricity) and that the distribution companies' sharing such information with the IRESCs could place the IESs at a competitive disadvantage.

In the CK Decision, the TCA held that, among others, the IRESC had obtained strategic customer data from the distribution company concerning historical consumption rates and the contact information of the customers who were in the eligible customer portfolio of the IESs. The TCA concluded the distribution company's systematic sharing of the foregoing with the IRESC constituted an abuse of dominance.

    b. <u>Distribution companies' granting of advantages to the IRESCs (CK and Enerjisa were fined for this practice)</u>

Under this category, the TCA examined two types of conduct: (i) distribution companies' performing certain activities in the downstream market on behalf of the IRESCs, and (ii) distribution companies' favouring the IRESCs while providing services in the upstream market.

While assessing whether the distribution companies granted any advantages to the IRESCs by conducting certain activities on their behalf, the TCA pointed out that under normal circumstances, the distribution companies would not be expected to engage in any activities that fell under the responsibility of the electricity sales companies as per the relevant legislation (e.g., delivering debt notices to customers, signing bilateral agreements, etc.). Moreover, the TCA also underscored that the IESs could never procure such services from the distribution companies. Hence, the TCA reiterated that distribution companies' providing these services on behalf of the IRESCs would confer the IRESCs an undue competitive advantage to the detriment of the IESs. In both the CK and Enerjisa decisions, the TCA condemned such practices as abuse of dominance.

With respect to the second type of abusive conduct, the TCA indicated that distribution companies are legally obliged to provide certain services in the upstream market (e.g., certain repair and maintenance services) to everyone under equal and non-discriminatory terms. Yet, in the CK Decision, the TCA found evidence that the distribution company favoured the customers of the IRESC and concluded that this amounted to an abuse of dominance.

c. <u>Distribution companies' irregular and false meter reading practices (only CK was fined for this practice)</u>

As per the relevant legislation in Turkey, meter reading must be carried out exclusively by the distribution companies. Therefore, the distribution companies read the meters of the customers of IRESCs as well as those of the IESs. The TCA stated that in case the quality of meter reading services provided to the customers of the IESs is degraded, this could place the IESs in a competitive disadvantage vis-à-vis the IRESCs. In the CK Decision, the TCA, by examining the relevant data, found that there was considerable degradation in the quality of meter reading services (especially in the form of significant delays) provided to the customers that had switched to the portfolio of the IESs recently. The TCA disregarded the explanations by CK as to the objective grounds for the de-facto situation and decided that this constituted an abuse of dominance in the upstream market that restricts competition in the downstream market to the advantage of the IRESCs.

2. Practices of the IRESCs that aim to make it more difficult for eligible customers to change their electricity supplier and to increase switching costs

a. <u>At the stage of including customers in the eligible customer portfolio</u>

The TCA had made it clear earlier (especially in the previous preliminary inquiry decisions and the EDSA Notice) that it is of utmost significance to ensure that the IRESCs and IESs compete on equal grounds for signing bilateral agreements with eligible customers. The TCA realized that the IRESCs have a natural advantage in that respect due to being the exclusive suppliers of all ineligible customers as they possess their consumption and contact information. Although this could not be challenged from a competition law perspective, the TCA was extra cautious about any unilateral conduct of the part of the IRESCs that could amplify the effects of this inherent advantage.

Below is a list of unilateral conduct that constitutes examples as to how the IRESCs strengthened their position vis-à-vis the IESs in terms of the competition for signing bilateral agreements with these customers. Although these conducts were deemed as a different type of violations in the CK, Enerjisa, and Bereket decisions, the underlying premise that led to the characterization of such conduct as abusive was the same. That is, when the IRESCs use their power in the regulated portion of the retail electricity sales market to create competitive advantages for themselves in the competitive portion, this restricts the competitive process in the latter to the disadvantage of the IESs.

i. Moving customers that do not exceed the eligibility thresholds to the eligible customer portfolio of the IRESC by way of contracts with dilatory conditions (CK, Enerjisa, and Bereket were fined for this practice)

In the CK, Enerjisa, and Bereket decisions, the TCA determined that the relevant IRESCs were offering their ineligible customers bilateral agreements with dilatory conditions that foresaw that these customers would be moved automatically to the ineligible customer portfolio of the IRESC as soon as they exceed the eligibility thresholds foreseen by the relevant EMRA regulations. The TCA decided that the IRESC's moving customers in their regulated customer portfolio to their eligible customer portfolio immediately after they had become eligible would increase the switching costs in the market to the detriment of the IESs.

It is important to note that neither of the IRESCs under scrutiny had received any commitments from the customers that signed these bilateral agreements to prevent supplier switches for a specific period (e.g., for the contract term) and these customers were always free to switch their suppliers whenever they desired without incurring any additional costs. Yet, the TCA referred to its detailed explanations regarding behavioural economics while assessing the effects of these agreements in practice and held that these agreements contributed to the existing biases and perceptions of the customers that already constituted a switching barrier. Hence, the TCA concluded that this practice was abusive, mainly due to the specific conditions of the relevant market and the bounded rationality of the customers therein.

As a final remark, the TCA also pointed out that while CK had not notified the customers that had signed these bilateral agreements before moving them to the eligible customer portfolio, Enerjisa had indeed issued informative notifications. However, the TCA did not consider that this difference in practices affected the illegality of the conduct in question.

ii. Moving customers that exceed the eligibility thresholds to the eligible customer portfolio of the IRESC without signing any contract with the customer (CK and Enerjisa were fined for this practice)

During the course of the investigations, the TCA realized that Enerjisa and CK had a number of customers in the eligible customer portfolio of their respective IRESCs with whom no valid bilateral agreement had been conducted (in general, there was either no bilateral agreement or the bilateral agreement lacked the signature of the customer). The TCA regarded this as evidence of the IRESCs' strengthening of their eligible customer portfolio and raising switching costs to the detriment of the IESs and held that this practice amounted to an abuse of dominant position.

iii. Obtaining IA-02 Forms[53] from customers who sign bilateral contracts that did not contain a date of signing (CK and Enerjisa were fined for this practice)

Before summarizing this violation, the function of IA-02 forms will be explained briefly. As per the relevant legislative decisions and regulations governing the Turkish electricity sector, retail electricity sales companies must submit forms (called IA-02) that contain basic information regarding the eligible customer to be included in the portfolio to the EPİAŞ, which is responsible for managing energy markets. The critical issue here is that these forms included a "signing date" and in case more than one company claimed that it had signed a bilateral agreement with the same customer, the EPİAŞ honoured the claim of the company that had submitted the most recent IA-02 form.

In the Enerjisa and CK decisions, the TCA found that the IRESCs had many IA-02 forms that did not contain a date of signing. The TCA argued that the IRESCs had intentionally obtained such IA-02 forms to be able to fill in the date just before making an application to EPİAŞ and ensure that it would always have the most recent IA-02 forms. Although there was some evidence that might support such an interpretation in the CK Decision, the TCA was unable to find any evidence in the Enerjisa Decision. Still, the TCA deemed that this was an abuse in both cases. This shows that the TCA considered this to be an abuse, not because of the motive behind the practice, but the potential effects that it may have had on competition. We refer here to "potential" effects because the decisions do not comprise an effect-based assessment to show how these forms were utilized by the IRESCs in practice.

[53] The IA-02 Form is the Power Sale Notification Form, which is a compulsory standard annex to the power sale contract. When the same customer has bilateral contracts with more than one electricity sales company, the customer is registered in the portfolio of the company that has submitted the most recent IA-02 Form.

b. <u>At the stage of providing electricity to eligible customers within the portfolio</u>

i. *Leveraging the legal monopoly in the market for the retail sales of electricity to ineligible customers*

- Switching customers between the regulated and eligible customer portfolio of the IRESC (CK and Enerjisa were fined for this practice)

In the CK and Enerjisa decisions, the TCA examined the IRESCs' switching of some of their customers (especially industrial customers with high consumption rates) between their regulated and eligible customer portfolios during the term of the bilateral agreements. The reason why IRESCs relied on such practices was cost minimization. The IRESCs had come up with a contractual framework whereby they served their customers under bilateral agreements during the seasons when the price of electricity in the wholesale markets was low and switched them to their regulated customer portfolio (under which it was impossible for them to incur any losses due to the cost-based nature of the regulated tariffs) when the prices were high. Via this practice, the IRESCs protected themselves from the volatility of electricity prices and prevented seasonal losses during high-cost seasons.

Although there was no evidence to indicate that the IRESCs engaged in such switching practices to exclude the IESs from the market, the TCA decided that this practice was a manifestation of the IRESCs market power, which stemmed from their legal monopoly in the regulated portion of the market. The TCA reasoned that switching was a practice that may never be implemented or matched by the IESs and decided that the IRESCs benefited from an undue competitive advantage in the competitive portion of the market by way of abusing their dominant position in the regulated market via switching.

- Using power take-off procedures that are only applicable for regulated customers to force eligible customers to pay their due debts stemming from bilateral contracts (CK and Bereket were fined for this practice)

As a brief background, according to the relevant legislations and regulations in Turkish electricity markets, it is not possible for the retail electricity sales companies to take-off the electricity of their customers due to defaults on payments accruing from bilateral agreements. The companies may only remove customers from their eligible customer portfolio and these customers continue to be served by the IRESC under regulated tariffs. Only the IRESCs have the right to initiate power take-off procedures if the customers default on their payments accruing from regulated electricity sales contracts. Therefore, in practice, the risks related to the collection of debts is lower for regulated customers due to the possibility of relying on power take-off in case of non-payment. It is critical to underscore that neither the IRESCs nor the IESs may take-off the power of customers who default on debts accruing from the bilateral contracts.

In the CK and Bereket decisions, the TCA found evidence indicating that the IRESCs, after removing the customers that had defaulted on their debts accruing from the bilateral contracts from the eligible customer portfolio and moving them to the regulated portfolio, and threatened to take-off the power of such customers if they did not pay their former debts which had accrued from the bilateral contracts. By this practice, the IRESCs were able to rely on the power take-off remedy to ensure the collection of their receivables stemming from the bilateral agreements as well as those stemming from the regulated agreements. This was an option not available to the IESs. According to the TCA, the IRESCs had obtained an undue advantage via leveraging their monopoly in the regulated market, vis-à-vis the IESs by reducing the risk of non-collection. Thus, this was also deemed as an abuse of dominant position.

c. <u>At the stage of customers' leaving the eligible customer portfolio</u>

i. Bilateral contracts with long-term commitments and automatic renewal clauses (CK, Enerjisa, and Bereket were fined for this practice)

The final type of abuse, which is the most conventional one in terms of a general competition law perspective, involves long-term bilateral agreements that bind customers via contractual penalties (or termination fees in the case of consumers).

The TCA determined that CK, Enerjisa, and Bereket had all signed bilateral agreements with various customers that included automatic renewal clauses that also covered customers' commitments not to terminate the contract until the end of the term of the contract. The TCA stated that although automatic extension clauses are necessary and beneficial in contracts regarding the provision of utilities to ensure the continuity of the service, it nonetheless emphasized that the extension of the commitments served no such service. The TCA emphasized that the competition is already very weak in the markets for the retail sales of electricity and that the IRESCs already have a very high market share. Therefore, it concluded that the presence of such clauses increased switching costs and further restricted the competition in the relevant market, thereby constituting an abuse.

The Role and Assessment of "Anti-competitive Effect" in Abuse of Dominance

Arguably the most controversial aspect of all three decisions was the assessment of anti-competitive effect stemming from the unilateral practices that constituted the subject of the investigations. In these decisions, the TCA focused mainly on the potential effects rather than the actual effects and the notion of anti-competitive intent. Although the presence of anti-competitive intent is an important criterion for the TCA in determining whether a conduct amounts to abuse of dominance, in most of the cases, intent is deemed to be secondary to the effect.

In the CK, Enerjisa, and Bereket decisions, the TCA expressly stipulated that the presence of anti-competitive intent may be enough to conclude that a unilateral conduct is abusive, especially if such conduct is only a barrier before trade and has no efficiency enhancing effects. Still, it should be noted that the TCA did not solely rely on anti-competitive intent while deciding that CK, Enerjisa, and Bereket had violated the Competition Law and it also analysed actual and (mainly) potential effects.

The effect-based assessment conducted by the TCA was far from convincing the parties of the investigation. Although there is a comprehensive and multi-faceted debate with respect to the TCA's assessments in the decisions, one of the key issues, which was strongly challenged by the parties, was the TCA's considering the average customer base of the IESs as a benchmark when evaluating the effects of the conduct in question. As a result of this approach and due to the great difference between the number of the customers of the IESs and the number of total customers in the relevant market, the TCA deemed that certain practices that affected only a negligible portion of the entire market had significant impact on market competition as they affected a large portion of the average customer base of the IESs. In any case, the TCA stressed that the potential effects of the relevant practices were sufficient for establishing the presence of a violation.

Conclusion

The CK, Enerjisa, and Bereket decisions of the TCA signify the beginning of a new era on the retail level of Turkish electricity markets as the playing field of the IRESCs is significantly restrained. The TCA identified a certain set of practices considered as abuse of dominance, solely due to the structure of the relevant markets and the characteristics of the customers in those markets.

From the perspective of market participants, the violations listed in these three decisions will be no different from the detailed sector-specific regulations of the EMRA, which expressly prohibits certain practices ex-ante, based on assessments concerning their potential outcomes, without taking into consideration their actual effects.

From the perspective of competition law in general, these decisions may be deemed as important signals as to how the TCA may adapt its conventional tools when dealing with markets that have distinct properties and how the competition law may complement deficient sector-specific regulations in markets with structural problems.

The long-term effects of these decisions in the electricity markets in particular and the markets with structural imperfections, in general, are yet to be seen. However, the fact that the TCA did not hesitate to rely on unconventional tools such as behavioural economics, which are normally alien to competition law, to address the case-specific concerns, indicates that a similar path may be followed in other areas as well.

1.1.2. The TCA's Final Decision on the Investigation Regarding the Poultry Sector

By Bahadır Balkı, Barış Yüksel, and Mustafa Ayna

The TCA concluded its full-fledged investigation regarding a total of 20 undertakings operating in the poultry sector. In its decision dated 13 March 2019 and numbered 19-12/155-70[54], the TCA held that the following nine undertakings had violated Article 4 of Competition Law by way of information exchange regarding future pricing and/or supply restrictions:

- Abalıoğlu Yem-Soya ve Tekstil Sanayi A.Ş.
- Banvit Bandırma Vitaminli Yem Sanayi A.Ş.
- Beypi Beypazarı Tarımsal Üretim Paz. San. ve Tic. A.Ş.
- CP Standard Gıda San. ve Tic. A.Ş.
- Ege-Tav Ege Tarım Hayvancılık Yat. Tic. ve San. A.Ş.
- Er Piliç Entegre Tavukçuluk Üretim Pazarlama ve Tic. A.Ş.
- Gedik Tavukçuluk ve Tarım Ürünleri Tic. San. A.Ş.
- Keskinoğlu Tavukçuluk ve Damızlık İşl. San. Tic. A.Ş.
- Şenpiliç Gıda San. A.Ş.

The TCA further stipulated that the Turkish Poultry Meat Producers and Breeders Association (BESD-BİR in Turkish) also had violated Article 4 of the Competition Law through its practices facilitating the anti-competitive behaviours of the undertakings.

Accordingly, the TCA unanimously resolved to impose a total fine of approx. TRY 156 Million (EUR 26 Million) on the concerned undertakings and association of undertakings corresponding to 0.75% and 1.125% of their turnovers generated during the previous year (i.e., 2018). The reason why some of the undertakings were imposed higher fines was that some of the foregoing undertakings had previously violated the Competition Law in 2009 as well and the TCA also considered the recidivism as an aggravating factor in determining the amount of the fine.

In the course of the investigation, the TCA relied on three main categories of evidence:

- Internal notes of one undertaking concerning the contents of certain BESD-BİR meetings, indicating that sensitive information regarding future pricing and production plans may have been discussed between competitors;

[54] https://www.rekabet.gov.tr/Dosya/geneldosya/pilic-eti-nihai-karar-pdf

- Internal notes concerning the contents of health and safety-related meetings held between certain undertakings in the Aegean region, indicating that sensitive information regarding production may have been discussed between competitors;

- Price lists and other production-related potentially sensitive information of competitors found in the premises of certain undertakings.

In the investigation report, administrative fines were requested for all the undertakings subject to the investigation. After the submission of the second written defences, the investigation committee changed its opinion with regard to certain undertakings. In the additional written opinion, the charges regarding the undertakings that did not attend any meetings (BESD-BİR or Aegean Region meetings) were dropped. Hence, in the end, price lists and other production-related information of competitors found on the premises of certain undertakings were deemed insufficient for proving the existence of an anticompetitive conduct on their own in the absence of supporting evidence that showed contact among competitors.

It is important to note that the TCA referred to Article 5/1(b) of the Regulation on Fines when characterizing the violation. This means that the relevant violation was not deemed as a "cartel" and was classified under "other infringements." This is noteworthy since the minimum amount of administrative fine to be imposed is considerably different for cartels and other violations. Whereas the amount of base fine to be imposed in case of cartels shall be between 2% and 4% of the undertakings' turnovers, the relevant amounts are 0.5% and 3% for other infringements.

This decision seems to be yet another example where the TCA refrained from characterizing information exchanges regarding future pricing and production strategies as a cartel. However, it should also be noted that up until now, the border between such information exchanges and cartels had never been very clear and there seems to be a considerable amount of legal uncertainty in that respect.

The TCA further resolved that the following undertakings had not infringed the Competition Law and thus no administrative fine was imposed:

- Ak Piliç Tic. Ltd. Şti.
- As Tavukçuluk Tarım İşl. San. ve Tic. Ltd. Şti.
- Bakpiliç
- Bupiliç
- Garip Tavukçuluk Gıda ve Yem San. Tic. A.Ş.
- Hastavuk Gıda Tarım Hayvancılık San. ve Tic. A.Ş.
- Pilyem Gıda Tarım Sanayi ve Ticaret A.Ş.
- Şahin Tavukçuluk Yem Gıda İnşaat San. ve Tic. A.Ş.
- Tad Piliç
- Yemsel Tavukçuluk Hayvancılık Yem Hammaddeleri San. ve Tic. A.Ş.

Aside from these, although they did not violate the Competition Law in essence, the TCA unanimously resolved that

- Bakpiliç should be given a fine corresponding to 1‰ of its turnover generated during the previous year, as it did not provide the requested information/document as part of the investigation; and

- Tad Piliç should be given a fine corresponding to 1‰ of its turnover generated during the previous year due to providing false or misleading information.

It is important to keep in mind that these two undertakings did not violate Article 4 of the Competition Law. The decision is of importance as it constitutes a concrete example regarding the potential outcomes of submitting false or misleading information/ documents or not providing any information within the determined duration or at all.

Disclaimer: Bupilic, one of the undertakings that did not violate the Competition Law according to the TCA decision concerned, was represented by ACTECON during the full-fledged investigation.

1.1.3. No More Attorney-Client Privilege for Competition Compliance Programmes in Turkey, at Least for Now

By Barış Yüksel and Özlem Başıböyük

On 08 August 2018, the TCA imposed an administrative fine of TRY 140 million (USD 29 million) on various companies controlled by the Enerjisa Group that operate in markets for the distribution and retail sales of electricity within various regions in Turkey. During the on-the-spot inspection conducted on the premises of one these companies (namely, AYESAŞ), the TCA officials had seized a document that had been prepared by AYESAŞ's lawyers during the course of a competition compliance programme as evidence. Due to AYESAŞ's objections, the relevant document had been placed in a sealed envelope without being examined by the TCA officials.

AYESAŞ had requested the return of the document seized by the TCA during the on-the-spot inspection, asserting that the said document had been prepared by an independent lawyer during a voluntary competition compliance program and that this document fell within the scope of attorney-client privilege, rendering its seizure by the TCA unlawful. The TCA denied AYESAŞ's request[55], stating that the said document might be used as evidence in the investigation as it had not been prepared for the purpose of exercising the right of defense within the scope of the ongoing investigation. AYESAŞ then had initiated an action for annulment and the Administrative Court, which is the court of first instance, had annulled TCA's decision by holding that this document was covered by attorney-client privilege and that it could not be used as evidence against AYESAŞ[56].

The Administrative Court had examined the legal framework and identified the relevant provisions in the law as follows:

- the right to a fair trial enshrined in Article 36 of the Constitution of the Republic of Turkey;
- Article 36 of Legal Profession Act No. 1136, which provides that lawyers shall not disclose information regarding their clients and further;
- Article 130 of Code of Criminal Procedure No. 5271 requiring a court order for a search to be conducted within the office of a lawyer; and
- Article 15 of the Competition Law, which states that the TCA may perform on-the-spot inspections within the premises of undertakings if it deems necessary.

[55] TCA's decision dated 06.12.2016 and numbered 16-42/686-314
[56] Ankara 15th Administrative Court's decision dated 01.03.2018, numbered E:2017/412 and K: 2017/3045

Since there was no clear provision concerning the boundaries of the attorney-client privilege in competition law, the Administrative Court made an assessment by evaluating the universal principles of law and the EU case law, which were also taken into consideration by the TCA in former decisions. The Administrative Court held that only documents prepared by independent lawyers who have no contractual employment relationship with the undertakings may benefit from such privilege to the extent that these are related to the use of the right of defense of the undertakings.

The Administrative Court stated that it was undisputed that the document titled "Enerjisa Audit Report" had been prepared by independent lawyers. Hence, the main issue was to decide whether the said document, which contained the results of the competition compliance programme implemented by AYESAŞ's independent lawyers, was related to AYESAŞ's right of defence or not. The Administrative Court referred to the TCA's explanations in the decision, which constituted the subject of the case at hand. In the decision, it was stated that a document prepared by an independent lawyer for the purpose of evaluating whether a certain agreement/conduct violates the Competition Law benefits from the attorney-client privilege whereas a document prepared for the purpose of explaining how the Competition Law may be violated does not.

Based on this distinction, the Administrative Court evaluated the contents of the "Enerjisa Audit Report" and stipulated that this document comprised the results of independent lawyers' examinations regarding the practices of AYESAŞ, a list of certain practices that may be deemed risky from a competition law perspective and recommendations to alleviate these risks. The Administrative Court then concluded that this document fells in the former category and thus benefitted from attorney-client privilege. Therefore, the court annulled the TCA's decision.

The TCA appealed this decision and the Regional Court overruled the Administrative Court's decision[57]. The Regional Court's decision is of significance as it may become a precedent, particularly in terms of determining the boundaries of the attorney-client privilege in competition law investigations.

The Regional Court agreed with the Administrative Court in that two foregoing conditions shall be satisfied simultaneously in order for a document to benefit from attorney-client privilege. However, it had different evaluations as to which documents are to be deemed within the right of defense. The Regional Court held that the "Enerjisa Audit Report" does not fall within the scope of the right of defence as there was no ongoing competition investigation when the said document was drafted. After clarifying that the document was not a direct product of AYESAŞ's exercise of its right of defence, the Regional Court stipulated that the relevant document my not benefit from attorney-client privilege.

[57] Ankara Regional Administrative Court's 8th Administrative Chamber's decision dated 07.01.2019, numbered E: 2018/658 and K: 2018/1236

It is noteworthy to mention that the contents of an internal e-mail of AYESAŞ that had been deemed risky in the "Enerjisa Audit Report" as well as the independent lawyer's evaluations regarding this e-mail were directly quoted in the Regional Court's decision to show that the relevant document contained certain expressions that might lead to the violation of the Competition Law. In light of the foregoing, the Regional Court accepted the claims of the TCA and overturned the Administrative Court's decision.

It should finally be noted that AYESAŞ may appeal the Regional Court's decision before the Council of State within 30 days. Once this process is finalized, it will probably draw a well-defined framework as to how the attorney-client privilege shall be applied in competition law investigations. If the Council of State agrees with the Regional Court, this may be detrimental to the rapidly growing tendency of companies to engage in competition compliance programmes to increase their awareness and to create an institutional compliance culture. This would indeed be ironic since it was the TCA itself that promoted competition compliance programmes through its official websites and publicly declared, even in its decisions, that the adoption of such programmes by companies is most welcomed.

1.2. Abuse of Dominance

1.2.1. An Evaluation of the TCA's Predatory Pricing Cases in 2019

By Reşat Eraksoy

1. Preface

The TCA rendered only five decisions in 2019 regarding predatory pricing allegations. Predatory pricing is a form of abuse of dominant market power as stated in Article 6 of Competition Law. None of these preliminary investigations culminated in a full-fledged investigation and in all these cases the TCA judged that no findings showed these five undertakings excluded their competitors from the markets in which they operated. Exclusionary practices by dominant firms take different forms, especially in their pricing policies. One of the possible venues of increasing market share or weakening a competitor's current market position is charging a price such that this pricing strategy will incur a financial loss for the dominant undertaking. Such an allegation can be put forward easily as most of the complainants will only have their own prices and those of the dominant undertaking to compare, only a rough guide to decide whether the dominant firm implemented a predatory pricing policy. One should also calculate the profits of the dominant firm to decide whether the alleged predatory pricing caused financial loss, by analyzing the costs of the dominant firm, which is almost always unknown to the complainant firm. When the TCA investigates the full price and costs of dominant firms, it is rare to find a sustained low pricing strategy of the dominant firm that would foreclose the market to an equally efficient competitor, but mostly a competitive behaviour put into effect for a short period of time especially during a product campaign. In this article, these five predatory pricing cases are summarized while providing market information, relevant markets, and explanation of calculation methods employed by the TCA. The main goal of this article to show how the TCA evaluated market and financial information to come up with no breach decisions.

2. Fundamentals of Predatory Pricing Analysis

Predatory pricing is defined in the TCA's Guideline as "an anti-competitive pricing strategy in which a dominant undertaking determines the sales price below cost for a short term, affording a loss or waiving a profit, in order for the dominant firm to preserve or increase its market power by forcing one or several of its current or potential competitors out of the market, disciplining their pricing behaviours, or by obstructing competitors' competitive market behaviours in any other way." In this regard, for the predatory pricing behaviour to violate the Competition Law, (i) the breach should be done by the dominant undertaking, (ii) the dominant undertaking should sustain financial loss with below-cost prices in the short run, and (iii) there should be a possibility of market foreclosure to an equally efficient competitor.

According to the Guideline[58], in predatory pricing analysis in which the dominant firm's prices and incurred costs are compared, it is imperative to investigate whether there is a possibility that the market could be closed to an equally efficient competitor as a result of the examined market behaviour of the dominant firm. In this context, in predatory pricing evaluation, like the accepted understanding in EU practice[59], the TCA does not come to an automatic conclusion that below-cost prices cause competitive damages. Instead, the necessity of an investigation to determine whether an anti-competitive market closure is possible with a predatory pricing policy is accepted.

Primary determination in predatory pricing analysis is to decide whether the investigated undertaking relinquished its short-term profits with its predatory pricing policy; in other words, whether the undertaking incurred loss even though it could have avoided these losses. In the Guideline, it is stated that the AAC[60] will be the main criterion to determine whether the dominant undertaking waived the short-term profits. In this regard, when a dominant undertaking charges a price below the AAC for the whole or a part of its production, it is accepted that this undertaking incurs costs that it could avoid just by not producing the concerned product and waive a profit it could earn.

However, according to the AKZO[61] decision of the CJEU, which sets a precedent for predatory pricing assessments within the scope of EU practice, when the price charged by the dominant undertaking is a below AVC, the pricing policy is accepted as a breach of Competition Law and the upper limit for predatory pricing is defined as the ATC. A price between the AVC and ATC is determined as a breach of Competition Law when the authorities can prove that the dominant undertaking intends to exclude its competitor from the market. Finally, a charged price over ATC will not be deemed as predatory. It can be seen that the AKZO test was performed in the TCA's HABAŞ[62], İSBAK[63], and Coca-Cola[64] decisions.

After the AKZO decision, in both the EU and the TCA practice, the cost criterion used in predatory pricing cases differed. In addition to AAC, the LRAIC is taken into consideration in investigations. The LRAIC is the average of all incurred fixed and variable costs of an undertaking, including sunk costs, to produce an increment of a certain product. Sunk costs could be R&D and marketing costs incurred specific to a product. In addition to these costs, operational, maintenance expenses and incurred capital costs for the incremental production with indirect costs stemming from the incremental production are also calculated while computing the LRAIC.

58 Guideline para 51.

59 Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, OJ C 45, 24.2.2009, pages. 7–20.

60 Average Avoidable Cost (AAC) is defined as the possible cost-saving or cost not incurred when an enterprise does not produce a certain amount of output. When AAC is calculated, the sum of all directly related fixed and variable costs are taken into account and it becomes possible to compute the undertaking's total incurred costs for the investigated production. Generally, as only variable costs are avoidable in the short run, in most cases AAC and AVC are equal to each other. But when the dominant undertaking is required to make additional production capacity investment to perform the investigated market behaviour, the said fixed costs are also taken cognizant of while accounting the costs. In these types of cases, AAC is a better criterion than AVC.

61 AKZO Chemie BV v. Commission (1991) EC I-3359.

62 TCA's 19.09.2006 dated and 06-66/887-256 nr. HABAŞ decision.

63 TCA's 22.05.2006 dated and 06-35/444-116 nr. İSBAK decision.

64 TCA's 23.01.2004 dated and 04-07/75-18 nr. Coca-Cola decision.

The ATC and LRAIC are similar and sometimes equal-cost criteria. These two criteria are even the same for single product manufacturing undertakings. Despite that, for multi-product undertakings when economies of scale are involved, the LRAIC might be lower than the ATC for each manufactured product. In the case of multi-product manufacturing, any cost that could be avoided by not producing the concerned product cannot be deemed as a general cost. However, if an undertaking's general costs are high, these costs also could be taken into account while assessing whether an equally efficient competitor is excluded from the market. The LRAIC is said to be a more suitable cost criterion in network, high-technology, and R&D investment intensive industry markets where variable costs are very low, and fixed costs are very high.

3. The TCA's 2019 Decisions Regarding Predatory Pricing

3.1 The TECHNIQUES SURFACES Decision[65]

3.1.1 Background

The complainant alleged that TS ISTANBUL, a subsidiary of HEF DURFERRIT, implemented a predatory pricing policy in nitration salt and nitration regenerator salt products thus abusing its dominant power in the relevant market. The complainant briefly stated in its allegations the following points:

- HEF-DURFERRIT is the dominant undertaking in nitration salt and nitration salt regenerator products in the world as well as in Turkey. TS ISTANBUL both sells and uses HEF-DURFERRIT products in Turkey.

- HEF-DURFERRIT gradually decreased its prices in the market and according to complainant's opinion, after taking into account the import, transportation, and operational costs added with a reasonable profit, HEF DURFERRIT's prices can be deemed as sales at a loss. Thus the complainant requested the TCA to investigate whether HEF-DURFERRIT performed market behaviours that could harm the competition using its dominant position.

3.1.2 Brief Information about the Nitration Salt and Nitration Regenerator Salt Sector

The concerned nitration salt and nitration regenerator salt products are chemical products used in the salt bath nitration process, which is one of the surface hardening processes lengthening the useful service life of metal parts. In the chemical process, the concerned products change the micro-structure of metals and alloys while improving their surface hardness, thermal resistance, durability, and continuity. The nitration process is widely applied to all iron and alloyed components used in the mechanical parts that are subject to friction and wear. Engine valves, crankshafts, bearing housings, bushings, pins, moulds and gear guides are some of the mechanical components to which the nitration process is applied. This chemical process is mainly used in the automotive, manufacturing equipment, and weapon industries.

3.1.3 Brief Information about TS ISTANBUL

Regarding the concerned products, TS ISTANBUL has two main activities in the Turkish market, selling chemicals specific to the surface treatment of metals in the nitration process directly to its customers and applying thermochemical treatment to metal surfaces by using the chemicals. TS ISTANBUL does not produce the chemicals that it sells but buys them from HEF DURFERRIT exclusively. HEF DURFERRIT and TS ISTANBUL are wholly owned by HEF Group, headquartered in France.

3.1.4 Predatory Pricing Analysis of the TECHNIQUES SURFACES Case

As the first step of analysis regarding the predatory pricing allegation, the unit selling price and ATC of nitration salt and regenerative nitration salt products are compared. If the selling price of the concerned products were over ATC, the predatory pricing allegations would be denied. TS ISTANBUL's selling prices excluding VAT during January 2015-October 2018 were over ATC, which concluded there could not be any predatory pricing policy. In addition to the first step of the analysis, the TCA also compared TS ISTANBUL's selling prices with those of the complainant firm.

When TS ISTANBUL's concerned product selling prices were compared to those of the complainant's products, it was seen that TS ISTANBUL's prices were higher. Therefore the complainant's allegation that TS ISTANBUL constantly undercut and lowered its prices to obstruct the complainant's sales could not be verified. The TCA also stated expressions in TS ISTANBUL's customer visit reports, obtained by the TCA while conducting on spot inspections, demonstrated there were other firms already quoting lower prices and some of TS ISTANBUL's customers had begun procuring the concerned products from its competitors as a result of price competition. Another allegation made by the complainant stated that although the complainant quoted a price to a certain customer, HEF-DURFERRIT had constantly lowered its prices and sales to this certain customer could not be realized. When the documents and relevant information were examined regarding this case, the TCA found that no sales made to this certain customer had been realized by TS ISTANBUL or HEF-DURFERRIT during the first 10 months of 2018.

In addition to these inquiries, the TCA evaluated in detail the sales trend of the complainant firm and contrary to the complainant's allegations stating its market activities had been obstructed and it had been pushed out of the market, in reality, the complainant firm's sales had been increasing. Thus there was no finding that showed

[10] This is valid for the cement products under Codes 14 and 24.sector.

[11] TCA – Cement Sector Report, Section III.B.II.III, p.102.

[12] TCA – Cement Sector Report, Section III.B.II.IV, p. 103-104, Chart 34 and 35.

[13] In terms of the observations made for the cases where only one unit operates currently, the monopolistic course of behaviour has been included into the simulations. The prices obtained as a result of the simulations and actually observed average prices in the concerned province/year have been compared and the closest course of behaviours/actions to the reality has been established. Considering the simulation performances of the closest scenarios to the reality and the proximity ratios between calculated and real prices, it has been evaluated in three categories (five percent or below, between five percent and ten percent, and between ten percent and 15 percent). Accordingly, in 277 observation points from 404, the difference between the calculated prices for the closest scenarios to the reality and observed prices is 15 percent or below. In 234 of these 277 observations, the joint profit maximisation behaviour reveals a result with 15 percent or much lower proximity on average. Taking lower proximity levels into account, it is seen that the wholly or partially joint pricing behaviour in the cement sector generates results to the observed prices in reality at a significant rate.

the complainant was forced out of the Turkish market.

In light of the cost-price analysis and findings regarding the case, the TCA decided it was not necessary to open a full-fledged investigation against TS ISTANBUL in relation to the abuse of dominant market power by implementing a predatory pricing policy.

3.2 The SONY EURASIA Decision[66]

3.2.1 Background of the SONY EURASIA Case

The complainant alleged that SONY EURASIA had abused its dominant power in the game console market by exclusionary market behaviours, culminating in obstructing its competitors' market activities and pushing them out of the market.

SONY EURASIA distributes, sells, markets, and performs after-sales and consulting services of Sony brand consumer electronics products and Sony Professional group products in Turkey as well as provides marketing, localization, software engineering, and security to Sony group companies through global Sony business units.

The complainant briefly stated in its allegations the following points:

- Game producers are required to obtain a license from SONY EURASIA to produce games compatible with the PlayStation[67] game console. In the game console market, SONY EURASIA is the dominant market player. By using its dominant power, it exerts its market power over game producers and has a substantial advantage while negotiating commercial terms in procuring games from game producers.

- SONY EURASIA sells the concerned games below the complainant's costs. At the same time it requires the complainant to buy the concerned games at higher prices from game producers, thus increasing the complainant's costs. In doing so, it seeks to exclude the complainant from the market.

- Although the prices SONY EURASIA's products, which are bought over the PSN, are similar to each other around the world, the prices of the same products in Turkey are much lower than world prices, a pricing strategy that aims to exclude the complainant from the market.

- PSN campaign durations are long and frequent. Outside of campaign periods, game prices are predatory, with prices lowered to below cost.

- SONY EUASIA sells its games to consumers at very convenient prices through pre-sales activity over PSN, and with this activity, it obstructs the complainant from achieving the economies of scale necessary to operate in this market. The

[66] TCA's 07.02.2019 dated and 19-06/47-16 nr. SONY EURASIA preliminary investigation decision.
[67] PlayStation is a video game brand designed and manufactured by Sony Interactive Entertainment, a division of Sony.

complainant stated that the PSN game FIFA 19 was sold at very low prices during a short pre-sales campaign before the game entered the market. The same strategy was used with PSN game PES 19, when the price was reduced before product launch for a two and a half month pre-sales period and shortly after the product launched. Because of the alleged irreparable damages to the complainant due to the anti-competitive market behaviours of SONY EURASIA regarding PSN games, the complainant requested that the TCA force SONY EURASIA to cease its PSN marketing activities temporarily in accordance with Article 9 of the Competition Law and send an opinion letter to the Information and Communication Technologies Authority[68].

- With the "PlayStation Brotherhood" campaign on PSN, it was possible for two consumers to each pay half of the game's price and buy the game, a marketing campaign designed solely to cloak the exclusionary and predatory pricing policy of SONY EURASIA.

3.2.2 Brief Information about the Video Games Sector

Video games[69] are a special type of computer-based software constructed on game scripts and visuality, written for use in entertainment and spare-time applications that can be played online or on a physical network by one or more players on computer and game consoles. Although the video games sector can be classified as a software industry, it has distinct features such as bespoke gaming hardware and technical infrastructure. It is an important industry that directly or indirectly affects many other sectors.

Currently, developments in communications and internet technologies, with the widespread use of PC, game consoles, smartphones, and tablets, enable digital games that can be played on or through these devices, advance visually and content-wise and comprise a big industry that is rapidly growing with mobile and online platforms, new business models, and new market players.

For a video game to be developed, produced, marketed, and sold to consumers, the producer must interact with many different sectors such as game console hardware manufacturers, game developers, game localizers, publishers, distributors, retailers, dealers, and customers. Companies use different business models in distributing their products to consumers such as (i) selling the boxed products in stores, (ii) selling products in digital form in digital stores, (iii) membership-based online product selling, (iv) freeware sales where the revenues are gained by inserting advertisements in the games, and (v) allowing players to play the first level of the game free of charge and purchase the product in order to advance to the second level.

Although the role of the distributors in the supply chain is to transport the physical copies of games to retailers, this activity is diminishing and transformed because of the

[68] National Telecommunications Regulatory and Inspection Authority of Turkey.
[69] Ankara Development Agency, Digital Games Sector Report, page 9.

current technological developments that have created alternative digital sales channels that have decreased the profitability of physical sales channels. The low costs of digital sales channels and the convenience of buying from digital stores has led to an increase of digital game sales in a short time period. In terms of revenues, with PC and console-based game sales surpassing physical sales. In the PC game category, digital sales earn twice the revenue of physical sales.

As the game consoles are produced solely for gaming and targeted at consumers who wish to play video games, their hardware is different from that of other game-specific hardware. Because technical hardware of the game consoles is radically different and requires a high level of expertise to develop and manufacture that can only be realized with high fixed asset investment that creates an entry barrier to the market, only three big companies lead the industry: Sony (PlayStation), Microsoft (XBox), and Nintendo (Nintendo Wii). Similarly, as the cost of producing a video game for console games is higher compared to that for mobile and PC games, generally only big budgeted game developers can produce game content.

3.2.3 Relevant Product Market in the SONY EURASIA Case

In the Sony Eurasia case, the TCA decided that fixed and hand-held game consoles are not substitute products and belong to different product markets in line with previous similar decisions by the TCA[70] and EU Commission[71].

To start playing, the player has to buy the game console and the game cartridge. Nowadays, consumers can buy console games in a box or digitally from a digital store. From the consumer's point of view, there is no difference in the game content whether it is bought from physical or digital channels, but boxed games and digital games differ in usage. For example, in digital sales, a player can register for a pre-order and buy the new game as soon as it is launched. Buying a game digitally and downloading it to the game console by entering a user name and a password is much quicker than going to a store to buy a boxed product or order the game cartridge CD from the Internet for and wait for the CD to arrive at the player's address. Contrary to digital games, second-hand sales of boxed games are possible. However, as the prices and the main features of boxed and digital game channels are similar, it is decided that physical and digital channels are substitutes and these two channels belong to the same market.

In the SONY EURASIA case, the TCA decided the market can be defined as fixed console games and hand-held console games without distinguishing and analysing these two different markets separately, in line with the ARAL decision[72].

[70] TCA's 24.11.2005 dated and 05-79/1086-312 nr. NINTENDO and NORTEC decision.
[71] CEU Commission's COMP/35.587 PO Video Games; COMP/35.706 PO Nintendo Distribution and COMP/36.321Omega-Nintendo decision.
[72] TCA's 07.11.2016 dated and 16-37/628-279 nr. ARAL decision.

3.2.4 Predatory Pricing Analysis in the SONY EURASIA Case

According to the market analysis, SONY EURASIA's PlayStation game console was the market leader during 2015-2017 against its competitors Xbox and Nintendo, although there was considerable competitive market pressure coming from parallel imports of PlayStation[73]. Those parallel imports were made by many companies competing directly with SONY EURASIA. In 2017, SONY EURASIA was the market leader in the game cartridge market followed closely by the other market player ARAL. ARAL's close market share showed that it had the potential to exert competitive market pressure over SONY EURASIA.

The complainant stated that the Sony Group's PSN sale prices were 80% lower than its own, which could not be explained with any economic efficiency arguments and further added that PSN campaign sale durations were very long, almost encompassing normal sale season. Allegedly, even the PSN sale prices were at predatory levels out of campaign periods. With the aforementioned campaigns, PSN units were sold below cost. In order to determine whether these allegations were true, the TCA investigated the pricing policies of SONY EURASIA and its parent company, Sony Group. Although PSN prices were determined by Sony Group, SONY EURASIA's domestic market knowledge and recommendations were taken into account as evinced by the documents found during the on-the-spot investigation.

The first price comparison was made with the PSN and boxed prices of the same games in December 2018. According to the comparison for some games, PSN prices were even higher than those of boxed games. SONY EURASIA also said that in line with worldwide-accepted discount seasons such as school opening months, Black Friday, New Year, and the semester holiday, PSN runs campaigns in these seasons with reduced prices. When Sony Group's 2017 sales were observed, it was seen that almost every day of the year some games were sold at discounted prices. The TCA also analyzed Sony's discounted sales revenue share in total sales revenue and in total market revenue.

The TCA opined that in the preliminary investigation period, the complained prices were not continuous in nature and were only temporary sale campaigns with no evidence that Sony Group had an exclusionary pricing strategy. Some of the documents obtained during on-the- spot inspections showed that even in periods when PSN prices were higher than those of its competitors, Sony Group did not reduce its prices, indicating that the price is determined according to a matrix quoted in foreign exchange currency. The abovesaid document made it clear that PSN was not sold steadily at lower prices when compared to its competitors and PSN prices were sometimes above the market average. The prices were volatile because they were based on foreign currency, which increased drastically against TL in the second half of 2018.

[73] Parallel imports (sometimes referred to as grey market goods) refer to branded goods that are imported into a market and sold there without the consent of the owner of the trademark in that market.

The TCA judged that while some of the games specified in the complaint had short-run campaigns and were limited in scope so that even those of Sony Group were dominant in the market and prices were below cost, the pricing policy of the Group could not be defined as predatory.

As per the PlayStation Brotherhood campaign's predatory pricing allegation, the TCA stated that as boxed games could also be used in more than one device, games that were bought from digital stores through the PlayStation Brotherhood application could not bring about predatory pricing as the goal of this application was not to reduce the selling price of the games and was not in the scope of excluding competitors from the market.

Evaluation of SONY EURASIA's pre-sales practice showed that this marketing activity was also used by SONY EURASIA's competitor, Microsoft Xbox. Pre-sales practice allows consumers to buy a new game before it is launched. In this way, a PlayStation user buying a digital game must wait until the new game is launched into the market. SONY EURASIA remarked that the rationale behind pre-sales marketing activity is to gauge market demand and, by increasing awareness of the new game, to increase demand. This situation also has to do with game publishers' setting the wholesale price of the games for pre-sales with more advantageous conditions. Pre-sales activity is not used for each game, only for some of the new games and pre-sales prices are available only for a short period of time. The TCA stated these discounts, applied for a short period of time and limited in scope, could not be deemed as predatory pricing.

One of the allegations of the complainant involved SONY EURASIA's pressure on game producers to sell their PS-compatible products to the complainant at higher prices. In order to substantiate this claim, the TCA requested signed agreements between SONY EURASIA and the game producers. After its evaluations, the TCA found no contract clause that could cause an increase in game distributors' costs. In this regard, it was concluded that Sony Group was not in a concerted agreement with game producers in the console games market to obstruct its competitors' market activities and thus it was jot in violation of Article 4 of the Competition Law, which forbids any agreements between undertakings to restrict competition in the market.

As a result of the preliminary investigation, having assessed all the findings and documents regarding the case, the TCA decided to reject the complaint and not to open a full-fledged investigation in accordance with Article 41 of the Competition Law.

3.3 The HABAŞ Decision[74]

3.3.1 Background of the HABAŞ Case

The complainant claimed that the marketing activities of HABAŞ in the industrial and medical gas sector violated Article 6 of the Competition Law by abusing its dominant power in the relevant market. The complainant briefly stated in its allegations the following points:

- The complainant claimed that because of HABAŞ's marketing activities in time it had suffered client loss and instead of producing industrial gas, it had begun to buy the concerned products from HABAŞ;

- HABAŞ tempted the complainant's dealers by selling at lower prices than those of the complainant and eventually had begun working with them with a strategy to offer lower prices to the complainant's dealers to push the complainant out of the market and dominate the sector.

- HABAŞ bid much lower prices than those of the complainant's 2017 prices in medical gas acquisition tenders for hospitals with prices were even lower than the designated price of the tender which had been appraised by a surveyor in accordance with market conditions. As a result of this low bidding, HABAŞ won the tender.

- The cost breakdown of the industry is 50% for energy, 25% for transportation, 15% for labor, and 10% for operating equipment and general expenses. The major cost item in an air decomposition facility to produce industrial gas is for energy. Because the complainant imports energy for the production, if this energy is not put to work in their facilities, the Turkish economy will suffer economic loss due to foreign currency spent without return. HABAŞ's market activities to abuse its dominant power with the intent to gain higher profits will destroy other players in the market and affect the Turkish economy in a negative way.

- Even though in 2018 energy costs tripled, liquid fuel costs doubled, and operating equipment costs and general expenses increased 100% compared to 2017 prices, HABAŞ quoted half of its 2017 prices while competing with the complainant.

3.3.2 Brief Information about HABAŞ

HABAŞ is the leading company in Turkey manufacturing industrial gas. HABAŞ is a group of industrial plants that produce industrial and medical gas, steel, electrical energy, heavy machinery, tubes, and cryogenic tanks as well as distributes and transports by sea liquified petroleum gas (LPG), liquified natural gas (LNG), and compressed natural gas

[74] TCA's 07.03.2019 dated and 19-11/125-53 nr. HABAŞ preliminary investigation decision

(CNG). The company produces industrial gas in its air decomposing facilities in İzmit, Bilecik, and Aliağa while marketing its products by direct sales or dealer network in Turkey.

HABAŞ's services to its clients include providing liquified gas tanks for storage, steel tubes, gas regulators, evaporators, gas distribution lines and systems, tube collectors, specific equipment for its client's needs, technical assistance, and training and maintenance services for all the systems and instruments.

3.3.3 Brief Information about the Relevant Market

Industrial gases, which are used in industries as main or raw material, are in a gaseous state at normal temperature and pressure conditions and are liquefied at lower temperatures under pressure. These gases are generally used in the iron and steel, automotive and automotive supplies, white appliances and their supplies, metal and machinery manufacturing, shipyard, chemicals and petrochemical industries.
Oxygen, nitrogen, hydrogen, argon, carbon dioxide and acetylene are the main industrial gases produced from air by naturally or chemical processes. Air is composed of 78% nitrogen, 21% oxygen, 1% argon, and minimal amounts of other inert gases such as neon, krypton and xenon. Oxygen, nitrogen, and argon are called atmosphere gases and are produced from air by cryogenic air decomposition technology cooling the air to very low temperatures while compressing it in air separation units. As all the different gases in this gas mixture are vaporized at different temperatures, it is possible to obtain them separately in their purest form. This process is totally physical and does not contain any chemical reaction. Other industrial gases not found in the atmosphere are produced with different processes. Hydrogen gas is produced by the electrolysis of water or by the cracking of hydrocarbons while carbon dioxide is made by liquefying purified underground carbon dioxide. Acetylene gas is produced by the chemical reaction of calcium carbide with water.

Industrial gases are not sold in retail stores because of their intermediate product characteristics. Sales are made according to the customers' purchase orders by directly contacting the customers who buy in large amounts, and are made through a dealership system for those who buy in smaller amounts. Although the main raw material of the industrial gases is air, the production inputs are electricity, human resources, and fuel as a result of transportation costs.

Imports and exports of industrial gases are extremely limited because of difficulties in storing and transporting the gases, leakage of gases to the air even when the temperature rises slightly, and because the gas storage tube is more expensive than the gas it contains. The export business is confined to neighbouring countries in small amounts. As not enough argon gas is produced in Turkey to satisfy demand, the deficit in production is covered by imports.

In Turkey, industrial gases are bought either in cylindrical tubes in gaseous form or in bulk and transported by tanker in liquefied form. Bulk industrial gas sales are made for customers who need greater amounts of gas continuously. In this method, the storage tanks of the gas manufacturer are installed on the customer's premises and tanks fill these storage tanks with liquified gas. As the storage of gas in liquified form is more practical and because of the need to it at very low temperatures, gas storage and transportation can only be made with cryogenic tanks and tankers that have superb heat insulation resistant to very low temperatures.

Industrial gas sales in tube form are the selling of gases with pressurized tubes. Customers with less than 1000 m^3 monthly demand prefer to buy gases in tubes. Selling the gases in tubes can be done directly by filling the producer's tubes on the customer's premises or by transporting the gases from the tube filling stations in liquid from with tankers.

Some industrial gases are also used in medical applications and are called medical gases. These gases are intensively used to meet the narcosis and oxygen needs of patients and for the operation, calibration, and sterilization of medical devices and instruments. Medical and industrial gases are supply substitutes because the same manufacturing process produces both gases. Although they do not demand substitutes like filling and control processes, medical gas purity ratios are different from industrial gases and hospitals can only use gases that are labelled as medical gas. Thus, as indicated in the EU Commission's Linde/AGA[75] and Air Liquide/BOC[76] decisions, as industrial, medical, and special use gases have different physical and chemical properties, and can not be used interchangeably, each gas has distinct product markets.

As a result, the TCA decided that industrial and medical gases form two different main markets, and the market can also be differentiated according to purchasing method either in liquid form or bulk. The TCA further stated each gas in industrial and medical gas definition can have its own product market, and the relevant product market is defined separately for each different gas as oxygen, nitrogen, argon, carbon dioxide, narcosis procured in bulk and oxygen, nitrogen, argon, carbon dioxide, hydrogen, acetylene and narcosis gases procured in tubes.

3.3.4 HABAŞ's Defensive Statements

HABAŞ stated there are many producers and sellers in the industrial and medical gas industry and that their market behaviours cannot be independent of foreign competitors, which are prone to technological innovations. HABAŞ also said foreign capital and other domestic manufacturers are heavily involved in the sector and HAVAŞ is not superior to its competitors in any market factor and thus is not in a dominant position in the market as judged by the TCA in its 20.12.2006 dated and 06.92/1173-351 nr. decision.

[75] EU Commission's Case No IV/M.1641, Linde/AGA (1999).
[76] EU Commission's Case No M.1630, Air Liquide/BOC (2000).

HABAŞ further stated that while oxygen, nitrogen, and argon gases are obtained from the air and thus have no raw material costs, energy, wage, maintenance, transportation, depreciation, and other costs are incurred in the manufacture of these industrial gases. For the production of gases other than these atmosphere gases, raw material and auxiliary material costs should also be added to cost items such as calcium carbide for acetylene, ammonium nitrate for narcosis, and natural gas for hydrogen. Raw and auxiliary material, energy, and transportation are variable costs while other cost items are fixed costs.

HABAŞ added that prices are determined according to many variable conditions such as quantity, quality, distance to customer's premises, procurement form (big or small tubes, tube bundle, tank, etc.), supply conditions, economies of scale, commitments (uninterrupted supply guarantee, other guarantees for quantity, pressure level, min. gas temperature), and payment terms. To prove that price is decided in a purely competitive market, HABAŞ said incurred prices are equal to the point where the manufactured supply output and required demand amount in the market's demand and supply curve are the same.

3.3.5 Predatory Pricing Analysis of the HABAŞ Case

Each industrial and medical gas, meaning atmosphere gases other than mixture gases, produced by HABAŞ have the same cost items such as auxiliary materials, energy, employment, maintenance, transportation, and depreciation costs per m3 or per kg. As the first step of the analysis, the TCA decided to compare the unit selling prices of different HABAŞ products with their respective ATC and if the selling price was above its ATC, the predatory pricing claim would be rejected.

When HABAŞ's concerned products' prices were observed during January 2017 and September 2018, it was obvious that its selling prices for the concerned products were above ATC. As a side note, when the e-mails were examined during on-the-spot inspections, many conversations revealed that dealers' buying prices from HABAŞ were well above the market rate and that dealers demanded price reductions from HABAŞ. In some of the e-mails, HABAŞ management stated that due to increases in electricity and fuel costs coupled with cost increases in imported raw material and other material costs because of the appreciation of foreign currency against TL, whole prices would be revised with new higher prices.

In light of the information and documents obtained during the on-the-spot inspection at HABAŞ, and market information from HABAŞ and its competitors, the TCA decided HABAŞ did not exclude its competitors from the market by using a predatory pricing policy.

Another allegation was that HABAŞ offered below-cost prices in medical gas tenders opened by hospitals in an effort to eliminate its competitors. When all 113 tenders won by HABAŞ in the previous two years were examined, it was seen that HABAŞ did not win all the tenders in three cities subject to complaints. In other words, competitors were chosen to provide the concerned products to the hospitals. So HABAŞ did not have any effect on market prices in these three cities. In addition to these observations, the lowest price bidding in these tenders between January 2017- September 2018 was greater than HABAŞ's highest costs and HABAŞ's prices were higher than the alleged lower prices in the region subject to complaints. These facts proved that HABAŞ did not use predatory pricing in tenders.

By taking into consideration all the facts and findings pertaining to the case, the TCA judged HABAŞ did not implement predatory pricing in selling oxygen, nitrogen, narcosis, hydrogen, argon, carbon dioxide, and acetylene in industrial and medical gas markets and there was no evidence showing HABAŞ excluded the complainant from the market or had incorporated the complainant's dealers. Thus in the conclusion, the TCA decided not to open a full-fledged investigation as the complainant's claims were not substantiated.

3.4 The GLANBIA Decision[77]

3.4.1 Background of the GLANBIA Case

The complainant claimed GLANBIA abused its dominant market power by implementing predatory pricing in protein powder and weight gainer products. The complainant stated that GLANBIA, which has 47% market share in the protein powder market and a 41% market share in the weight gainer market, has market dominance in the world and in Turkey. The allegations claimed that GLANBIA has high brand awareness and by using its financial power it tried to force its competitors, especially domestic producers, out of the market with its predatory pricing policy. The complainant also said that GLANBIA launched products into the market at the expense of not earning profit to secure its position as the unrivalled market leader.

3.4.2 Brief Information about GLANBIA

GLANBIA, which is controlled by its parent company Glanbia Nutritionals Limited, started its operations in 2015. The undertaking has no production facility in Turkey and it imports Glanbia Nutritional Limited's Optimum Nutrition, BSN, and Isopure branded sportsman nutritional supplements into Turkey. GLANBIA sells these products to wholesalers through distributors and thus does not sell directly to consumers.

3.4.3 Brief Information about the Nutritional Supplement Sector

Nutritional supplements are used to support normal nutrition. These supplements are either solely composed of or are a mixture of nutritional elements such as

[77] TCA's 23.05.2019 dated and 19-19/268-116 nr. GLANBIA preliminary investigation decision.

vitamins, minerals, proteins, carbohydrates, fibers, and fatty and amino acids with the addition of herbal and animal substances and bioactive and similar products in concentrated and extract forms. Nutritional supplements are prepared in liquid or powder forms of capsules, tablets, drops, instant use powder packages, and liquid bulbs. These nutritional supplements are not used to cure or prevent disease but are used to complement nutrition deficiencies because of changing life and work conditions' bringing insufficient daily nourishment.

The nutritional supplement sector has a growing trend in the world and in Turkey. The outlook for the future growth of the sector is positive thanks to the changes in lifestyles because of industrialization and urbanization. The total world market size in 2016 was USD 132.8 billion, whereas in Turkey, it size was TRY 735 million and is expected to be TRY 950 million in 2021.

One of the submarkets of nutritional supplements is supplements for the sportsman (or athlete), specially prepared food and food mixtures used to satisfy the sportsman's special nutritional needs to perform at the highest level. In 2016, the sportsman supplement market reached TRY 180.9 million, comprising 25% of the whole nutritional supplement sector. Although there are many different products, only protein powder and weight gainer products are examined regarding the case at hand.

Protein powders are mixtures of more than one amino acid types with different additional vitamins and minerals used to meet the protein needs of athletes in the fastest way after their performance. Weight gainer products contain 25% protein, 75% carbohydrates and as these products have more carbohydrates compared to protein powders, these two types of products are preferred by different athletes. While weight gainers are used by low weight persons, protein powders are used by all.

3.4.4 The Turkish Protein Powder and Weight Gainer Product Market

Nutrition consumption habits in Turkey are changing from low protein to high protein-based nourishment. As the number of people playing sports and pursuing balanced diets increases, demand for sportsman dietary products is growing and this trend makes the market bigger. During 2012-2018, the market size increased each year and is expected to grow for the coming years.

Even though local distributors, stores, and pharmacies play an important role in reaching consumers, almost half of the total sales are realized through online channels. Online platforms like Supplementler, Protein7, and FitPro also sell their own branded products. Marketing and advertising spending are mostly done for online platforms in parallel to e-commerce's growing importance in sportsman products. Studies for which products are suitable for athletes and consciousness of consumers have gained momentum in the sector.

The biggest share in sportsman supplementary nutrients belongs to protein powders with 48.6% of the market. In this regard, the protein powder market, which represents almost half of the sportsman supplementary products, encourages both domestic and foreign enterprises entering the market and forms the growth dynamic of the market. On the other hand, domestic production is very limited so the market need is largely met by importing foreign brands. According to the information obtained regarding the case, the sector is dynamic and has many market players, although statistical data and analyses are limited due to the fact most of the sales are done via many channels like the internet, local distributors, and pharmacies. Some of the brands have higher brand awareness, like GLANBIA's Optimum Nutrition brand, which has a worldwide reputation.

The data showed the protein powder market grew during 2012-2018, except for 2017. Compared to protein powders, weight gainers had a smaller share in the sportsman supplementary nutrients market because they are preferred by a limited number of consumers. Beginning from 2015, the non-protein sportsman supplementary nutrient market in which the weight gainer products are included has lagged behind the protein powder market. These two market characteristics were similar and generally, the same market players were present showing that a producer can manufacture both products.

3.4.5 Relevant Market for Protein Powder and Weight Gainer Products

The concerned protein powder and weight gainers are developed to satisfy the increasing protein needs of athletes and help people gain weight more easily. Protein powder has amino acid types both necessary and unnecessary for the body, and vitamins and minerals, whereby weight gainers have a high amount of carbohydrates in addition to certain amino acids like protein powders. As the amount of carbohydrates in weight gainers is much greater than that in the protein powders, they appeal to a more limited consumer base. Accordingly, whether protein powder and weight gainer can be substitutable depends upon the goals and expectations of the individual who uses the two products. For example, a mid-level athlete could use weight gainer to gain weight and protein powder to maintain muscle mass.

The TCA assessed the market situation and evaluated the purpose of using these two products, their ingredients, their differing product positioning in the consumers' eye and concluded that the demand substitutability of the two products is weak. However, from the producer's point of view, there is a certain supply substitutability of the two products as the similar features of the products both can be produced by the same companies. In accordance with the market information obtained during the investigation, the TCA decided to describe the relevant market as "protein powder" and "weight gainer" products.

3.4.6 Predatory Pricing Analysis of the GLANBIA Case

The only market information source is Euromonitor's "Sports Nutrition in Turkey," which provides a comprehensive evaluation of the whole market. In terms of retail sale, GLANBIA and three other competitors were the four biggest companies in 2017 and 2018 in sportsman supplementary nutrients. In the investigation period, GLANBIA's estimated market share was calculated according to data from major online platforms and GLANBIA. Within this framework, in order to ascertain the retail sales value of protein powder market, GLANBIA's protein powder turnover was multiplied with its maximum margin percentage value obtained by the difference between the recommended retail sales price and the distributor sale price. To determine whether the undertaking had market dominance, the resultant retail sales value was divided to find the total protein market value measured by Euromonitor to reach GLANBIA's market share in the protein powder market, which was found to be below the 40% threshold. GLANBIA's market share was also below 40% in the weight gainer product market.

There are many domestic and foreign producers in the protein powder and weight gainer market, which is growing each year. There are no entry barriers to these markets, which also have no import restrictions. As these products can be sold online, distribution channel limitation does not exist.

Taking into consideration the market shares, the multi-player structure of the market, the absence of limitations on distribution channels, and new entrants to the market, one can easily conclude that GLANBIA is not in a dominant position in the market. In order to examine GLANBIA's market behaviours, the complaint was evaluated under the assumption that GLANBIA was dominant in both of the concerned markets.

The basic claim regarding the case was that GLANBIA implemented predatory pricing and supplied its products to the market at the expense of not profiting. To prove predatory pricing behaviour, there should be evidence that the dominant firm sells its products below cost in the short-run. When GLANBIA's protein powder and weight gainer products' distributor sale prices and costs in 2017 and 2018 were examined, it was evident that GLANBIA was profitable for each of these years even if all of its costs were deemed avoidable. As a conclusion, it was decided GLANBIA did not engage in the alleged predatory pricing market behaviour.

3.5 The HUAWEI Decision[78]

3.5.1 Background of the HUAWEI Case

After several complaints were filed against the market activities of HUAWEI, the TCA decided to open an ex officio preliminary investigation regarding the company's

[78] TCA's 23.05.2019 dated and 19-19/268-116 nr. GLANBIA preliminary investigation decision.

alleged obstruction of its competitors by predatory pricing in the mobile network infrastructure installation market. Although the complaints were not within the scope of the Competition Law, the complainants' statements claiming that HUAWEI had improved its standing in the mobile telecommunications network infrastructure and implemented below-cost prices in some bids, and thus obstructed its competitors in the relevant market, led the TCA to open an investigation.

Huawei Technologies Co. Ltd. is a China-based telecommunications company that has operated in Turkey under the trade name Huawei Telekomünikasyon Dış Ticaret Ltd. Şti. since 2002. HUAWEI's operations consist of three different business segments:

- Carrier Business: In this business segment, HUAWEI cooperates with main mobile carriers in order to install mobile and fixed networks,

- Enterprise Business: In this business segment, HUAWEI provides equipment and related services to state institutions and various companies through its distributors,

- Consumer Business: In this business segment, HUAWEI sells smartphones.

The case is about HUAWEI's mobile network equipment and installation business under its carrier business segment. HUAWEI provides mobile network equipment and related services to TÜRK TELEKOM, TURKCELL, and VODAFONE. These equipment and services are provided through tenders or proposal requests and price negotiations by mobile carriers. HUAWEI imports the necessary equipment from China or buys directly from domestic manufacturers in Turkey. It also conducts domestic production and provides network installation, network maintenance, and equipment warranty services. HUAWEI and ERICSSON are the two dominant firms in 3G and 4.5G network installations.

3.5.2 General Information about the Mobile Network Installation Sector

Mobile carriers can provide mobile electronics telecommunications services only by installation, operation of base stations, and the establishment of mobile network infrastructure. Wireless networks consist of hardware and software infrastructure enabling communications technology equipment to connect wirelessly and is made up of three subsections, namely antenna, base station, and field infrastructure.

An antenna is used to receive and transmit signals. It receives electromagnetic waves and guides the waves to the receiver and transmits electromagnetic waves that the receiver generates. A base station is a piece of equipment that produces a wireless signal the signal coverage of which is dependant upon frequency band and application scenario. Because of these dependencies, the number of base stations for uninterrupted wireless coverage for a certain area varies. A base station is generally composed of a baseband unit and a remote radio unit. A mobile carrier needs approximately 6000 to 12,000 base stations to provide 4.5G mobile communications service throughout Turkey. Field infrastructure consists of an antenna tower, power supply system, air conditioning, and batteries. Technical requirements for the field vendors are not as strict as other equipment parts of the mobile signalling system and as these products are not high-tech equipment they can be purchased through domestic small and medium-sized companies. As a result of this market condition, there are many vendors providing equipment and services to mobile carriers.

Base stations are connected to a core network, which processes voice and data signals. The core network and base station must be compatible with international standards. The base station can connect to the core networks of different vendors. Base stations belonging to different vendors require distinct high-level technical expertise regarding equipment installation, configuration, and maintenance. Mobile carriers do not prefer to work with more than two base station vendors considering cost-saving and management convenience and use only one vendor's base station in a certain area.

When a new technology is being launched into the market, it coexists with the older one and becomes widely used in time. For a new technology to be widely used takes 5 years whereas in 10 years it becomes obsolete. Like base stations, network equipment is manufactured according to internationally accepted standards. The general features of this equipment do not change frequently and one supplier's equipment can be replaced with those of another supplier with the same technical capability. Mobile carriers prefer to procure from one or two main vendors to save on operational costs and the same suppliers provide all required network equipment in a certain area.

As the technological developments regarding network equipment do not occur synchronously and the acceptance of different network equipment in the market differs, mobile carriers will not replace all network equipment with new ones when a new technology is brought up but will make changes one at a time. A new supplier should present its price offer for the new advanced equipment as well as the older ones belonging to the other vendor. Mobile carriers take advantage of this market condition to replace their old equipment in a cost-effective way.

ICTA in Turkey holds mobile carriers liable to make certain investments. These liabilities state that at least 40% of the high-technology investments containing hardware and software used in mobile networks will be acquired from suppliers established to develop R&D projects in information and communications technologies employing a certain number of engineers in their R&D centres and at least 10% of the same type of investments should be acquired from small and medium-sized enterprises founded to develop network systems and products.

3.5.3 Relevant Market for the HUAWEI Case

In terms of HUAWEI's services and the scope of the case, the subject of the investigation was the wireless network business of the telecommunications sector, excluding core networks. The TCA decided that "base station hardware and software products" and “antenna and antenna equipment” were different market sub segments because the concerned products were used differently in 3G and 4.5G technologies, are different in their functionalities, could be manufactured by different suppliers, and mobile carriers could acquire this equipment from different vendors. As a result, the two relevant markets were defined as the “baseband station hardware and software market,” which includes baseband and remote radio units, and the “base station antenna market.”

3.5.4 Evaluation of HUAWEI’s Market Dominance

First, compared to other vendors, HUAWEI’s share in three mobile operators’ total number of base stations was analysed. Additionally, a breakdown of suppliers in mobile carriers’ remote radio and baseband units used in base stations were examined. Evaluation of these data showed that HUAWEI brand remote radio and baseband unit usage is over 50% for all three mobile carriers, more than HUAWEI’s competitors’ market shares.

In the base station antenna market, HUAWEI’s share is below 40% according to the information given by the mobile carriers. In the antenna market, there are many market players unlike in the base station market. According to the opinion letter submitted by the ICTA, in the antenna and antenna equipment market, the market share of HUAWEI that it had considerable market power. The TCA continued its investigation despite HUAWEI’s share being below 40%.

The network and equipment required to provide electronics telecommunications services contains high R&D costs and initial investment is high. After-sales services in this market are important for mobile carriers to maintain the standard level of service for consumers. Within this framework, HUAWEI is in an advantageous position according to its competitors because of its economies of scale, brand recognition, and financial strength. The fact that domestic manufacturers have been unable to gain a significant market share despite the ICTA’s requirement for mobile carriers to buy a certain amount of their equipment from Turkish suppliers showed that there were barriers to enter the market effectively. One of the main difficulties for the new market entrant is the necessity to prepare a price proposal for the new technology product as well as to submit a swap proposal for the other vendors’ existing equipment. While the swap operation is costly for the suppliers, the mobile carriers request big reductions in swap proposals. This market condition is to the advantage of current market players who have the technology for the existing equipment and to the disadvantage of the new entrants.

Another factor in assessing the dominant market position was to determine whether there was buyer power in the market. Although the mobile carriers have bargaining power over the equipment manufacturers, as switching to a different supplier in a short time is not easy in terms of cost and maintenance of existing equipment, the TCA decided buyer power was not exactly certain.

In accordance with the evaluations, the TCA decided that because of HUAWEI's market share in remote radio and base-band units, coupling with other market conditions, it could be said that HUAWEI had a dominant position in the market. In the base station antenna market, although HUAWEI's market share was below 40% and there were many other suppliers in this low-tech market, because of ICTA's market share estimate the TCA assumed that HUAWEI was in a dominant position in the base station antenna market. In conclusion, instead of determining an exact market dominance, the TCA decided to analyse HUAWEI's alleged abuse of market power with the assumption of HUAWEI's market dominance.

3.5.5 Predatory Pricing Analysis of HUAWEI Case

First, HUAWEI's base station hardware/software comprising remote radio and baseband unit, and antenna market revenues in 2017 and 2018, and their separate shares in total revenue were examined. Then the base station and antenna product groups' direct and indirect costs in 2017 and 2018 were listed. While direct costs included equipment and service costs, indirect costs included customs tax, customs inspection tests, freight, warehousing, tax, and worker benefits.

Base station indirect costs were calculated according to the below formula:

(<u>Base Station Revenue Share in Total Revenues</u> x <u>HUAWEI's Total Indirect Costs including other business lines</u>)

According to revenue and cost calculations, HUAWEI had priced its equipment and antenna over cost and incurred profits.

The TCA also analyzed HUAWEI's revenues and costs for the 3G and 4.5G network installation tenders in which HUAWEI participated in 2017 and 2018. While the indirect operating and finance costs were reflected to the relevant tenders, the below formula was used:

<u>Total Revenue from Tender Projects</u> x <u>(Total Indirect operating and finance costs)</u>
<u>Total Revenue of HUAWEI</u>

Indirect operating costs included rent for HUAWEI premises and depreciation of fixed assets.

The TCA specified that as it was only possible to avoid variable costs in the short-run, AAC would be equal to AVC and it preferred to use AVC for the predatory pricing analysis. In this case, fixed costs included warehouse, personnel social aid, and operating and finance costs, while variable costs included equipment, service, customs duty, customs inspection, and freight. Net profit was calculated by deducting fixed/variable costs together with corporate tax payment from net revenues. In the predatory pricing analysis, profits were calculated with respect to variable costs. According to variable cost based on net profit calculations, HUAWEI was profitable for all its tender business.

In light of the examinations pf 2017 and 2018 data, it was seen that HUAWEI was profitable in the base station and base station antenna markets in addition to its above the cost pricing in all tenders in which it participated. As a result, the TCA concluded pricing below cost condition was a must to prove the abuse of dominant market position, and this condition was not met in the HUAWEI case, proving that Article 6 of the Competition Law had not been breached.

4. Conclusion

As these five preliminary investigations show, to put forward a predatory pricing claim against dominant undertakings, even when the complainant thinks its evidence is solid, does not mean that the TCA will decide in favor of the complainants, finding that the dominant firm sold its products below cost or under average avoidable cost. The main difficulty lies in not knowing the dominant firm's costs, which would enable to calculate the dominant firm's profitability. The interesting situation was that almost all of the complainants' claims regarding the complained firms' lower prices were not substantiated. In some cases, the TCA found that the complained firms' prices were higher than the complainant firms, proving that the complainant had not prepared a solid and convincing file. For example, the complainant in the TS ISTANBUL case claimed that it was being excluded from the market by TS ISTANBUL. However, in reality, the complainant firm's sales were increasing.

In the TS ISTANBUL and HABAŞ cases, the TCA compared the selling price of the concerned products with ATC, and as the prices were above ATC, the case was concluded. In the SONY EURASIA case, although the campaign prices were below cost for some periods, because the campaign was short-run, it was enough for the TCA to decide the market practice was not predatory. While the undertaking engaged in product campaigns almost daily, the TCA opined that as each campaign was limited in scope and did not last long, even if SONY EURASIA priced its PSN below cost, it did not abuse its dominant power in the market. In the GLANBIA case, GLANBIA's positive profitability figures were enough for the TCA to decide there was no predatory pricing. In the HUAWEI case, when profits were calculated according to the variable costs, it was obvious that HUAWEI was profitable.

The TCA did not employ the LRAIC cost calculation method in either of these cases. Except for HUAWEI, the related industries of the other cases did not have high technology and R&D investment-intensive industry markets. Thus the TCA was able to use the LRAIC method for the HUAWEI case but decided to calculate AAC. As in the short-run AAC would be equal to AVC, the method chosen was variable cost based net profit calculations. In the HUAWEI case, the TCA calculated AAC by taking into account the fixed costs that could be avoided by not manufacturing the concerned products.
We hope that by reviewing the 2019 decisions, complainant firms will prepare evidence-based files when claiming dominant firms are engaged in predatory pricing market behaviours.

1.2.2. The Turkish Competition Authority's Approach to Indirect Refusal to Supply Practices: Radontek Decision

By Mustafa Ayna and Emine Bilsin

Introduction

On 1 February 2019, the TCA published its reasoned decision[79] regarding the full-fledged investigation conducted against Radontek Medikal upon a complaint submitted to the TCA by Düzey with the purpose of determining whether the relevant undertaking had violated Article 6 of the Competition Law through the abuse of its dominant position in the sales and after-sales markets for Accuracy-branded CyberKnife radiotherapy devices.

This decision is important as it is the last link in the TCA's established precedents[80] regarding the abusive refusal to supply practices in the aftersales of medical devices. Refusal to supply is one of the most debated topics in competition law as it constitutes a limit to the freedom of contract.

Radontek Medikal operates as a distributor and after-sales service provider of cancer diagnosis and treatment devices. Besides its operations in the sales and after-sales markets for CyberKnife radiotherapy device produced by Accuracy, Radontek is also the distributor of Rosa (Medtech Surqical), Mobetron (Intraop), and S 250 Proton Terapi (Mevion) products in Turkey.

The applicant, Düzey, operates in the fields of sales and after-sales of all kinds of radiology, radiotherapy, and nuclear medicine devices and systems. Düzey's customer portfolio consists of public hospitals, private hospitals, and private polyclinics. In addition to CyberKnife, the relevant undertaking also operates in the after-sales markets for Varian, Siemens, GE, and Elekta branded radiotherapy devices.

As per the complaint, the allegations are as follows:

- Radontek Medikal is in a dominant position in the sales and after-sales services markets for CyberKnife radiotherapy devices, as it is the sole distributor of the relevant product in Turkey;

[79] Decision of the TCA dated 11.10.2018 and numbered 18-38/617-298.

[80] Other such precedents include decisions of the TCA dated 18.02.2009 and numbered 09-07/128-39; dated 16.03.2010 and numbered 10-23/326-114; dated 02.06.2011 and numbered 11-33/704-217; dated 04.06.2013 and numbered 13-33/447-198.

- Radontek Medikal has implemented excessive and discriminatory pricing between purchasers with equal status by offering different terms for the same product in order to exclude Düzey from the aftersales market where Düzey competed, amongst others, with Radontek Medikal.

The Relevant Market

When dealing with the definition of relevant product markets in such cases, the TCA focuses on the question as to whether it would be appropriate to consider the sales and after-sales services concerning a product as a whole and thus within the same relevant product market. In case the TCA considers that the purchasers of a certain product do not take into consideration the conditions of aftersales services when making the initial purchase decision and they become locked in to the after-sales market following that, it prefers to define a separate and brand-specific relevant product market for the aftersales services. The TCA generally separates the sales and after-sales markets when the medical diagnostic and monitoring equipment considered and defines brand-specific markets for the latter.

In the case at hand, the TCA concluded that separate relevant product markets should be defined for the sales and after-sales services. With respect to the sales market, the TCA stipulated that the characteristics of the CybreKnife-branded linear accelerator differentiated it from all other linear accelerators to a significant extent and held that no other products constituted substitutes for CybreKnife-branded linear accelerators. Therefore, the relevant product market was defined as the market for "CyberKnife branded linear accelerator devices."

With respect to the after-sales services, in line with its precedents in the relevant sector, the TCA stated that a separate and brand-specific after-sales market for CyberKnife linear accelerators should be defined. Thus, the after-sales markets were defined as "spare parts market for CyberKnife brand linear accelerator device" and "maintenance and repair services market for CyberKnife brand linear accelerator device."

Assessment of the Abuse of Dominance Allegations

Analysis of Dominant Position

It is indicated that there are currently 11 CyberKnife radiotherapy devices in Turkey and that Radontek Medikal is the exclusive distributor of these devices. Hence, it is clear that Radontek Medikal holds a dominant position in the market for CyberKnife branded linear accelerators due to its rights arising from the exclusive distribution agreement with Accuray. Having said that, there are various undertakings providing maintenance and repair services for the said device.

With regard to the after-sales market, the TCA evaluated that Radontek Medikal was in a dominant position due to the following reasons; (i) Radontek Medikal's market share

in the after-sales market was consistently higher compared to that of its competitors, (ii) Radontek Medikal is the sole spare parts supplier for the CyberKnife device although it was not the only provider in the market in practice, and (iii) no countervailing buyer power existed due to the fact that the number of alternative undertakings in the after-sales market, as well as their capacity, was limited.
In light of the foregoing, it is concluded that Radontek Medikal is in a dominant position in the markets for "CyberKnife-branded linear accelerators," "spare parts for CyberKnife-branded linear accelerators" and "maintenance and repair of CyberKnife-branded linear accelerators."

Excessive Pricing

Excessive pricing is an anti-competitive pricing strategy whereby a dominant undertaking consistently sets its prices "significantly" above the competitive level[81]. Excessive pricing may constitute a type of refusal to deal in case the dominant undertaking charges unreasonably high prices at the upstream level, which would practically render it impossible for the downstream purchasers to get access to the relevant input.

According to the precedents of the TCA[82], the method mainly used to determine whether excessive pricing exists is the two-tiered "Economic Value Test (EVT,)" which comprises of (i) the assessment of the price with the underlying costs, and (ii) comparison of the price with the prices of competing products or prices across similar markets. Within the scope of the implementation of the EVT, the TCA mainly prioritizes the comparison of the relevant price with similar markets and the price-cost analysis is conducted only if specific costs related to the service/product in question may be calculated[83].

In the case at hand, it was claimed that Radontek Medikal had asked for excessive prices upon the spare part request of Düzey, which is a competitor in the downstream after-sales markets. The TCA emphasized that, in the relevant sector, such practices weaken the competitors' position in the downstream market in which it provides services through tenders organized by hospitals. Therefore, it is indicated that Radontek Medikal's excessive pricing had exclusionary effects in the downstream market. Within this context, the TCA concluded that Radontek Medikal's practice should be deemed as an indirect refusal to supply rather than excessive pricing, which is regarded as an exploitative conduct[84].

Having said that, the TCA first examined Radontek Medikal's prices within the scope of the EVT in order to determine whether the price at the upstream level was high enough to be deemed as an indirect refusal to supply. As a result of the TCA's assessment, it

[81] Decisions of the TCA dated 17.01.2014 and numbered 14-03/60-24; dated 12.11.2014 and numbered 14-45/812-365.
[82] Decisions of the TCA dated 06.04.2001 and numbered 01-17/150-39; dated 03.01.2008 and numbered 08-01/5-4; dated 17.01.2014 and numbered 14-03/60-24; dated 27.10.2016 and numbered 16-35/604-269.
[83] Decisions of the TCA dated 30.04.2002 and numbered 02-26/262-102; dated 26.05.2006 and numbered 06-36/462-124; dated 01.03.2007 and numbered 07-18/164-54.
[84] Decision of the TCA dated 21.10.2005 and numbered 05-71/981-270.

was stated that the price of the relevant product was deemed to be unreasonable when compared to other offers submitted to third parties, especially hospitals, by Radontek Medikal for the relevant product. Thus, Radontek Medikal's price offered to Düzey was deemed to be excessive. The TCA further held that Radontek Medikal was not able to show any reasonable justifications for such practice.

Refusal to Supply

As per the Guideline, refusal to supply is defined as "an undertaking's refusal to supply the goods or services it produces as well as tangible or intangible business inputs in its possession to other undertakings, or its direct or indirect refusal to allow other undertakings to use thereof."

In addition to outright refusal to supply, the same conduct may manifest itself in the form of a constructive refusal through behaviours such as undue delays in shipments, quantity restrictions, and the imposition of unreasonable conditions. It is also indicated in the Guidelines that refusal to supply may target the competitors of the dominant undertaking in the downstream market. In case the dominant undertaking is vertically integrated and its purchasers in the downstream market are also its competitors, then the refusal to supply is more likely to restrict effective competition.

When assessing the refusal to supply claims in the case at hand, the TCA examined the following conditions, which must be cumulatively satisfied for a violation to exist: (i) the refusal should relate to a product or service that is indispensable for the competition in the downstream market, (ii) the refusal should be likely to lead to the elimination of effective competition in the downstream market, and (iii) the refusal should be likely to lead to consumer harm.

Regarding the first condition, it is stated that the spare parts form an essential and indispensable input in the aftersales market as they have no substitutes. It is further indicated that the undertakings operating in the downstream market have no alternative source from which they may procure spare parts on a sustainable basis.

While examining whether the refusal to supply would eliminate effective competition and lead to consumer harm, the TCA found that Radontek Medikal had gained the upper hand vis-à-vis its competitors by means of its exclusive distribution agreement, which increased the effectiveness of Radontek Medikal's practices. In parallel with the foregoing, it was stated that due to the excessive price offered by Radontek Medikal, the competitors in the downstream market were prevented from providing after-sales services for the relevant devices in time and thus the consumers who are not able to get health care service were harmed. On top of that, it was indicated that such consumer harm was of the utmost significance as human life may be at stake.

Conclusion

In the light of the assessments regarding excessive pricing and refusal to supply practices, the TCA has resolved that

- Radontek Medikal has applied excessive pricing in the upstream market, which weakened its competitors' position in the downstream market;
- Radontek Medikal's conduct should be evaluated within the scope of constructive refusal to supply practices;
- the constructive refusal relates to spare parts, which are indispensable for being able to compete in the downstream market and the refusal leads to the elimination of effective competition and to consumer harm,
- such practices constituted a violation of Article 6 of the Competition Law and an administrative monetary fine shall be imposed on Radontek Medikal.

1.2.3. The Turkish Competition Authority Imposes a Daily Fine on Google for not Complying with Obligations (Google)

By Barış Yüksel, Fırat Eğrilmez, Alper Karafil

The TCA recently published its Review Decision reviewing the obligations that ought to be fulfilled by the economic integrity comprised of Google LLC, Google International LLC, and Google Reklamcılık ve Pazarlama Ltd. Şti. (referred to as "Google" collectively, hereinafter) pursuant to the TCA's Infringement Decision.

The Review Decision focuses on Google's activities that took place in the six-month period wherein it had been required to become fully compliant with the obligations imposed by the TCA in the Infringement Decision. To fulfil its obligations, Google had made two submissions, namely a general draft of the measures to be taken to eliminate the infringing conducts and a compliance package. After assessing these submissions, the TCA concluded that Google's compliance package was not sufficient for the fulfilment of its obligations and for being fully compliant with the competition rules. Consequently, the TCA decided to impose a daily fine on Google at a rate of five per ten thousand of its turnover generated in Turkey, starting from the end of the 6-month period. Google is obliged to pay daily fines until it meets all the obligations fully.

Background of the case

In 2015, upon a complaint submitted by Yandex, which alleged that Google had abused its dominant position by imposing agreement clauses to the device manufacturers to place Google Search products exclusively in the smartphones that are run by Android, the TCA had conducted a preliminary inquiry and concluded that a full-fledged investigation was not necessary. However, the TCA's decision was annulled by Ankara 5th Administrative Court and Administrative Court's Decision was upheld by Ankara Regional Administrative Court. To comply with the requirements of the administrative review process, the TCA initiated a full-fledged investigation in 2017. The investigation was concluded in 2018 and the TCA decided that Google had violated Article 6 of the Competition Law by tying Android with its search and Webview services as well as concluding agreements (i.e. Revenue Share Agreements or RSAs) with device manufacturers to incentivise the exclusive usage of the said services. Google faced an administrative fine amounting to TRY 93,083,422.30 (approx. EUR 12.6 million as of the Investigation Decision's date of issue), and also was required to comply with the set of obligations put forth by the TCA for putting an end to Google's anti-competitive conducts.

The respective obligations aim to tackle specific terms stipulated in a series of agreements, made between Google and the device manufacturers setting the framework for Android's usage since the TCA considers that Google's anti-competitive tying and exclusivity conducts were put into practice via said agreements.

For instance, a set of obligations tackling the prerequisites stipulated by Google for licensing the Commercial Android in the MADA requires Google to comply with the following rules:

- to remove the provisions and conditions that directly or indirectly introduce the obligation to install the Google search widget in a preferential manner on the home screen, which restricts the device manufacturers' right and freedom to choose between Google and its competitors;

- to remove the provisions and conditions forcing the device manufacturers to put Google Search in all search access points as default and to avoid creating further obligations to a similar effect in the future;

- to remove provisions requiring device manufacturers to install the Google Webview component as the default and exclusive in-app internet browser.

Furthermore, Google was required to remove and to prevent from becoming effective all provisions included in the RSA and other related agreements made or to be made with the device manufacturers that grant incentive payments in return for not pre-installing products competing with Google search and not using such products in any search access points in devices.

Why was Google Found as Incompliant?

The TCA's Review Decision is of particular significance because it provides further insight as to the standpoint regarding Google's tying and exclusivity conducts that had been revealed initially by the assessment made in the Infringement Decision.

First, the TCA determined that the compliance package introduced by Google was not sufficient to remove the conditions tying Google's search services (i.e., Google search and the search widget) to Android, although Google had dismantled the relevant provisions in the MADA that required device manufacturers to set Google search services as default in all search access points in devices and placing Google search widget on the home screen.

The underlying reason for that is the new design put forth by Google in the compliance package. Google introduced a financial incentive for the device manufacturers, that agreed to place Google search widget on the home screen of their devices, while removing the clauses that rendered such conducts mandatory for usage of Commercial

Android. Google created an incentive by offering to give Commercial Android for free if device manufacturers agreed to place the Google search widget on the home screen of their devices, whereas the device manufacturers were required to pay a license fee otherwise.

The Review Decision puts forth that the financial incentives introduced by the compliance package could have similar effects with a naked obligation to place Google's search widget on the home screen. According to the TCA, Google's competitors would have to make additional payments to convince the device manufacturers to place their search widgets on the home screen of devices instead of Google's widget and to compensate the license fee paid by device manufacturers for using Commercial Android without placing Google's search widget on the home screen.

It is indisputable that the TCA has the authority to challenge the said incentives as the obligations imposed on Google in the Infringement Decision also prohibited "financial and other kinds of incentives that would give rise to similar consequences" with a naked obligation imposed on device manufacturers.

That being said, adopting such a wide interpretation and prohibiting all forms of incentives without further assessing their effects could create significant negative unintended consequences for Turkish device manufacturers such as Vestel and GM because to comply with this such a blanket prohibition on incentives, Google may have to implement a new business model whereby it requests license fees from all device manufacturers that would like to use Commercial Android. Although this may not be a concern of competition law, from a wider industrial policy/societal welfare perspective, the Review Decision may have some adverse effects on the competitiveness of Turkish device manufacturers vis-à-vis their already strong international competitors. It should be noted that the TCA's preference of not taking into consideration the potential impacts of its decision on national producers is a strong indication that the Turkish competition law practice is not affected by protectionist policies and that the TCA follows a purely technical approach.

Secondly, the TCA's opinion concerning Google's obligation to remove any clause (particularly the clauses included in the MADA) that requires device manufacturers to use the Webview component for displaying a web page on an exclusive basis and to set Webview as default is also noteworthy. With the compliance package, Google propounded a revised version of the MADA that enables the device manufacturers to determine freely among competing components with the functionality of displaying web pages. However, the compliance package also introduces additional security and update requirements that the competing components would have to comply with in order to be preloaded and set as default.

As regards the steps taken by Google to comply with its obligations regarding Webview, the Review Decision initially reminded in reference to Google's defence in the Infringement Decision that there had been no provision in the MADA (or imposed by Google to the device manufacturers by other agreements) that prevented device manufacturers from preloading competing web page display components. The Review Decision emphasized that device manufacturers' discretion to choose between alternative web page display components would be ensured simply by removing the clause in the MADA that had prevented it. The TCA also indicated that while there is no clause that prevents device manufacturers from preloading competing web page display components, introducing additional security and update requirements as a prerequisite for preloading would contradict with the purposes of the obligations set forth by the Infringement Decision.

It should be noted that the extent of the next steps to be taken by Google to comply with its obligations are not clear in the Review Decision. That is because the relevant section of the decision starts with indicating that the introduction of new requirements for preloading Webview and setting it as default is incompatible with Google's original obligations. Then, the Decision continues by focusing on the fact that new requirements would contradict the aims of the obligations since there had been no restriction regarding preloading of competing services and the new requirements may imply a restriction thereof. Consequently, there is certain vagueness (at least in the public version of the Review Decision) as to how Google is expected to comply with the obligations put forth by the TCA in the Infringement Decision. To be more specific, it is not clear whether Google will satisfy the obligations if it removes the new security and update requirements precisely for preloading Webview or setting it as default or for both.

Lastly, the approach adopted in the Review Decision as to the obligations on Webview may be interpreted as rigid, since it seems that Google was not provided the opportunity to demonstrate that there are objective justifications for introducing new security and update related requirements, such as providing a secure and consistent operation of Android-run devices. On the other hand, the TCA's refusal to entertain the validity of such justifications may be understandable when it is considered that it had already dealt with Google's defence that setting Webview as default is necessary for ensuring technical/consumer security in the Infringement Decision and concluded that no causality exists between them.

1.2.4. Online Food and Grocery Delivery Markets are Getting Crowded Thanks to the TCA's Yemeksepeti Decision

By Bahadır Balkı, Nabi Can Acar, and Burak Buğrahan Sezer

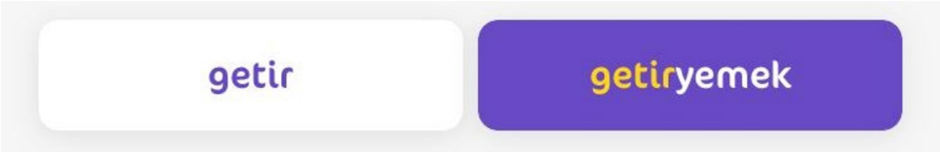
With the developments in online services, our habits in everyday life have been changing rapidly. Nowadays, one can cater to any of one's needs via websites or simple smartphone apps instantly. These developments have also reflected their effects on maybe one of our most common and frequent habits, grocery shopping. We experienced (and are still experiencing) the change from going to our friendly neighbourhood grocery store to ordering anything we need anytime, anywhere, with the promise of delivery within minutes through our smartphones.

Istanbul was introduced to instant grocery delivery services (probably) by a start-up called Getir (Bring) in 2015. Established by Nazım Salur, the same entrepreneur who launched BiTaksi (A Taxi), an app that allows people to hail a cab 24/7 anywhere in İstanbul and Ankara. Getir distinguished itself from traditional grocery delivery services by offering 24/7, an instant (aimed at 10 minutes) delivery option via its mobile application and accepting solely online payments. Such distinction required a great number of motorcycle couriers constantly making rapid tours between customers' houses and local warehouses solely dedicated to online orders. This led to a great number of Getir-flagged purple vehicles free-floating in streets and turning the start up into a well-known, reliable instant grocery brand.

Beside Getir's popularity among İstanbul residents, we also see pink and orange vehicles operated by two different neighbouring market giants that have introduced their own instant grocery delivery services challenging the early entrant's position. Pink ones among these vehicles belong to "Yemeksepeti" ("Foodbasket," the dominant online food delivery platform) under its "Banabi" ("One to Me") brand and the orange ones are operated by Migros (retail giant) under the "Migros Hemen" ("Instant Migros") application. With the new entrants and their market power in neighbouring markets, the dynamics of the instant grocery delivery services have changed drastically.

The Start of a New Rivalry

Following the hype around its instant grocery delivery services, Getir also introduced its online food delivery services on February 2019 under the Getir Yemek (Bring Food) brand and offered the newly introduced online food delivery services with its already existing instant grocery delivery services under the same application:



Offering both services in one application was designed to steer Getir's already existing customer portfolio to the newly introduced food delivery services. This move, however, initiated competition with Yemeksepeti.

Yemeksepeti, an undertaking operating in the online food delivery services since 2000, was sold in 2015 for USD 589 million to Delivery Hero, a German-based food distribution company operating in over 40 countries and today is active 76 cities in Turkey[86].

It's worth mentioning that Yemeksepeti has not always been friendly to new entrants and one could argue that Yemeksepeti reached to its current scale due to anticompetitive conducts. Indeed, the TCA fined Yemeksepeti back in 2016, having established that Yemeksepeti had abused its dominant position via implementing exclusionary MFC clauses placed into the restaurant agreements[87], forbidding restaurants from offering better terms to any other channel. It is underlined by the TCA that in the course of Yemeksepeti's abusive practices, most of the new entrants to the online food delivery market failed and exited due to the strictly implemented MFC clauses of the dominant player. It was further concluded that the market's two-sided nature had amplified the effects of this anti-competitive practice. It seems like the TCA decision was the main reason behind Getir's introduction of its online food delivery services.

While introducing online food delivery services, Getir advertised that the food orders would be delivered specially designed thermo boxes by Getir's own motorcycle couriers. This was in fact an attempt to distinguish Getir's services from Yemeksepeti, which does not interact with delivery services. Indeed, the delivery services of Yemeksepeti is mostly carried out by restaurants and for the sake of effectiveness, delivering separate orders via one vehicle is a common practice among them. Yemeksepeti's operation

[86] https://www.yemeksepeti.com/sehir-secim
[87] The TCA's decision dated 09.06.2016 and numbered 16-20/347-156

method is occasionally criticized by consumers due to poor delivery service and delays. Getir aims to compete with Yemeksepeti by providing better services via its delivery infrastructure and thermo boxes.

Yemeksepeti responded to Getir's entry into the online food delivery market by introducing its own online instant grocery delivery service in April 2019, filling the Istanbul streets with pink vehicles. While introducing its new services, Yemeksepeti designed an interface called "Banabi" and updated its application to include both services, adopting the same strategy as Getir had used while introducing Getir Yemek. Now, while launching the Yemeksepeti App, the consumers are asked to choose between Yemeksepeti and Banabi pages:

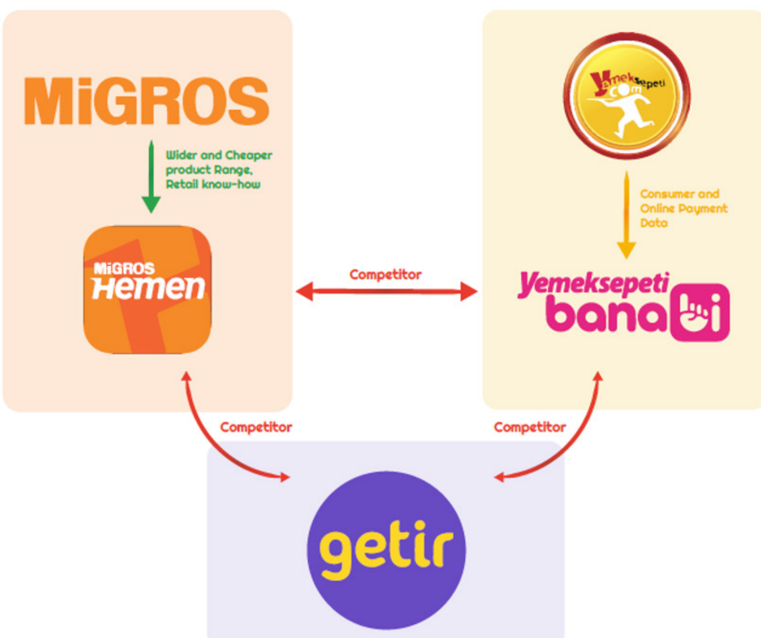
Yemeksepeti's entry strategy into the instant grocery delivery market constitutes a perfect way of monetizing data and once again reveals the importance of large data packs. In fact, since Yemeksepeti occupies a bottleneck in the online food delivery market, it has access to a great deal of consumer data including the optional online payment information and already has established app widely installed and regularly used by its customers throughout Turkey. It must also be noted that since bundling the apps assured visibility and consumer traffic for the new services, Yemeksepeti also sidestepped high advertisement costs. Nevzat Aydın, the CEO of Yemeksepeti, confirmed the winning strategy by tweeting "We received 1 Millionth order @banabi. Moreover, within six months from its start. It took seven years @Yemeksepeti (...)" on 21 October 2019.

During a YouTube interview made on May 2019, Nevzat Aydın said, "We are utilizing from Yemeksepeti. Yemeksepeti is going well and is a profitable operation. We take the risk of not being profitable [on Banabi] and we choose to give a portion of our Yemeksepeti profits to our customers for the sake of Banabi." Indeed, Yemeksepeti advertises Banabi as offering a wider product range, at lower prices than those of its rivals, and accepting cash payment.

Retail Giant Shows Up

Migros also introduced its own instant grocery delivery services under the "Migros Hemen" (Migros Instant) application in February 2019. Unlike its rivals, Migros is not a start-up, but an organized fast-moving consumer goods retail giant with 2186 stores present in every city of Turkey[88]. To understand its scale, we must remember that Migros took over Tesco's Turkish subsidiary Kipa back in 2017 and the transaction was subjected to conditional approval of the TCA . Unlike Getir or Banabi, Migros does not deliver 24/7 and its "instant" services is claimed to be on average 30 minutes, considerably longer than Getir's or Banabi's delivery time, both aimed at 10 minutes. Despite its shortcomings, Migros has the advantage of being familiar with online grocery delivery services and this know-how may pose an advantage over the start-up rivals. In fact, Migros Sanal Market (Migros Virtual Market), an online grocery delivery services, was launched back in 1997. However, it is impossible to qualify Migros' undergoing online grocery delivery activities with Migros Sanal Market as "instant" because consumers can only place an online order and specify a future delivery time interval. In this picture, Migros Hemen may be deemed as weaker than its rivals due to its slower and workhour limited delivery services and yet, Migros Hemen advertises as offering a wider product range and lower prices than its rivals.

The Competition Dynamics of Instant Grocery Delivery Services



[88] https://www.migroskurumsal.com/en/Icerik.aspx?IcerikID=183

As the competition is heating up, there are also other relatively smaller undertakings entering the same market such as İstegelsin and Glovo. Even though these undertakings have much smaller market shares, they display the growing characteristic of the concerned market.

In order to grasp the nature of the instant grocery delivery services market, the must-have power of succeeding should be assessed: user data and visibility. Since the instant grocery delivery services market is mostly based on smartphone apps, it is important for the undertakings that their apps are downloaded by as many consumers as possible. Yemeksepeti has an advantage here due to its TCA-certified dominant position in the food delivery services. Indeed, Yemeksepeti announced in 2018 that it had 11 million current users, which represents a high rate of visibility. With the additional fuel from powerhouse parent Delivery Hero, it wouldn't be wrong to state that Yemeksepeti has a clear advantage over Getir.

Migros, on the other hand, has a deeper knowledge of the retail industry than both parties and most probably is more vertically integrated than any other player thanks to its established supply chain. It also has a considerable amount of consumer data as well thanks to a customer loyalty program for 18 years operated with its "Migros Club Card," the biggest loyalty program in Turkey with 12 million active users in 2018[90].

It is commonly acknowledged that competition law ensures the protection of competition by performing the necessary regulations and supervisions and maximizing consumer welfare. While looking at the heated competition in instant delivery services (both in food and grocery), it comes to mind that the TCA's Yemeksepeti Decision is, in fact, the reason behind these markets having new entries. If Yemeksepeti had been allowed to continue its anti-competitive conduct, Getir most probably wouldn't have attempted to enter the online delivery food market. In such case, Yemeksepeti would not have felt obliged to respond to Getir with a new investment into an unknown territory, and of course the retail giant Migros would not have deemed the instant grocery services as a new opportunity. The real beneficiaries of the competition between these companies are, of course, consumers, who enjoy with greater choice and lower prices.

[90] https://www.migroskurumsal.com/userfiles/image/pdf/migros-fr-2018-gk.pdf

1.2.5. The Turkish Competition Authority to Shape the Future of Multi-Play Services in Telecommunication Industry [TTNET]

By Barış Yüksel, Fırat Eğrilmez, and Özlem Başıböyük

On 21 December 2018, the TCA published its decision regarding the investigation conducted against TTNET, the leading internet service provider in Turkey, which is vertically integrated with the incumbent wholesale broadband access provider Turk Telekom. The decision comprises the TCA's assessment as to whether TTNET had abused its dominant position, in violation of Article 6 of the Competition Law via certain types of bundled sales of fixed broadband internet and pay-TV services.

The bundled package of TTNET called the "New Year Campaign with Tivibu (will be referred as "Campaign"), which was at the focal point of the investigation, had been provided within the period of January-July 2016. TTNET offered broadband internet and pay- TV services through the Campaign and the Campaign was basically a marketing strategy whereby two separate offers that were already being offered to customers separately were merged under a single offer.

Characterization of the Campaign from the Competition Law Perspective

The decision signifies that the most challenging aspect for the TCA was the characterization of TTNET's conduct in terms of competition law. As per the TCA's Guideline, in order for a joint offer of more than one product to be deemed a "package rebate," the price of the bundle must be lower than the sum of the stand-alone prices of the individual products forming the bundle:

"In package rebates known as multi-product rebate or mixed packaging, the products may be offered for sale separately, however, when they are bought separately the total price of the products adds up to more than the package price."

However, the Campaign in question was not a conventional form of a packaged rebate, whereby a discount is offered for the bundled purchase of two separate services, simply because TTNET did not actually offer a discount for the Campaign (i.e., the price of the Campaign was equal to the sum of the stand-alone prices of the two services offered as a bundle).

It should further be emphasized that the Campaign constituted a "soft bundle," as both the broadband internet and pay-TV service in the Campaign were also available in the market on a stand-alone basis. Moreover, the customers who purchased the Campaign provided separate commitments for the broadband internet and pay-TV services in the

Campaign and the validity of these commitments were not dependent on each other in any way.

Thus, it was clear that the Campaign was merely a marketing strategy rather than a package rebate from a strictly economic perspective.

Yet, the TCA indicated that even though the Campaign did not meet the "formal requirements" of a package rebate (or soft bundling) in terms of competition law, and recommended a detailed analysis to evaluate the effects of the Campaign on customer behaviours and the level of competition in the relevant markets.

As a result of its assessments, the TCA decided that the Campaign would be deemed a bundled discount that might cause competition law-related concerns when considered within the scope of the following aspects:

- Behavioural economics
- TTNET's de-facto practices
- The complementary and close substitutional character of the services comprising the bundle

Below, the TCA's analysis regarding these aspects is explained in greater detail.

Remarks of the TCA in relation to Behavioural Economics

Regarding behavioural economics, the TCA put emphasis on "framing effect" and "status quo bias." The TCA explained that the Campaign was designed to create a perception that the "soft bundle" offered to the customers generated a greater advantage/discount than the option to purchase the services in the bundle separately and thus, created a framing effect that rendered one of the two options with equal expected returns, predominantly preferable vis-à-vis the other option via the style of presentation. The TCA further indicated that the methods used in the announcement of the campaign, namely commercial videos and announcements, which took place on the internet, were more likely to create the perception that the internet and TV services were only provided together.

As for the status quo bias, which can be defined as the tendency to preserve the current position or previously given decisions, the TCA expressed that once consumers had opted for the Campaign, they were more likely to ignore new options and maintain the status quo. Therefore, according to the TCA, once the will of consumers was shaped to purchase the broadband and pay-TV services together (i.e., once the Campaign was purchased) by means of the framing effect, the fact that the individual services in the Campaign could cancelled separately would become negligible due to the status quo bias.

Last, the TCA drew attention contrary to the remarks made by TTNET, certain advertising material had suggested that the price of the Campaign was considerably lower than the stand-alone prices for the services in the bundle. The TCA expressed that such practices revealed that the Campaign was designed to lead customers to purchase broadband and pay-TV services as a bundle and more importantly to make them believe that the sum of the stand-alone prices of the services comprising the "soft-bundle" was actually higher than the Campaign prices.

Remarks of the TCA in Relation to TTNET's De-facto Practices

The TCA focused on the behaviours displayed by the sales team of TTNET during the period when the Campaign had been active. The TCA expressed that the sales team had not promoted a bundled version of the services with pay-TV, when phone calls were made with customers in relation to the broadband internet services; however, the findings demonstrated that the employees had been encouraged to offer a bundled option when customers were contacted vis-à-vis, in a TTNET customer centre or when the services were installed on the premises of the customer.

On the flip side, the TCA determined that TTNET employees had actively offered bundled sales of pay-TV and broadband internet services with the Campaign conditions while promoting pay TV services through all types of communications made with the customers. The TCA set forth that TTNET might have chosen to refrain from offering bundled sales through its operations of broadband services since it was deemed to be in a dominant position in the mentioned market. The TCA further expressed that the foregoing marketing strategies of TTNET did not differ in essence since they aimed to promote broadband and pay-TV services to the customers as a bundle.

Remarks of the TCA in Relation to the Character of the Services Comprising the Bundle

The TCA set forth that the broadband internet services and pay-TV services were deemed to be complementary and that TTNET had built its sales strategy upon this fact. Within this context, the TCA first examined the churn rates of the customers who purchased the services for broadband internet on a stand-alone basis and those who had purchased internet and pay TV services as a bundle. The churn rates of the customers that preferred the bundled services were revealed to have been lower compared to the customers that had preferred stand-alone services. The TCA expressed that the difference in the churn rates of bundled and stand-alone products signified the close complementary relation between pay TV and broadband services and refuted the argument that the joint promotion of those products could not have been deemed a bundled sale.

The TCA further examined the number of TTNET subscribers purchasing stand-alone internet services, stand-alone pay-TV services, and bundles between January 2015 and June 2017 and concluded that the rate of increase in the number of subscribers of bundles had surpassed the rate of increase in the number subscribers of each stand-alone service in the period where the Campaign had been active.

In light of the foregoing, the TCA expressed that pay-TV and broadband internet services were complementary and that there was an increasing trend to purchase these two services as a bundle from the same supplier.

Cost/Revenue Analysis and Effects-Based Approach

After determining that the Campaign should be deemed as a bundle that might give rise to concerns related to competition law, the TCA moved on with a cost/revenue analysis to determine whether the prices of the Campaign were below-cost. The economic assessments showed that the prices of broadband internet services were above-cost, whereas the prices for pay-TV services were below-cost.

The TCA expressed that the analysis of prices and costs could be made either via:

- considering the costs and the price of the bundled product as a whole, pursuant to the approach adopted in the TCA's previous decisions, or
- based on the as-efficient competitor test, through which the total discount provided for the bundle is attributed to one of the products comprising bundle.

In light of the foregoing, the TCA concluded that if:

- the first method were used, the maximum profit generated from the services included in the Campaign could not compensate for the overall costs and,
- if the second method were used, the competitors could not economically replicate the rebate scheme that had been applied by TTNET.

After concluding that the Campaign did lead to below-cost pricing, the TCA proceeded with an effects-based analysis per Article 25 of the Guidelines, which sets forth that an assessment of exclusionary conduct should be based on an examination concerning the actual or potential anti-competitive foreclosure stemming from such conduct.

Within the scope of its effects-based analysis, the TCA determined that approximately 20,000 new subscribers had purchased the Campaign. When this number was compared with the average number of new subscribers of TTNET's competitors, the TCA stressed that the campaign had not foreclosed the market for broadband internet services. In support of the foregoing, the TCA also indicated that TTNET's market share on the market for retail fixed broadband internet services had decreased over the period of 2015-2017.

The TCA further compared TTNET's and its competitors' performance in the market for pay-TV services by assessing the number of subscribers and the number of new subscribers. The TCA also took into consideration TTNET's competitors' ability to respond to the Campaign with plausible commercial strategies and decided that TTNET's competitors that provided OTT services had been able to replicate TTNET's bundled offers in the relevant period. Lastly, the TCA considered the design of the Campaign as a factor that mitigated the foreclosure effect as it allowed the customers to cancel their subscriptions for the individual services in the bundle independently.

Conclusion

In light of the assessments made throughout the investigation, the TCA determined that the Campaign had not led to market foreclosure and that TTNET's conduct could not be deemed as abuse of dominance. Although the decision, which is not final yet (i.e., the decision does not preclude any action to appeal), does not entail an administrative fine, it includes significant remarks that may help stakeholders of the Turkish telecommunication industry to make reliable predictions regarding the future of the industry and that of the multi-play services in a period where convergence is reshaping the industry.

Even though TTNET's bundled sales (multi-play services) were not deemed to be anti-competitive, the TCA made it clear that the convergence of different services in the telecommunications industry causes concerns related to inter-network and intra-network competition and that the way in which multi-play services are provided is of crucial importance. While emphasizing that inter-network and intra-network competition would help multi-play services improve, the TCA points out that the current status of both are not at desired levels.

Aiming to ensure competition at both levels, the TCA decided to issue an opinion addressed to the ICTA, indicating that a regulation would support the competitiveness of the market, while referring to draft rules on multicast access services, which had fallen off the agenda without coming into effect after having been opened to public consultation by the ICTA. According to the TCA, the relevant regulation should include the following:

- conditions on the provision of IPTV multicast access services,

- detailed rules aiming to ensure access of competing operators to IPTV multicast access services in an efficient way, in relation to the following:

    - » topology and network management,
    - » application and allocation processes
    - » commitments on service level

- rules in relation with the pricing of IPTV multicast access services at the wholesale level.

It should be reminded that this opinion does not bind the ICTA in any way but that the ICTA may take steps in that direction if it considers that the TCA's concerns valid.

1.2.6. The General Court's Taking on the Responsibility of the Parent Company in Deutsche Telekom and the Case Law in Turkey

By Barış Yüksel and Mustafa Ayna

In 2014, Europe's largest telecoms provider Deutsche Telekom and its Slovak subsidiary were imposed a total fine of EUR 69.84m by the European Commission for abusing their dominant position in Slovakia's broadband internet infrastructure market[91]. The GCEU partially annulled the decision of the Commission and reduced the amount of antitrust fines imposed on Deutsche Telekom by about a third, from EUR 31m to EUR 19m, and the joint fine imposed on Deutsche Telekom and Slovak Telekom, from EUR 38.84m to EUR 38.08m, by stating that EU regulators had made a mistake while calculating the amount of fine[92].

This decision shows that the nature of the parent-subsidiary relationship is of vital importance for calculating the amount of fines in competition law. Since fines constitute a certain proportion of companies' turnovers, the question of whether the parent company's turnover will be included in the calculation of the fine is crucial. Although it is accepted that the Commission has discretion in that respect, the criteria on which the Commission relies when exercising such discretion are not clear. In the Deutsche Telekom decision, the General Court has drawn a framework as to when the liability of the parent company could exceed that of its subsidiary through the assessment of the "factors reflecting the individual conduct of the parent company in the infringement."

Facts of the Deutsche Telekom Case: The 2014 Decision

Until 2000, Slovak Telekom held a legal monopoly in the Slovakian telecommunications market. However, after the liberalization in 2000, a local loop unbundling obligation was imposed on Slovak Telekom, whereby it was required to provide access to its local loop "under transparent, fair and non-discriminatory conditions."[93]

In its decision, the Commission held that Slovak Telekom is in a dominant position in the upstream market for wholesale local loop access. The Commission further decided that Slovak Telekom had been abusing its dominant position through setting out unfair terms and conditions for providing access to the local loop, which amounts to a refusal to supply, and via pricing policies that constitute margin squeeze[94].

[91] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2015.314.01.0007.01.ENG
[92] https://www.reuters.com/article/us-eu-deutschetelekom-antitrust/eu-court-cuts-deutsche-telekom-antitrust-fine-by-a-third-idUSKBN1OC1F6
[93] https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-12/cp180196en.pdf
[94] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2015.314.01.0007.01.ENG

According to the Commission, the anti-competitive conduct had continued for more than five years[95], from 2005 to 2010. The starting point was deemed as the day on which Slovak Telekom published its reference access offer, which comprised unfair terms and conditions.

As a result of the Commission's assessments, the two companies were imposed a joint fine of EUR 38.8m and Deutsche Telekom received an additional fine of EUR 31m. It should be mentioned that Slovak Telekom is a subsidiary of Deutsche Telekom as Deutsche Telekom holds more than 51% of the share capital of Slovak Telekom.[96] Deutsche Telekom became a part of this investigation due to this relationship and it was held liable accordingly.

The GCEU held that the Commission's calculation was not correct

The companies challenged the decision of the Commission before the GCEU. While the GCEU upheld the Commission's assessments regarding the abuse of dominant position, it partially annulled the decision and reduced the amount of fine on the following grounds:

- The GCEU held that the Commission had failed to demonstrate the exclusionary effects of margin squeeze during the last four months of 2005 and since the margins had remained positive during these months, the GCEU decided that the amount of the joint fine would be reduced accordingly.

- The GCEU pointed that "the Court points out that, where the liability of the parent company is purely derivative of that of its subsidiary, the liability of that parent company can exceed that of the subsidiary only where there are factors which individually reflect the conduct for which the parent company is held liable. The Court considers that the status as a repeat infringer of the parent company, Deutsche Telekom, constitutes a factor that individually reflects its conduct, which could justify an additional fine being imposed on it by the Commission. By contrast, the Court considers that Deutsche Telekom's turnover is not capable of reflecting its individual conduct in the infringement at issue and that it, therefore, could not serve as a basis for the calculation of an additional fine imposed on the latter." Consequently, the GCEU ordered that the amount of the fine would be reduced.

Deutsche Telekom stated that although it was pleased by the latest decision of the GCEU, it was not satisfied by all aspects of the decision and might file an appeal with the ECJ, the highest court of the EU. Deutsche Telekom argued that it is not normal that rulings in national competition cases taken as a basis to decide on an anti-trust infringement under EU law and that the court had failed to demonstrate the procedural errors in relation to the Commission's economic analysis and calculation of fine clearly in its decision.

[95] https://www.reuters.com/article/us-eu-deutschetelekom-antitrust/eu-court-cuts-deutsche-telekom-antitrust-fine-by-a-third-idUSKBN1OC1F6
[96] https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-12/cp180196en.pdf

Besides Deutsche Telekom, the Commission could also appeal the decision of the General Court to ECJ[97].

Parent Company's Liability under Turkish Competition Law

There are similar cases whereby the TCA has evaluated the parent-subsidiary relationship for the purposes of determining the parent's liability and the fine to be imposed. As a general principle, in Turkish competition law, parent companies may be liable due to their subsidiaries' breach. The TCA generally assesses whether the parent company has direct influence over the anti-competitive strategies of its subsidiary. Regarding the position of the parent company, there are two possibilities.

If the parent company is directly or indirectly involved in the anti-competitive conduct of the subsidiary, it will be held jointly and severally liable for the violation. If, on the other hand, the parent company is not directly or indirectly be involved in the violation, the degree of control that the parent company exerts over its subsidiary is examined the extent of the liability of the parent company is evaluated accordingly.

The most notable decision of the TCA whereby the liability of the parent company from the anti-competitive conduct of its subsidiary is the Türk Telekom decision[98]. This was also a margin squeeze investigation in the Turkish fixed broadband internet market initiated against the incumbent operator Türk Telekom that had acquired the DSL broadband internet infrastructure through privatization, and its wholly-owned subsidiary TTNET, which operates in the retail fixed broadband internet market. The TCA imposed a total fine of TRY 12.4m (approx. EUR 6.5m as per the average currency rates in 2008), which was calculated over the combined turnover of the companies and for which both companies were held jointly and severally liable.

The TCA held that the downstream market in which TTNET operates was foreclosed due to the practices of Türk Telekom and TTNET that amounted to margin squeeze. Similar to the Deutsche Telekom decision, the TCA first held that Türk Telekom and TTNET, which constituted a single economic entity despite being separate legal entities, held a dominant position in the wholesale broadband internet access and retail broadband internet markets.

Türk Telekom claimed that Türk Telekom and TTNET should not be deemed as a single entity as the very reason why TTNET had been created as a separate legal entity to operate in the downstream market was the TCA's opinion during the privatization process. Türk Telekom argued that this legal entity separation and the related regulations prevented Türk Telekom from affecting the competition in the downstream market. Hence, Türk Telekom claimed that it should not be held liable for any conduct that only had effects in the downstream market. However, the TCA held, by referring to

[97] https://www.reuters.com/article/us-eu-deutschetelekom-antitrust/eu-court-cuts-deutsche-telekom-antitrust-fine-by-a-third-idUSKBN1OC1F6

[98] TCA's decision dated 19.11.2008 and numbered 08-65/1055-411.

the Competition Law, EU case law and the Council of State[99], that these companies constituted a single economic entity from the perspective of competition law and that the mere separation of legal entities did not change this fact.

After clarifying this issue, the TCA stipulated that a case-by-case analysis would be required to decide which companies within the same economic entity would be held liable for the violation and how the relevant turnover would be calculated. The TCA held that margin squeeze was a special type of anti-competitive conduct through which the downstream market is foreclosed to the competitors of the dominant undertaking due to the relation between the wholesale and the retail prices (i.e., the very thin or negative margin makes it impossible for the competitors to economically replicate the dominant undertaking's offers). Since neither the wholesale prices of Türk Telekom nor the retail prices of TTNET were individually responsible for the violation but it was the combined strategy of the two companies, the TCA decided that TTNET and Türk Telekom would be held jointly and severally liable, and that the fine would be calculated based on the total turnover of the economic entity. It is important to note that the decision did not include an assessment in relation to whether Türk Telekom had an impact on the commercial strategies of TTNET.

Conclusion

In light of foregoing, parent companies can be held liable for the anti-competitive conduct of their subsidiaries both under Turkish and EU competition law. Up to now, the TCA was mainly concerned with the involvement of the parent company in the violation. The Deutsche Telekom decision may lead to the introduction of a new dimension for determining the boundaries of the liability of the parent company, which is the analysis of the "factors reflecting the individual conduct of the parent company in the infringement." Considering that the Turkish Competition Law has been modelled on the EU Competition Law and that the TCA closely follows the EU case law, it is possible that the Deutsche Telekom decision may affect Turkey as well.

[99] Council Of State, Plenary Session Of The Chambers For Administrative Cases, Stay of Execution Decision, Appeal No:2007/246.

1.2.7. The Dusseldorf Court's Decision Suspending the Bundeskartellamt's Facebook Ruling: A Guideline for Examining Alleged Exploitative Abuses

By Barış Yüksel, Mehmet Salan, and Nabi Can Acar

In 2019, the Bundeskartellamt rendered one of the most controversial decisions in recent competition law history, finding that Facebook's making subscription to its social network conditional upon the acceptance of terms and conditions for the collection and processing of Additional Data (Instagram, WhatsApp, Masquerade, Oculus, and Facebook Business Tools) amounted to an abuse of dominance merely based on the findings that these were incompliant with the GDPR and Facebook was in a dominant position, without establishing a causal link between Facebook's dominance and its ability to apply the allegedly GDPR-incompliant terms and conditions or setting forth concrete consumer harm (namely Facebook Decision). The said decision could have had significant ramifications for competition-law jurisprudence had it not been torn apart by the Dusseldorf Court. In doing so, the Dusseldorf Court laid down solid and systematic guidance with respect to the requirements that must be satisfied by the competition authorities in order to prove the existence of exploitative abuses. The Dusseldorf Court's suspension decision also contains significant insights as to the meaning of consumer harm and the competitive dynamics in zero-price markets where such harm may not be associated with pecuniary parameters.

How to Establish Exploitation

The Bundeskartellamt's finding of an abuse in the Facebook Decision was founded on the Authority's assumption that it is sufficient to show that (i) Facebook is in a dominant position in the social network market, and (ii) Facebook's terms and conditions that render subscription to its media services conditional upon users' accepting Facebook to process Additional Data is in violation of the GDPR, in order to prove the existence of exploitation.

Under this assumption, the Bundeskartellamt absolved itself from the necessity to prove that Facebook's ability to establish a link between social network subscription and the processing of Additional Data stems from its dominant position and that such a practice would not be possible in the absence of dominance (i.e., establishing a link of causality between dominance and the exploitative conduct). Rather, the Bundeskartellamt argued that whenever a dominant company acts in contrary to a legal provision that aims to protect the weaker party of an unequal contractual relationship (e.g., unfair contract terms, labour law, etc.) to the disadvantage of the protected party (which, according to the Bundeskartellamt, amounted to exploitation), this would automatically lead to a violation of the competition law. This meant that in the Bundeskartellamt's view, all that was required to prove the existence of an exploitative abuse is to establish a causal link between dominance and exploitation.

The Dusseldorf Court unequivocally rejected the Bundeskartellamt view and provided thorough and detailed explanations as to why establishing a causal link between dominance and exploitation may not be sufficient in exploitative abuse cases and that a further causal link between dominance and exploitative conduct also must be shown.

The Dusseldorf Court explained that legal provisions that aim to protect the weaker party of an unequal contractual relationship do not necessarily aim to address an imbalance that stems from the "market power" of the stronger party but rather a bilateral-imbalance that is inherent in the nature of such relationships (e.g., an employer in relation to a worker, a seller in relation to a consumer, and a data controller in relation to a data subject is always stronger parties due to the nature of these relationships even if they possess no "market power" from a competition law perspective). The Dusseldorf Court emphasized that the concept of exploitation, as a technical competition law term, refers to the exploitation of consumers due to dominance and thus that exploitation may not be proven without showing that it would not be possible in the absence of dominance. The Dusseldorf Court also set forth that the "special responsibility" of dominant companies only relates to obligations stemming directly from competition law and that the scope of such responsibility may not be extended to cover other legal provisions that serve different purposes.

After clarifying the necessity of a causal link between dominance and allegedly exploitative conduct, the Dusseldorf Court went on to examine whether it may be argued that Facebook is able to establish a link between social network subscription and the processing of Additional Data because its social network services are indispensable for consumers. The Dusseldorf Court stipulated that it is not reasonable to claim that Facebook provides indispensable services for consumers as these services do not relate to essential needs and that a significant portion of the German population prefers not to use these services at all. In light of this data, the Dusseldorf Court held that the consumers make a rational choice of letting Facebook use their personal data in return for the provision of zero-price services financed by advertising. As per the view of the Dusseldorf Court, the absence of other alternatives may not justify the presupposition that the consumers have no choice but to allow Facebook to process Additional Data in order to benefit from its social network services.

Finally, the Dusseldorf Court also set forth that the Bundeskartellamt had erred in assuming that consumers' accepting Facebook's terms and conditions without reading them is an indication of their dependence on Facebook and thus a reflection of Facebook's ability to exploit consumers by way of abusing its dominant position. On the contrary, the Dusseldorf Court stated that this is merely due consumers' indifference to Facebook's processing of Additional Data and their belief that the benefits of subscribing to Facebook's social network outweigh any potential disadvantages that may arise from the processing of Additional Data.

What is Consumer Harm in Zero-Price Markets?

In its decision, the Dusseldorf Court also delved into the question of "consumer harm," a concept that had been widely interpreted by the Bundeskartellamt in the Facebook Decision.

The Bundeskartellamt claimed that consumers' "loss of control" over their data and the weakening of their "right to informational self-determination" due to the "excessive" data processing of Facebook is sufficient to show the existence of consumer harm even at a conceptual level without need for further concretization. Here, the Bundeskartellamt argued that the excessiveness of processing was due mainly to the disproportionality between Facebook's processing of Additional Data and the social network-related services it provides, under the assumption that the former is not a precondition of the latter.

The Dusseldorf Court was of the opinion that the Bundeskartellamt's claims were off the mark on various fronts.

First, the Dusseldorf Court made it clear that consumer harm in the case at hand must be due to the processing of the Additional Data, as this is the alleged abuse, and that all the data processing activities of Facebook may not be taken into consideration.

The Dusseldorf Court noted that, despite Bundeskartellamt's assertions, it is not possible to accept that consumers have lost control of their data as their allowing Facebook to process Additional Data was a conscious decision and a result of rational calculation. The Dusseldorf Court added that the fact that there is a significant number of non-Facebook users in Germany is clear proof that the consumers do have discretion and that different consumers exercise this discretion in different ways.

Rather the Dusseldorf Court stated that Facebook's processing of additional data does not weaken the consumer economically as Facebook's processing of Additional Data does not deprive consumers of their right to making the same data available to other third parties, including the competitors of Facebook in return for certain economic benefits. Moreover, the Dusseldorf Court further recognized that a certain economic value may theoretically be assigned to excessive disclosure of data. However, according to the Dusseldorf Court, such economic value also must be calculated in accordance with the fundamental principles of competition law. Since, from a competition law perspective, excessiveness under that framework refers to Facebook's disproportionate data processing that is only made possible due to its market power, the Bundeskartellamt should have conducted a counterfactual analysis or an "as-if" test. This test would require a comparison between the degree of data processing that could have emerged in a competitive market and the current degree of data processing. The gap between the former and the latter would point out the allegedly negative effects of Facebook's dominance over consumers and a valid exploitation claim could only be raised if this gap was deemed to be unreasonably high. This is due to the fact that the competition law does not prohibit all forms of subjective "excesses," but only those that are clearly due to an abuse of dominant position. The Dusseldorf Court reflected that the Bundeskartellamt's findings were insufficient to prove such a correlation.

Considering the foregoing assessments, along with other findings, the Dusseldorf Court decided to suspend the execution of Facebook Decision, which it deemed to be implausible.

Conclusion

The decision of the Dusseldorf Court comprises significant insights with respect to the interplay of data protection and competition laws.

Although the Dusseldorf Court did not completely dismiss the possibility of exploitative abuses in zero price markets, it made it very clear that competition authorities should refrain from incorporating the concepts and purposes of data protection law into competition law without further assessment.

In light of the Dusseldorf Court's decision, competition authorities should be wary of the dynamics of the zero price markets and the fact that the consumers of zero price services are very much aware that these services are financed by advertising, which is only made possible by the processing of their personal data, and that the absence of "explicit consent" (in terms of relevant data protection regulations) may not justify a blanket assumption that consumers are being forced to accept detrimental contractual terms and conditions by dominant companies. Furthermore, it is of utmost importance that the competition authorities realize that data protection regulations are drafted with a mindset aiming to protect data subject vis-à-vis data controllers due to the bilateral imbalance between these parties and there are fundamental differences between such regulations and competition law based prohibition of abuse of dominance that is designed to interfere only in case of an abuse of market power stemming from dominance.

1.2.8. Competition Authorities to Investigate Mobile Application Store Dominance

By Barış Yüksel, Nabi Can Acar and Mehmet Salan

Competition authorities are tuned into mobile app stores, trying to implement classical competition rules in non-traditional digital markets. This tendency was revealed when the Commission deemed Google as the dominant undertaking in the app stores for the Android mobile operating system (i.e., Google Play Store) and hit the online search and advertisement giant with EUR 4.34 billion for its anti-competitive practices to strengthen its position in various of other markets through its dominance in the app store market[100].

This scenery may beg the question of whether Google is the only app store owner troubled by competition authorities. The answer is clearly negative when considered that the Commission, the ACM, the US District Court, and the FAS are now looking into Apple's activities as the owner of the App Store placed into iOS devices. The Commission's Android Decision is of particular importance for Apple since it directly places it as the dominant undertaking in the market for "iOS app stores."

Both Apple and Google have a dual role as a platform: (i) they distribute their own apps (ex. Apple Music and Youtube) on their app stores (respectively, App Store and Google Play Store), and (ii) they provide an app store in which third-party app developers may offer their product and services directly to smartphone users. This dual role, which creates both vertical and horizontal relationships, is apparently leading up to a competition fight among app store owners and third-party app developers, resulting in numerous complaints to be made to competition authorities worldwide. The story behind all these complaints is the same, one of a monopolist trying to leverage its dominance in the upstream market (i.e., platform) via favoring its downstream division (i.e., apps) vis-à-vis its competitors.

[100] The European Commission, Case No 40099 Google Android Decision.

The market structure of the mobile device ecosystem is summarized in the following chart:

It is clear that there is a great deal of hype around the "digital markets" with claims that the dynamics of these markets do not resemble anything that we have encountered before and thus the policymakers (including the competition authorities to the extent that they shape competition law policies by way of interpreting the existing rules) are urged to be hesitant when interfering with these vibrant, dynamic, yet delicate institutions. Yet, from a competition law perspective, the alleged anti-competitive conduct of the platform owners does not seem to be materially different from one of the oldest tricks up the sleeves of monopolists that have been around for so long, namely foreclosing downstream competition by way of leveraging power in the upstream infrastructure markets (some examples include the foreclosure of the market for railroad transportation by way of leveraging the monopoly in railways, of that for maritime transportation by way of leveraging the monopoly in ports, and of that for retail internet by way of leveraging the monopoly in the internet infrastructure, etc.). Hence it seems that the difference does not arise from the nature of the conduct but from the underlying "infrastructure" used by its owners to monopolize related markets in which such infrastructure constitutes a crucial input.

Apparently, the digitization of the economy also led to the digitization of a vital infrastructure in the economy (from railroads and ports to platforms and search engines). However, this does not necessarily mean that the competition rules, which were unarguably designed during times where the economy was more "physical," may not answer the needs of the digital era. On the contrary, as long as the nature of the conduct that is dealt with remains the same, the changes in the characteristics of the relevant market will only constitute new factors that must be considered while applying the rules. In other words, a fine-tuning rather than a revolution in competition law may be what is needed to address the challenges of our age.

The ongoing investigations we focus on in this article constitute one of the most recent examples of the "competition law-related problems of the digital era" that are at the top of the list on the agendas of some of the most competent competition authorities around the globe. Since the complaints in these cases were widely made public, we can deep dive into the ongoing investigations, along with the current developments on this issue.

The Commission's (Probable) Investigation into the Apple-Spotify Dispute

The leading music streaming service Spotify announced that it had filed a formal complaint against Apple before the Commission based on the alleged anti-competitive conduct of Apple in the digital music streaming market.

Before looking at the complaint in greater detail, the background story of Apple's entry into the digital music streaming market is worth mentioning. Apple Music was launched in 2015, a year after Apple's gigantic (3 billion USD) acquisition of Beats Electronics. This acquisition kickstarted the music streaming capabilities of Apple by granting it an established streaming platform consisting of contracted artists and paying customers. Apple's entry strategy into the digital music streaming market worked out to be just fine; in the five years since its launch, Apple Music has caught up to the world digital music streaming leader Spotify in the United States, and its 40 million (and counting) subscribers, are paying off Apple's investment in the music streaming services. Apple Music's value for Apple also may be followed from its acquisition of Shazam, the biggest player in the market for music recognition apps, which forced the Commission to investigate whether the acquisition would put competing music streaming services at a competitive disadvantage[101].

Spotify's complaint could be deemed inevitable as the competition between Apple Music and Spotify has been heating up since Apple Music's introduction. The complaint was made public by Spotify's battle cry of "time to play fair!" As per this complaint, which involves a couple of entertaining animated mini clips that apparently aim to garner public support, the alleged anti-competitive behaviours of Apple (whereby its dominance in the app store market is used to leverage its own music streaming service Apple Music against Spotify) are as follows:

Implementing Discriminatory Fees

Apple uses an IAP that allows it to charge digital content providers such as Spotify a 30% fee for using its payment system for any subscriptions sold through the App Store. Spotify has claimed that this 30% fee amounts to unfair "taxation" for other players in the market such as Google's Play Music, YouTube Music, Amazon, and Tidal,

[101] https://europa.eu/rapid/press-release_IP-18-5662_en.htm

which forces companies to fully pass the 30% commission on to their consumers, thus "artificially inflating the price" of membership above the price of Apple Music. Spotify further claims that Apple charges this allegedly excessive fee in a discriminative way; requesting it only from the competing platforms. According to Spotify, as Apple does not compete with Uber and Deliveroo, it does not charge those platforms for use of its payment system.

On a separate note, it is worth mentioning that Apple's 30% IAP fee is also currently under US District Court's examination. The case was initiated by a group of consumers alleging Apple is a monopolist retailer and that the 30% commission it charges developers for the right to sell through its platform represents an anti-competitive (excessive) price.

Obstructing Communications with Customers and Complicating the Upgrade Process

Spotify suggested that if it refuses to utilize Apple's payment system in order to refrain from the IAP fee, Apple restricts Spotify's communication with costumers through in-app notifications or even e-mails. Also, Apple prohibits app developers from referring to an external payment system under its Paid Applications Agreement and this prevents app developers from avoiding the IAP fee amounting to 30% of the subscription fee.
Apple's removal of third-party payment methods from the in-app payment ecosystem resulted in some app providers' collecting their service payments via web browsers. However, since the app developers are prohibited from placing external payment links in their apps or send in-app notifications to their customers, they are unable to directly inform the consumers via their apps.

Rejecting App Enhancements

Spotify further accused Apple of routinely rejecting its bug fixes and app enhancements based on unilaterally-imposed restrictions that were not implemented against Apple Music. Apple deems itself as the sole arbiter of the App Store and this attitude is boldly announced under the terms and conditions of the App Store:

"We strongly support all points of view being represented on the App Store as long as the apps are respectful to users with differing opinions and the quality of the app experience is great. We will reject apps for any content or behaviour that we believe is over the line. What line, you ask? Well, as a Supreme Court Justice once said, "I'll know it when I see it." And we think that you will also know it when you cross it."

This quotation explicitly grants Apple large discretion as to what it will and will not allow. However, such great discretion also may be justified since the quality of apps available to a hardware system directly relates to the end-user experience and is the most important battleground for smartphone developers. The fact that the Apple Store is not licensable thus solely installed to Apple devices strongly indicates dedication to ensure a high-level end-user experience. Indeed, Apple could have made iOS licensable, monetarized (realistically speaking) one of two mobile operating systems in the world and collected huge amounts of license fees from third-party device manufacturers running iOS. Instead, Apple preferred to keep its ecosystem closed in nature for the sake of its brand image. Actually, iPhone's well-established brand image has been based on Apple's ability to integrate its product's hardware and software perfectly since the introduction of the Macintosh back in 1984. Considering these facts, Apple's expectation from app developers satisfying "high expectations for quality and functionality" under its Human Interface Guidelines may very well be explained by Apple's legitimate priorities aimed at keeping its ecosystem clean and tidy.

Blocking Access to Certain Services and Devices

Spotify also claimed that Apple prevented it from utilizing Siri (Apple's smart assistant) and HomePod (Apple's smart speaker) and unduly postponed its introduction to the Apple Watch (Apple's smartwatch). It is argued that Apple is using its vertical integrated position to target competitors with device compatibility issues while offering its proprietary apps full access to hardware features. This complaint is often voiced by third-party app developers, suggesting that Apple is not providing the same APIs that grant app developers access to hardware features (such as GPS, NFC Chip, and Camera) in the same manner as Apple's propriety apps. The examples of such dissimilar treatment are exemplified by way of referring to the music streaming capabilities of Siri; whereas Apple Music can launch directly through Siri, Spotify cannot.

Apple addressed Spotify's claims with a press release in which it rejected all the claims set forth by Spotify, suggesting that Spotify made false accusations. Apple stated that its IAP fee is being objectively implemented and not in a discriminatory manner; meaning that Apple is offering similar conditions to equivalent transactions with other parties. It further stated that "Spotify seeks to keep all benefits of the App Store ecosystem without making any contributions to that marketplace" and "Spotify's aim is to make more money off others' work"[102].

Despite the loud allegations by Spotify, the Commission has not yet announced that it has initiated a full-fledged investigation. However, Commissioner Margrethe Vestager addressed Spotify's complaint stating that:

"We are looking into that and we have been asking questions around in that market but of course also Apple themselves, for them to answer the allegations. And when they come back, we will know more."

Accordingly, the Financial Times reported on 5 May 2019 that the Commission was to launch a formal antitrust investigation against the alleged anti-competitive practices of Apple[103]. Thus, we could soon hear news of the initiation of a full-fledged investigation

[102] https://www.apple.com/newsroom/2019/03/addressing-spotifys-claims/
[103] https://www.ft.com/content/1cc16026-6da7-11e9-80c7-60ee53e6681d

aiming to take a deeper look into the tech giant's practices due to numerous and parallel complaints.

ACM's Market Study into App-Stores Followed with Initiation of a Full-fledged Investigation against Apple

To follow up or even pioneer the global developments on the issue, the ACM also conducted a market study into mobile app stores, aiming to "gain more insight into how app providers get their apps in app stores, and what influence the app stores have on the selection of apps for users[104]", and published a report on 11 April 2019.

In the report it is established that Apple and Google reach consumers in three ways, through their operating systems (iOS and Android respectively), app stores (the App Store and Play Store), and their proprietary apps (such as Apple Music and Google Chrome). It is further determined that by allowing third-party developers to distribute their apps via app stores, Apple and Google benefit from indirect network effects (i.e., the more apps in the app stores, the more consumers come to the platform, the more attractive the platform gets for app providers). In this way, Apple and Google both have attained strong positions in the smartphone-related markets and are both able to decide whether an app is available in the app store and how this app can reach its customers.

In order to understand whether Google and Apple hold dominant positions with respect to the app stores installed on their operating systems, the ACM assessed whether alternative app stores for Android and iOS exist or not. While the installation of different app stores on Android devices is possible, iOS completely bans third-party app stores from devices running on iOS and considers sideloading a foreign app store to be a breach of warranty. Nevertheless, this differentiation between Android and iOS ecosystems was not deemed as material and it was stated that there are no realistic alternatives within either of these ecosystems. It is concluded that the App Store of Apple and Play Store of Google constitute a bottleneck and their app-ecosystems are closed by design.

Google's strong position in licensable mobile operating systems also may be observed from the latest move of the all-time software company Microsoft, announcing the introduction of a new smartphone, Surface Duo, to run on Android OS rather than its famous failure, Windows Mobile. The sole reason behind Microsoft's backstepping from using its own mobile operating system is that it is not willing and most probably unable to support its operating system with an app store rich enough to attract customers from iOS or Android ecosystems, as it failed to in "Windows Marketplace for Mobile." The reasoning behind this approach of Microsoft also has been confirmed by one of its officials as follows[105]:

[104] https://www.acm.nl/sites/default/files/documents/2019-04/marktstudies-appstores.pdf
[105] https://www.theverge.com/2019/10/3/20895268/microsoft-surface-duo-foldable-phone-dual-screen- android-hands-on-features-price-photos-video

> "Well, because those are the apps you want," says Panay. "Because there are hundreds of thousands of apps, and you want them. And [Microsoft CEO Satya Nadella] and I talked about it, and it's about meeting our customers where they are, where they're going to be. I don't think the mobile application platform's going anywhere anytime soon. It's pretty simple. Like, literally, you need the apps.
>
> You want to give customers what they want in the form factor that they're using. We've learned this — let's put the right operating system on the wrong product or the other way around. But what's the right operating system for the form factor? And in this case, on mobile devices, Android's the obvious choice, But anything [bigger than] that, Windows is everything."

In addition to the closed nature of these ecosystems, the ACM determined certain indicators that Google and Apple might favor their own apps and conduct discriminative practices among apps.

While sharing its market study findings, the ACM also announced the initiation of a follow-up investigation into Apple with respect to abuse of dominance claims[106]. Henk Don, member of the board of ACM stated that:

"To a large degree, app providers depend on Apple and Google for offering apps to users. In the market study, ACM has received indications from app providers, which seem to indicate that Apple abuses its position in the App Store. That is why ACM sees sufficient reason for launching a follow-up investigation, on the basis of competition law."

FAS Investigation

According to its 9 August 2019 dated press release, the FAS initiated an investigation into Apple upon the complaint of antivirus software developer Kaspersky Lab[107]. The complaint was filed on 19 March 2019[108], suggesting that Apple had abused its dominant position in the market for parental control apps.

According to the press release, the conflict stemmed from Apple's notice stating that KSK, a parental control app, did not meet the requirements of guidelines for apps hosted in the App Store regarding the utilization of the MDM technology, which allows app developers to access personal data including user location, app use, email accounts, camera permissions, and browsing history. In its notice, Apple requested that Kaspersky submit an updated version of its app to avoid being banned from the App Store. From the point of Kaspersky Lab, such an update would mean removing two key

[106] https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store
[107] http://en.fas.gov.ru/press-center/news/detail.html?id=54248
[108] https://www.kaspersky.com/blog/apple-fas-complaint/26017/

features from KSK, app control and Safari browser blocking by parents. These features are deemed essential for a parental control app; therefore, according to Kaspersky Lab, KSK had lost a significant part of its functionalities.

Kaspersky Lab noted that Apple's move was simultaneous with the introduction of Screen Time, a proprietary parental control app of Apple, and claimed that Apple dictated terms and prevented other app developers from operating on equal terms with Screen Time by using its position as the owner of App Store, the sole channel for delivering apps to users. It is further suggested that Apple created a competitive advantage for its parental control app by way of this conduct. Apple addressed Kaspersky Lab's claims, suggesting that it has always supported third-party apps on the App Store that help parents manage their kids' devices and further stated that utilization of MDM "put users' privacy and security at risk" and represented "a clear violation of App Store policies"[109].

The investigation initiated by the FAS is of crucial importance as it will examine whether Apple tries to foreclose the downstream market where it competes with Kaspersky through leveraging its dominance in the upstream market via unilaterally prepared policies and guidelines.

What to Expect?

One could argue that Apple's practices whereby it leverages its dominance in the app store market form a part of its new business strategy that improves the services it offers to consumers along with its flagship products. Indeed, Apple's income derived from its hardware sales has been declining[110] and we now see Apple, while prioritizing its services, seeking long-term profitability through increased brand loyalty (or in other words, shifting its focus to software rather than hardware). In parallel, a newly published article[111] by Maribel Lopez reads as follows "In a market where other hardware manufacturers offer compelling designs, where can Apple differentiate and grow? Of course, there's always usability but increasingly Apple's layering services on top of its hardware to grow the business. While much of the recent commentary on Apple's strategy focuses on declines in smartphone sales, the company has been consistently ramping its services play."

This change of strategy manifested itself through Apple's Keynote Events in recent years, where the launch of its services such as News+, Apple-exclusive content for the Apple TV, Apple Arcade, Apple Pay and, indeed the Apple Music have been announced. However, it seems that this strategy of Apple also will be evaluated by competition authorities throughout the world because of its dominant position in the app store market. Apple's conduct in question seem to be quite similar to those of Amazon's

[109] https://www.apple.com/newsroom/2019/04/the-facts-about-parental-control-apps/

[110] Apple's iPhone sales in 2019 are down 12% versus 2018. Please see: https://www.cnbc.com/2019/07/30/apples-iphone-sales-miss-estimates-down-13percent-versus-last-year.html

[111] https://www.forbes.com/sites/maribellopez/2019/09/07/evaluating-apples-services-strategy-ahead-of-the-apple-watch-5-re-lease/#3c3d5a101ba8

allegedly anti-competitive business strategies (Amazon also has a vertically integrated structure that is said allows it to abuse its position as a marketplace to get ahead of its competitors in the retail level) and Google's practices that already have been found to be anti-competitive in the Google Shopping decision of the Commission.

There is no doubt that competition law shall ensure fair competition between third-party app developers and vertically integrated app store owners. On the other hand, in doing so, competition authorities should at all times bear in mind the reason for their existence, which is maximizing consumer welfare (though the debates regarding how this welfare should be measured also should not be disregarded). It is worth mentioning this as it is currently argued by many that the Android decision, whereby similar leveraging concerns were examined and deemed as violations, may have negative impacts on consumer welfare in the long run through higher prices for the smart-phones due to the insufficient analysis made by the Commission of a zero-price structured market.

The allegations made by downstream competitors such as Spotify and Kaspersky suggest that the platform owners are causing significant harm to the downstream competition. In order to address these allegations, the ACM referred to the Net Neutrality Regulation[112] and suggested that "it could be questioned whether app stores have the opportunity to restrict end-user rights effectively as protected under the Net Neutrality Regulation." In other words, it is possible to see a court or a competition authority decision suggesting that Apple and Google's conducts violate European Open Internet Regulation. In such event, the oft advocated "integrity, safety and the quality of the app stores and the ecosystems" justification behind strong control over app stores would have been deemed as not worthy of protection.

The competition authorities and (as the premier policy-maker) the Commission will need to come up with a solution that paves the way for those that better serves consumer needs while ensuring the quality standards of the app stores that Apple and Google are (supposedly) trying to protect. Accordingly, the up and coming[113] P2B Regulation is aimed at this very purpose, to "ensure a fair, predictable, sustainable and trusted online business environment" and also will apply to app stores. In accordance with its preamble, the P2B Regulation aims to prevent the providers of online intermediation services from behaving unilaterally as they often have superior bargaining power, through requirements such as:

- Ensuring that the terms and conditions of the services are plain, clear, and available to all business users;
- The prohibition of restriction, suspension or termination of services without cause or prior notice
- Including a description of any differentiated treatment to its own services; and
- The restriction of offering different conditions through other means.

[112] European Open Internet Regulation prohibiting Internet Service Providers from blocking or slowing down of Internet traffic based on commercial considerations
[113] Please note that the P2B Regulation will apply 12 months after its adoption and publication (July 12, 2020), and will be subject to review within 18 months thereafter.

Likewise, in parallel to the current complaints against the application stores, the preamble of the P2B Regulation also provides a brief explanation to the dual relationship of online intermediation services (Google and Apple) as follows[114]:

"(...) In such situations, in particular, it is important that the provider of online intermediation services acts in a transparent manner and provides an appropriate description of, and sets out the considerations for any differentiated treatment, whether through legal, commercial or technical means, such as functionalities involving operating systems that it might give in respect of goods or services it offers itself compared to those offered by business users."

It is without a doubt that the P2B Regulation would help to mitigate potential anti-competitive conduct of application stores; nonetheless, It is associated with discrimination between separate "business users." However, one should also keep in mind that the claims concerning the "excessive pricing" of these platforms still will be dealt with by the competition authorities. The ACM also agrees that "the P2B Regulation is a good first step to solve some of the transparency issues that were raised by app providers." On the other hand, most app providers with whom ACM spoke, considered this regulation as "a step in the right direction, but the regulation does not go far enough," since it does not cover all aspects of the problems. The P2B Regulation should simply be deemed as a supportive legislation for addressing a certain type of behaviour.

Accordingly, it seems that the new tech giant in competition authorities' spotlight will be Apple after Google's long-term leadership. It would not be surprising to see several full-fledged investigations into Apple to examine whether it is abusing its dominance in the app store market. Such investigations could make Apple reconsider its relatively new strategy to prioritize its services as a source of revenue.

When one examines the ongoing debates about the potentially anti-competitive behaviours of the tech giants that own various mega-platforms by distancing oneself from the technical terms and the ever-changing technologies, it becomes clear that the fundamental competition law issues are quite similar to those discussed and resolved (somehow differently on the two sides of the Atlantic) in the past. For example, when Spotify's allegations as to how Apple is trying to leverage its upstream monopoly position via utilizing a vast array of different strategies, which ultimately aim to put Spotify at a competitive disadvantage vis-à-vis its retail division, are examined along with the counter-arguments raised by free-market proponents with respect to the potential "chilling effects" of any intervention to such strategies along with their high expectations from Schumpeter's "creative destruction" process, one cannot help but remember the following quote from the Supreme Court in the famous Verizon v. Trinko ruling[115]:

[114] Preamble of the P2B Regulation, para. 30.

[115] Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP (02-682) 540 U.S. 398 (2004) 305 F.3d 89, reversed and remanded

> "Allegations of violations of §251(c)(3) duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations. Amici States have filed a brief asserting that competitive LECs are threatened with "death by a thousand cuts," (...) —the identification of which would surely be a daunting task for a generalist antitrust court. Judicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by competitive LECs."

At that time, the concern was that the owner of the internet infrastructure (i.e., Verizon) could kill its downstream competitors (i.e., Local Exchange Carriers or LECs) by way of various practices, the combination of which would lead to a "death by a thousand cuts." The Supreme Court responded by saying "let these be dealt with via regulation." This was an approach that has never been approved by the Commission. Verizon v. Trinko, along with its counterparts in the European Union, fuelled the discussion as to whether such complex unilateral conduct of the infrastructure owners (especially telecommunications infrastructures), which may lead to the foreclosure of downstream markets should (and could) be dealt with via competition law or whether there is a need for regulation. Not surprisingly, just a few years after the tech giants proved that their infrastructures constitute the backbone of the digital economy and they can easily undertake the role of gatekeepers who decides who can enter which market, similar discussions have recently become very popular with respect to the platforms as well.

Not a day goes without a statement made by officials as to regulating the digital markets in order to better deal with the potential anti-competitive conduct of the tech giants. Others, who point out the virtues of disruptive innovation and creative destruction, argue that this increased motivation to over-regulate seems futile, since, thanks to the increased motivation to innovate, we come up with newly created markets on a daily basis along with their (potentially) anti-competitive nature due to the monopoly of its creator. In parallel with the discussion regarding the need to regulate, there are also different views concerning the suitability of the century-old competition rules in tackling these non-traditional digital markets. While some argue that the long-established concepts of competition law directly related to its ultimate aim should be questioned and a brand-new competition law policy for digital markets should emerge, others believe that minor modifications would do the trick.

As eloquently expressed by the Commission in its report entitled Competition Policy for the Digital Era, "there is no general answer to the question of whether competition law or regulation is better placed to deal with the challenges arising from digitization of the economy. This question can only be sensibly answered with respect to specific issues." To our understanding, control over app stores indeed enhances end-user experience and has been the key feature in sales of mobile devices for many years. However, it may also be the case that the allegedly anti-competitive conduct of vertically integrated giants such as Apple and Google in the upstream platform markets where they are in a dominant position is obstructing their competitors in the downstream markets. Time will show whether these are real concerns and how they will be dealt with by policymakers.

1.3. Merger Control

1.3.1. Highlights of the Turkish Competition Authority's M&A Overview Report 2019

By Barış Yüksel, Mustafa Ayna, and Özlem Başıböyük

The Report was published on the official website of the TCA on 8 January 2020. The Report provides brief information about the Turkish merger control system, comparing previous years and 2019 and determining the position of Turkish and foreign companies in the market. The value of Turkish-to-foreign transactions as well as foreign investments in Turkish companies in 2019 indicates that foreign investors continue to be interested in the Turkish market.

A Brief Review of M&A Transactions in 2019

As in most jurisdictions, the Turkish Competition Law mandates a pre-notification to the TCA of M&A transactions that involve a change of control on a lasting basis if the turnover thresholds stated in Article 7 of Communiqué No.2010/4 are met. According to the Report, the period during which the notified M&A transactions were concluded by the TCA in 2019 was approximately 14 days following the date of final notification.

Indeed, considering the above-mentioned notification requirement, a total of 208 M&A transactions were notified to the TCA in 2019. It is seen that there is a decrease in the number of M&A transactions notified to the TCA in 2019 compared to the number in 2018. In fact, this number was 223 in 2018.

It should be noted that the statistics for the last five years demonstrate that the numbers of the M&A transactions notified to the TCA are quite variable:

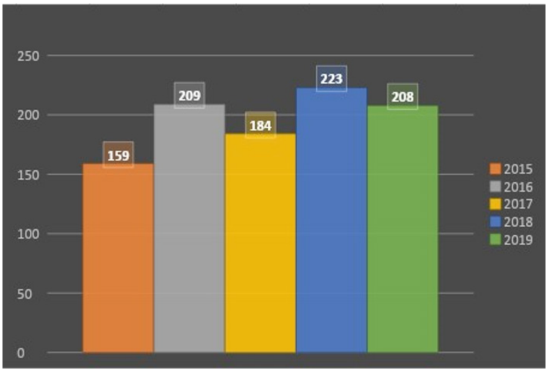


Figure 1: Number of M&A transactions notified to the TCA in the last five years

As shown from the figure above, the number of M&A transactions notified to the TCA in 2019 showed a downward trend compared to the number in 2018. However, when the average of the last five years is considered, it is seen that the number of M&A transactions notified to the TCA in 2019 was above that of the last five years. Indeed, a total of 208 M&A transactions were notified to the TCA in 2019, whereas the average of the last five years was 197.

Very interesting data concerns the amount of transactions notified without any Turkish nexus (i.e., transactions that do not create any affected markets in Turkey). Transaction without a Turkish nexus amounts to 73 out of 208 transactions (35% of all transactions) notified to the TCA in 2019. In addition, it was held that 20 of the notified transactions were not subject to authorization.

A Categorization Based on the Origin of Transaction Parties

According to the categorization in terms of the origin of the transaction parties, the number of transactions realized solely between Turkish companies in 2019 was 38, the same as in 2018. As shown in the figure below, however, there was a slight decrease in the number of foreign-to-foreign transactions notified to the TCA in 2019 when compared to 2018. The number of foreign-to-foreign transactions notified to the TCA was 115 in 2019 while the corresponding number in 2018 was 121. On the other hand, transactions between Turkish and foreign companies numbered 51 in 2019, compared to 45 such transactions in 2018.

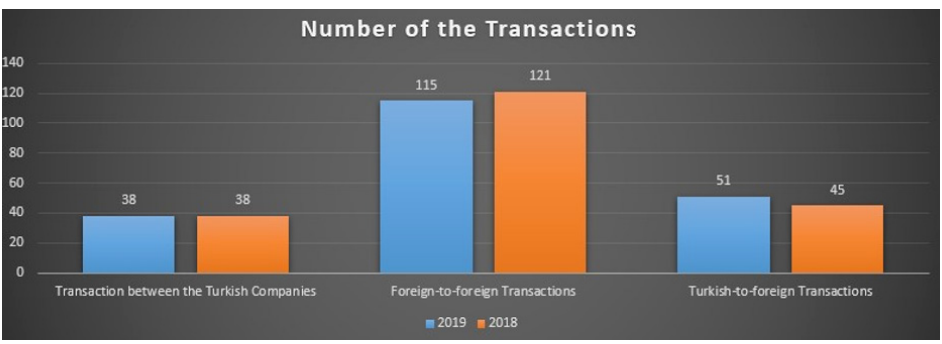


Figure 2: Number of transactions based on the origin of the parties in 2018 and 2019

In addition to the number of transactions, their value is included in the report as well. According to the report, the value of the transactions between the Turkish companies declined to a considerable extent (by 41%) from 2018 to 2019. Indeed, the value decreased from TRY 10.6 billion (approx. EUR 1.87 billion[116]) in 2018 to TRY 6.2 billion (approx. EUR 1 billion[117]) in 2019. However, the value of foreign-to-foreign transactions increased

[116] Calculations for the transactions realized in 2018 are based on the year-end average exchange rate of 2018 (Euro: 5.67).
[117] Calculations for the transactions realized in 2019 are based on the year-end average exchange rate of 2019 (Euro: 6.35).

from TRY 2.8 trillion (approx. EUR 494 billion) in 2018 to TRY 2.9 trillion (approx. EUR 456 billion) in 2018. Similarly, the value of the Turkish-to-foreign transactions increased from TRY 19 billion (approx. EUR 3.35 billion) in 2018 to 20 billion (approx. EUR 3.1 billion) in 2019.

Foreign Investments Maintain Importance in the Turkish Market

As in previous years, foreign investors continued to be interested in the Turkish market in 2019 as well. Indeed, foreign investors from 20 countries made investments in Turkey in 2019, while the number was 21 in 2018.

2019 saw an increase in the number of foreign entities investing in Turkish companies, with 46 in 2019 while it was 36 in 2018. The ranking of foreign investors (in terms of transactions in 2019) demonstrates that Japan leads with seven transactions. Japan is followed by France, with five transactions. In 2018, however, while Italy led with four transactions, no investors from Japan invested in Turkish companies.

In acquisition transactions where Turkish companies were acquired, the foreign investment amounted approximately to TRY 36.2 billion (approx. EUR 5.7 billion) in 2019, while in 2018 this figure amounted to TRY 14.9 billion (approx. EUR 2.63 billion). It should be noted that the amount of foreign investment realized in 2019 was the highest in the last five years.

The top sector is the production, transmission and distribution of electricity

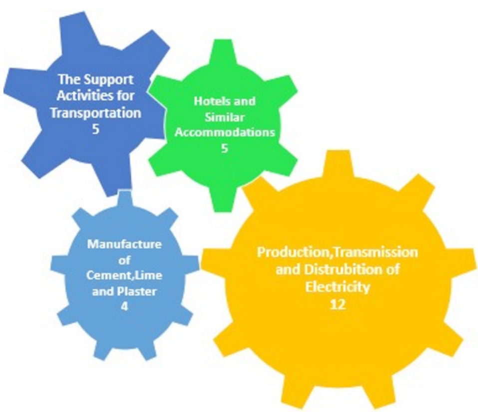


Figure 3: Most active sectors in terms of the number of transactions

In 2019, excluding privatizations, most of the M&A transactions were realized in “the production, transmission, and distribution of electricity markets.” As of 2018, “the production and distribution of electricity, gas, steam, and ventilating systems market” was the leading market in terms of the number of transactions realized.
The highest transaction value in Turkey in 2019 was realized in the field of “the activities

of the monetary intermediary institutions." The transaction value in the said area constituted 36.1% of the total value of all transactions in 2019 (excluding privatizations).

Transactions Examined More Closely!

As mentioned above, a total of 208 M&A transactions were notified to the TCA in 2019. Only two of the notified transactions were taken into the second phase by the TCA in 2019: "The acquisition of the sole control of Marport Liman İşletmeleri Sanayi ve Ticaret A.Ş. by Terminal Investment Limited Sàrl" and "the acquisition of the sole control of Embracon (a business of Whirlpool Corporation) by Nidec Corporation."

Moreover, three transactions were conditionally approved in 2019, likewise in 2018.

Conclusion

The report provides a clear picture of the merger control regime in Turkey and determines the place of Turkish companies in the market. Foreign investors continue to be interested in the Turkish market, considering the increased value of Turkish-to-foreign transactions in 2019.

1.3.2. The TCA's "Meal Card" Decision: Crucial Insights for Determining the Full-Functional Character of a Joint Venture

By Barış Yüksel and Fırat Eğrilmez

On 15 April 2019, the TCA published its reasoned decision whereby it imposed administrative fines totalling approximately TRY 8 million (EUR 1.2 million) against Sodexo and Edenred (two leading undertakings in the market for the meal card services market[118] in Turkey) as well as Network, a JV established by Sodexo and Edenred for managing the technical infrastructure of the meal card services. The TCA decided that Sodexo and Edenred had engaged in anti-competitive collusion and that this collusion had been further facilitated by Network.

The most interesting aspect of the TCA's Meal Card Decision is the fact that Sodexo and Edenred had sought the TCA's approval before the formation of Network in 2001 and the TCA had held that Network was a full-function JV that did not aim to restrict competition between its parent companies or did not cause any impact thereof. Hence, the TCA had concluded that the formation of Network constituted a concentration that did not trigger the mandatory pre-notification thresholds and had cleared the transaction. Network was established in 2002 following the TCA's clearance.

During the recent investigation, the TCA realized that its clearance decision in 2001 had been based on a false presumption that Network would be a full-function JV able to act independently of its parent companies. The TCA further expressed that the reason it had previously considered Network a full-function JV was that Sodexo and Edenred had stated in the initial notification that Network would provide technical infrastructure services to third parties operating in the meal card services market. Yet, the TCA found out in the recent investigation that Network had not provided services to any undertaking operating in the meal card services market other than its parent companies since 2002.

Probably the most significant detail in the Meal Card Decision was Network's claim that it actively tried to provide services to third parties operating in the meal card services market by offering them non-discriminatory service terms (i.e., commercial conditions that are the same as those applied to Sodexo and Edenred by Network) and that it was unable to provide services to third parties not because of its dependence on its parents but due to the lack of demand by the third parties. Following this line of argument, Network emphasized that the presence of active efforts to provide services to third parties should be deemed sufficient for concluding that a JV is not dependent on its parents and that the de-facto situation could be disregarded in such cases. The TCA

[118] The exact relevant market is defined as "the market for the provision of convenience food and food to customers via tools which represent money." Yet, for the sake of simplicity, we refer to the relevant market as the "meal card services market."

unequivocally rejected this argument, clarifying that the efforts of a JV to engage in commercial relations with third parties has no relevance in determining whether it is independent from its parents and that the only parameter that matters is the presence of actual commercial relations.

This was a critical issue since the TCA's Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control (which are modelled on the Jurisdictional Notice of the Commission) made it clear that a JV should not be almost entirely dependent on its parents and that it also should generate a certain portion of its turnover from sales made to third parties, to be deemed as full function. The TCA further elaborated, by referring both to the Commission's Jurisdictional Notice and its Guidelines, that a full-function JV may be almost entirely dependent on its sales to its parents for the first three years after its establishment, however this period should not exceed three years under normal circumstances.

Considering the foregoing, the TCA stipulated that since the clearance decision in 2001 had been based on allegedly misleading information provided by the parties, the legality of the Network needed to be re-evaluated in light of the new market conditions, and held that as of 2005 (three years after the establishment of the JV), Network had failed to satisfy the conditions of being a full-function JV (because it did not start providing services to third parties). Thus, the TCA stated that, for the entire period from 2005 to 2018, Network must be deemed as having had a horizontal agreement between Sodexo and Edenred, the legality of which would depend on the satisfaction of the conditions for benefiting from an individual exemption laid out in the Competition Law.

After disqualifying Network as a fully function JV, the TCA analysed whether an individual exemption could be granted for Network and its activities. The TCA determined that although the establishment of Network created efficiencies and contributed to consumer welfare to a certain degree, this was not enough to render it legal as the agreement also constituted a disproportionate restriction that eliminated competition in a significant portion of the meal card services market by facilitating coordination between the two market leaders mainly by harmonizing their costs to a considerable extent. Therefore, the TCA decided that this agreement could not be exempted and that it constituted a violation of the Competition Law. Consequently, it set forth that Sodexo and Edenred had been party to an ongoing anti-competitive collusion since 2005.

The TCA's Meal Card Decision will serve as an important guide as to future assessments for determining whether a JV can be deemed as full-function or not. The reasoning of the TCA in the said decision is especially important in identifying the competition law-related risks in cases where undertakings envisage to form a fully function JV that would extensively rely on sales to its parents for a certain period of time after its establishment before engaging in commercial relations with third parties. The parents may indeed consider adopting additional safeguards in such cases to avoid future risks, via relying upon the insights provided in the TCA's Meal Card Decision.

1.3.3. The Automotive Industry is Moving towards Electrification via Joint Ventures

By Barış Yüksel, Nabi Can Acar, and Burak Buğrahan Sezer

Triggered by technological advancements and the demand created by the awareness regarding the protection of the environment, EVs have become a centre of attention for the automotive industry. Also, emission regulations have contributed significantly to this change and the players that have been active in the manufacturing of traditional fossil-fuelled vehicles are increasingly moving towards manufacturing EVs. Such transformation is forcing manufacturers to abandon their long-standing investments in fossil-fuelled cars (both in terms of capital and R&D) and step into unknown territory. As EV manufacturing requires intensive R&D work and new investments, this environmentalist move to traditional automakers can be deemed as not (totally) voluntary. Indeed, countries are introducing stricter emission standards and incentive programs for EV adaptation. Moreover, there is a disrupting new player in town, Tesla, an automaker solely dedicated to EVs.

It is not common for a totally new automaker to execute market entry successfully mainly because the business is highly capital intensive, competitive, and requires high levels of safety certification. In this article, we will break down what it takes to deliver an EV with references to Tesla's strategies, mention to some of the important EV related collaborations, and make a prediction about future market structure and regulatory expectations.

Tesla's Market Entry

Tesla was founded in 2003 with the aim of becoming a pure EV brand with a huge footprint. In order to do so, it had to prove to customers that electric vehicles were feasible and realistic alternatives to gasoline cars. To break the prejudice against the EVs, Tesla introduced the Roadster, an EV built around the existing Lotus Elise platform. With the Roadster, Tesla exhibited to the world its battery tech and electric powertrain and then moved to designing a luxury sedan with great performance, the Model S.

Both the Roadster and Model S were aimed at building hype around pure EVs. Indeed, Tesla became a legend among car enthusiasts; the four-door family sedan Model S can outperform every Ferrari in terms of 0-60 acceleration thanks to the electric motor's instant torque. This approach of Tesla was aimed at gathering demand for a low-priced, high-volume electric vehicle, Model 3, which is projected to bring Tesla among top traditional automakers in terms of production and sales numbers.

To get a sense of why and how a start-up dared to enter the auto industry, we must understand the fundamental differentiation between EVs and fossil-fuelled cars. Whereas an EV does not require a big and expensive internal combustion engine, it requires a huge battery pack and a well-established charging network.

These inherent differentiations eliminate supply-side substitutability between EVs and fossil-fuelled cars. In other words, with the electrification process, the already established and well-funded R&D and manufacturing investments of traditional automakers are turning into a sunk cost. Thus, a new entrant into the EV market may actually benefit from a "first-mover advantage" and totally concentrate on building a tailormade EV platform while its competitors are introducing low performing hybrid models, struggling to recover from gasoline investments, and refraining from offering zero-emission cars.

For instance, while building an EV with efficient battery power and range is an issue, establishing the network for charging is another, possibly more challenging one. It can be argued that there is a significant positive feedback loop in the EV market that stems from the relation between EVs themselves and EV charging stations. Since the charging network plays a key role in consumers' decisions when determining which EV brand to purchase and the turnover generated by the EVs can then be re-invested in the widening of the EV charging network, considerable network effects are also present. In a more technical language, the characteristics of the EV market leads to a gap between the intrinsic value (the value derived from the inherent properties of EVs) and the synchronization value (the value derived due to EVs having access to a wide network of charging stations) of EVs. Economic theory suggests that the larger this gap, the more significant the advantage gained from being a first mover. This is because the positive contributions of owning a larger network (e.g., charging stations) on the synchronization value of individual products (e.g., EVs) is non-linear and there is increasing returns of scale.

The current trends in the market support the theoretical explanations. Tesla currently has 1,636 Supercharger Stations with 14,497 Superchargers, solely owned by Tesla and dedicated to Tesla drivers. Being the first entrant and deciding to vertically integrate, Tesla now has the advantage of offering sustainable charging solutions to its customers which traditional automakers cannot deliver today.

While a charging infrastructure is important, delivering EVs is also highly dependent on the battery technology. It is safe to state that the most expensive part of an EV is its battery pack and for a vehicle to be successful, it should have a reliable, long range battery pack. While the auto industry has utilized multiple battery types in different applications, the lithium ion battery is the only feasible battery type for EVs. This characteristic of lithium ion battery is also confirmed by the Commission in its Case No. COMP/M.5421 – PANASONIC/ SANYO decision in 2009:

> "Although NiMH is a proven technology in HEVs, it has certain limitations in terms of weight and energy density when compared to Li-ion which, as acknowledged by respondents to the Commission's market investigation, appear to make it unsuitable for use in PHEV and EV as the degree of vehicle electrification and the demands placed on the battery increase.
>
> (...)
>
> The market investigation in the present case has demonstrated from both a demand and supply-side perspective that Li-ion batteries for automotive applications, which have yet to be sold in commercially significant quantities, are likely to constitute a distinct product market from NiMH batteries."

The importance of lithium-ion batteries is also recognized by the Royal Swedish Academy of Sciences. The Nobel Prize in Chemistry 2019 was awarded to John B. Goodenough, M. Stanley Whittingham, and Akira Yoshino "for the development of lithium-ion batteries"[119].

From an economic perspective, the significance of battery technologies also could lead to first mover advantages for two main reasons. First, user-data could be a significant input for more efficient R&D investments as it could guide the manufacturer in identifying the areas that require improvements or fixes. As the amount of such data is correlated directly with the number of users, the first-mover could have considerable strategic advantages vis-à-vis the newcomers. Second, in the case the first-mover can secure critical patents in addition to its know-how, this could significantly increase the costs of the newcomers. Moreover, as there is also a positive relation between battery technologies and the number of EVs sold, superiority in this field also could contribute to the positive feedback loops described above and solidify the strength of the first mover. Hence, the approach of the conventional manufacturers that would enter into the EV market with respect to battery technologies is also critical for the future of the market.

Lithium-ion Batteries

As the electrification process spreads, the competition between traditional automakers in building powerful and efficient combustion engines is shifting to battery packs. So, the new battleground for automakers is going to be building higher range vehicles equipped with denser battery packs.

Lithium-ion batteries also are creating kind of a competition between states in terms of production plant locations. Indeed, Europe is working hard to get a piece of lithium-ion battery production, which is currently dominated by China. To do so, the Commission launched the European Battery Alliance[120] in October 2017 with the aim "to support

[119] https://www.nobelprize.org/prizes/chemistry/2019/press-release/
[120] https://ec.europa.eu/growth/industry/policy/european-battery-alliance_en

the scaling up of innovative solutions and manufacturing capacity in Europe." This tendency can also be followed by the latest state aids granted to the lithium-ion manufacturers LG Chem and Samsung SDI by Poland and Hungary. Poland granted LG Chem an investment aid amounting to EUR 36 million for a new electric vehicle batteries plant in the Dolnoślaskie region that was approved by the Commission on 28 February 2019. Hungary is also planning to grant EUR 108 million of public support to Samsung SDI to invest in the expansion of its battery cell production facility in Göd. The Commission initiated an in-depth investigation with respect to Hungary's public support to Samsung SDI on 14 October 2019.

EV Joint Venture Era

While traditional automakers had the time and money to vertically integrate and build their own internal combustion engines, the lack of know-how and the initial cost of lithium-ion battery production has forced them to enter into EV-related collaborations. This characteristic of the industry also was recognized by the Commission in PANASONIC/ SANYO case by stating that "the sector is characterised by a large number of joint ventures and collaborative developmental projects between car manufacturers, battery suppliers and/or Tier 1 suppliers." The following are some of the noteworthy and recent EV-related collaborations, which also indicates that the industry is indeed and still characterised by joint ventures and collaborative developmental projects:

Toyota/Panasonic[121]

With Case M.9446 dated 10 September 2019, the Commission approved the establishment of a joint venture between Toyota and Panasonic to operate in the research and development, manufacture and sale of prismatic automotive batteries, as well as research and development into other automotive battery technologies.

Smart: Daimler/Geely[122]

Daimler and Geely notified the Commission of a proposed transaction regarding the establishment of a 50-50 joint venture company on 08 November 2019. The joint venture is planned to be active in the field of the manufacture of smart-branded pure battery electric vehicles (BEVs) in China, as well as wholesale and retail distribution in China and the EEA. The notification is still pending before the Commission.

LG Chem/Geely[123]

In June 2019, LG Chem and Geely announced the establishment of a joint venture company with a 50-50 shareholding structure to be jointly engaged in the production and sales of new energy vehicle batteries in China.

[121] https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9446
[122] https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9360
[123] http://global.geely.com/media-center/news/geely-auto-and-lg-chem-to-establish-joint-venture-company-to-produce-batteries-in-china/

Toyota/BYD[124]

Toyota and BYD announced in November 2019 the establishment of a joint venture company for R&D for EVs. The new R&D company, which will work on designing and developing EVs (including platform) and its related parts, is anticipated to be established in China in 2020, with BYD and Toyota to evenly share 50% of the total capital needed.

Rivian: Ford[125] */Amazon*[126]

Rivian, a Michigan-based electric vehicle start-up announced that it had received a USD 700 million round of funding from Amazon in February 2019. It was announced in September 2019 that Amazon is ordering 100,000 electric delivery vans from Rivian[127].

Following Amazon's investment, Ford also announced in April 2019 the formation of a strategic partnership through a USD 500 million minority investment in Rivian. The partnership is to include manufacturing Ford-branded, all-new battery electric vehicles using Rivian's flexible skateboard platform.

Daimler/BMW[128]

The Commission approved the creation of six different joint ventures by Daimler AG and BMW with its decision dated 7 November 2018 and numbered Case M.8744. The mentioned joint ventures are focused on various areas including charging services.

As the mentioned collaborations reveal, it has become common for automakers to enter into joint ventures with battery manufacturers. With the increase in EV adaptation, once consumer electronics battery suppliers such as Panasonic, LG Chem, and Samsung SDI are now facing the overwhelming demand of the industry, and hold the key to the development of successful EVs. So, it is not surprising to see automakers funding their suppliers as the booming battery demand requires new and expensive manufacturing facilities. However, as will be explained in the next section, we can expect the automakers to make an unexpected manoeuvre in the near future.

Towards In-House Battery Production

Collaboration with battery manufacturers may be beneficial in short-term as automakers know little about building batteries. Yet, depending on third parties in terms of the most important and expensive part of a vehicle, this is obviously undesirable for automakers in the long term. It is safe to state that automakers most likely eventually abolish these collaborations, try to vertically integrate, and build lithium-ion batteries in-house.

[124] https://global.toyota/en/newsroom/corporate/30565932.html
[125] https://media.ford.com/content/fordmedia/fna/us/en/news/2019/04/24/rivian-500-million-investment-ford.html
[126] https://www.cnbc.com/2019/02/15/rivian-announces-700-million-investment-round-led-by-amazon.html
[127] https://www.reuters.com/article/us-amazon-environment-rivian/electric-vehicle-startup-rivian-gets-a-jolt-from-big-amzon-com-van-order-idUSKBN1W42JA
[128] https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8744

Tesla, the leading EV manufacturer, is currently partnering with Panasonic to build its lithium-ion battery packs. Tesla CEO Elon Musk publicly complained of Panasonic's poor performance in lithium ion output and tweeted in April 2019 that "Pana cell lines at Giga are only at ~24GWh/yr. & have been a constraint on Model 3 output since July." This discomfort is steering Tesla's future strategy of vertically integrating and is reportedly trying to build its own battery cells to reduce dependence on Panasonic[129]. These reports also can be confirmed from Tesla's latest battery-related acquisitions. In May 2019, Tesla announced its acquisition of Maxwell Technologies[130], a battery company with ultracapacitor technology and unique dry electrode technology for batteries, which it is speculated will enable Tesla to develop its own highly durable battery cells with high energy density[131]. Following the Maxwell acquisition, it was reported[132] in October 2019 that Tesla had acquired Hibar Technologies, a Canada-based company specialized in building manufacturing equipment for different processes in battery manufacturing.

What to Expect from a Regulatory Perspective

The regulatory framework may have crucial impacts on the future of the EV market and especially the pace at which the transition to EVs would be realized. From an environmental perspective, there is strong public demand for governments to support and accelerate the transition to EVs (e.g., via tax cuts, subsidies on electricity to be used in EVs, etc.). So far, pure EV players like Tesla have been able to ride that wave. However, when regulatory policies are discussed, divorcing politics from the process could be a fatal mistake. When predictions regarding the future of policies concerning the transition to EVs are made, the massive impacts of such policies on various industries that are among the strongest interest groups and largest employers on the planet also should need to be considered. Although we do not have any intention to provide an exhaustive list of industries that will be affected by this transaction (and thus the policies that would set its pace), the most obvious ones would be the fossil-fuel industry and the conventional automotive industry.

With respect to the fossil fuel industry, a distinction may be made between the producers that are highest up in the chain and distributers that own gas station networks throughout the world. Although the transition to EVs will affect both of these, the effects on producers may be milder as an increase in the use of EVs would be accompanied by an increase in the demand for electricity and as long as electricity is generated through fossil fuels, the producers would not be heavily damaged (hence it may be wiser for them to focus their energies on policies that subsidise renewable energy production rather than those that subsidise EVs). However, a wide-scale transition to EVs could create huge costs on the part of the distributors as this would inevitably reduce the demand for fuels used in automobiles and also make the current distribution network largely redundant. Therefore, strong lobbying from distributors should be expected against EV-subsidisation policies.

129 https://www.cnbc.com/2019/06/26/tesla-secret-lab-building-battery-cells-to-reduce-panasonic-dependency.html
130 https://ir.tesla.com/news-releases/news-release-details/tesla-completes-acquisition-maxwell-technologies
131 https://www.cnbc.com/2019/02/04/tesla-to-but-maxwell-technologies-for-4point75-a-share.html
132 https://www.cnbc.com/2019/10/07/tesla-reportedly-bought-a-company-for-high-speed-battery-manufacturing.html

With respect to the conventional automotive industry, the relevant interests seem to be more complex.

First of all, due to the feedback loop between EVs and EV charging stations explained above, while the first mover may have the advantage of subsidising its network development costs directly through its revenues generated from the sales of EVs, conventional manufacturers that desire to enter the EV market would have to engage in cross-subsidisations whereby the costs of creating a comparable EV charging network would have to be subsidised from the revenues generated through fossil-fuel vehicle-related operations. Yet, considering the fact that EVs compete directly with fossil-fuelled vehicles, the foregoing scenario means that the investments for a disruptive technology (EVs) would have to be compensated by revenues generated through the older technology that is being disrupted (fossil-fuelled vehicles) and this could create a dilemma. Additionally, the transition to EVs also would require significant changes in the established after-sales networks (many of which may simply have to close down) and a decrease in the revenues generated through highly lucrative after-sales services. It is highly probable that because of these issues, the manufacturers of conventional vehicles would have a vested interest in ensuring that the transition to EVs would be gradual rather than radical and they may have strong incentives to push for regulations that would slow down the transition process.

Moreover, the conventional automotive industry also may be interested in any "pro-competitive" regulations that would grant them access to the established charging network of first movers (e.g., by way of FRAND access requirements) as well as any critical patents they may have, especially regarding batteries.

In light of the foregoing, it may be expected that there will be a clash of interests in the political arena between among others, environmentalists, pure EV players, the fossil-fuel industry, and the conventional automotive industry, and that the future regulatory framework could be shaped largely by the outcomes of this battle.

Concluding Remarks

The coming era of electrification triggered both by environmentalist regulations and a disrupting new entry is very exciting. As the superiority of EVs over gasoline vehicles has been well demonstrated in the last decade, demand for them has skyrocketed. As traditional automakers are now forced to change their gasoline tanks and internal combustion engines with lithium-ion batteries and small electric motors, they now must compete on delivering vehicles with better batteries.

This fundamental change, in the Commission's own words, is leading to "a large number of joint ventures and collaborative developmental projects between car manufacturers, battery suppliers and/or Tier 1 suppliers." It is safe to say that these joint ventures and collaborative developmental projects are aimed at a newly established market and create high-efficiency gains; thus, the competition authorities tend to clear the notified transactions in this field. In the future, however, as automakers gain manufacturing related know-how, they may try to reduce dependence on battery manufacturers for the sake of supply security and cost cutting. Thus, we may see automakers acquiring small but battery technology and manufacturing specialized companies instead of establishing joint ventures with battery giants.

Moreover, this issue has complex political aspects and creates tense relations between some very strong interest groups. The moves of these groups, as well as their respective effects on future regulations, also should be observed closely to better predict what the future may hold for EVs.

1.3.4. Does Wrong Interpretation of SHA Clauses Constitute Misleading Information? The Jacobs Decision of the TCA

By Barış Yüksel, Mustafa Ayna, and Emine Bilsin

The TCA cleared a transaction concerning the creation of a joint venture between "Jacobs Turkey" and Turkish tea producer "Of Çaysan" through its decision dated 17 October 2018 and numbered 18-39/632-307. Although the merits of the case are not of much significance from a competition law perspective, the different opinion provided by a board member is indeed noteworthy.

In brief, the proposed transaction consists of two stages. First, Jacobs Turkey, which was controlled by Jacobs Douwe Egberts International B.V., would acquire Of Çaysan in its entirety. Subsequently, the Kasap family, which holds the entire shares of Of Çaysan, would acquire 30% of the shares of Jacobs Turkey.

As part of the review, the TCA concluded that the proposed transaction was considered as a full-function joint venture as per Article 5 (3) of the Mergers Communiqué No. 2010/4. Considering that there was no horizontal or vertical overlap between the parties' activities, the relevant transaction did not raise any anticompetitive concerns and the TCA cleared it.

During the review, the TCA was unsure as to whether the Kasap family's acquisition of 30% of the shares of Jacobs Turkey would lead to the creation of joint control over Jacobs Turkey although it was stated in the notification form that it would not. Thus, the TCA requested further information from Jacobs Turkey. In this regard and based solely on the clauses of the SHA that already had been provided to the TCA in full, Jacobs Turkey reiterated that obtaining 30% of Jacob Turkey's shares would not confer joint control to the Kasap family over the company. Yet, in light of the provisions of the SHA, the TCA reached a different conclusion and held that 30% shareholding did confer joint control to the Kasap family in the case at hand. The details as to why the parties and the TCA had interpreted the same SHA differently were not revealed in the reasoned decision.

The TCA did not consider that the evaluations of the parties regarding the joint control issue constituted false or misleading information, albeit being different from those of the TCA. However, one of the board members submitted a different opinion in that respect.

In the different opinion, it was discussed whether the information provided by the parties regarding the control structure could be considered as false/misleading information within the scope of Article 16 of Competition Law and whether a monetary fine should be imposed on the parties.

The different opinion referred to the decisional practice of the TCA[133] and the Council of State[134], which demonstrates that the mere act of providing incomplete, false, or misleading information is deemed sufficient for the violation of Article 16 and points out that neither moral elements such as the purpose of deception nor the suitability of the relevant information to have an undue influence on the decision is deemed relevant. A decision of the 13th Chamber of the Council of State[135], which emphasized that Article 16 of the Competition Law aims to ensure that the board takes a decision as swiftly as possible based on accurate information given by the undertakings without having to undergo additional examination and to deter undertakings from providing inaccurate information, was also cited.

This decision, and especially the different opinion, is a significant reminder of the TCA's sensitivity when it comes to the provision of accurate information. Considering the increase in the number of the cases[136] where the TCA imposed administrative fines due to the provision of incomplete, false or misleading information, undertakings are advised to show utmost diligence when communicating with the TCA.

[133] Decisions of the TCA dated 11.09.2008 and numbered 08-54/847-338; dated 18.03.2010 and numbered 10-24/339- 123.
[134] Decisions of the 13th Chamber of the Council of State numbered 2009/869 E., 2012/3794 K.; numbered 2009/1523 E., 2012/3795 K.
[135] Decision of the 13th Chamber of the Council of State dated 13.12.2012 and numbered 2009/869 E., 2012/3794 K.
[136] Decisions of the TCA dated 13.03.2019 and numbered 19-12/155-70; dated 08.02.2018 and numbered 18-04/64-37; dated 03.07.2017 and numbered 17-20/310-136; dated 28.02.2017 and numbered17-09/107-49.

1.3.5. The Beginning of the New Challenge: Merger Control in the Digital Economy

By Barış Yüksel, Ayberk Kurt, and Celal Duruhan Aydınlı

Introduction

Innovation is a “must” for most of the companies, especially for big tech companies such as Facebook, Amazon, Apple, Google, Microsoft, and others in a data and tech-driven world. However, it is not always possible for the internal R&D departments to hit the right spots every single time due to both practicability and economic reasons. As a result, seizing the existing opportunities and acquiring a fresh start-up that brings the required innovation with limited resources appears to be a popular solution. However, this approach has its positive and worrisome characteristics in the eyes of competition authorities.

Especially since the mid-2010s, M&As in the digital markets have started to create concern as to whether current competition rules and implementation are insufficient to assess these transactions. The standpoint of competition authorities in former cases drew more attention than ever and competition authorities’ past decisions are being called into question.

In this piece, we will evaluate the effects of these acquisitions in digital markets along with the reactions of the competition authorities.

Digital Platforms and the Importance of Data

As the era of digitalisation has arrived in different fields and dimensions, a different approach may be needed to understand the characteristics of digital markets even though competition laws are flexible and innovative to some extent. Such a need seems to be ever more present especially in fields that depend on Big Data and AI. Moreover, the fact that the “monetary price” of digital goods and services are far from reflecting the overall picture in digital markets due to the increasing worth of data is another reason why conventional and accumulated wisdom in competition law may just miss the target when dealing with the relationship between the structures of such markets and the welfare of the recipients of the relevant goods and services.

The term “data” refers to personal or commercial information that is commercially valuable especially if only one or a few competitors are able to access it. Reasonably, the latest trend for digital firms is to develop their strength in the processing and collection of "data," as it is the key to knowledge and fuels the algorithms that create competitive differences in today's world. As it is not possible to establish a direct link between data and turnover, especially in the initial phases of start-ups where they manage to collect a significant amount of data but have not yet figured out how to monetize it, current merger review thresholds can be inadequate. Certain acquisitions do not trigger notification thresholds although they may relate to the acquisition of significant future challengers by big tech companies in their incipiency.

From the perspective of the dynamics of the digital era, if there is one asset that is more important than cash, it is data. Thus, acquiring small (in terms of turnover) but data-rich services may allow the acquirer to enjoy the best of both worlds by increasing its competitiveness vis-à-vis the existing rivals and eliminating the threat of a new challenger with a single blow. The recently cleared acquisition of Apple/Shazam may be given as an example of this. Thanks to Shazam's huge database, containing not only Apple Music users' data but also those of other competitors such as Spotify, Youtube Music, Tidal and Deezer, Apple now has access to the key data of its competitors. Yet, this is not all. The merger also allowed Apple to put aside any concerns regarding Shazam's entering into competition with Apple Music in the future. One can see a pattern when the company's former actions, which consist of the acquisitions of Beats Music in 2015, BookLamp in 2014, Dryft in 2014, and Prime Sense in 2013, are viewed as a whole.

Merger Control in the Digital Markets

The main problem that prevents competition authorities from even being able to examine some digital acquisitions, especially start-up acquisitions, appears to be turnover thresholds. However, if a too low threshold is to be introduced, a significant amount of irrelevant transactions would have to be evaluated, creating resource problems and inefficiencies. In that vein, adopting alternative approaches to turnover-based thresholds (e.g., transaction value thresholds) or designing sector-specific merger review rules for digital markets may be required to solve this problem.

In addition, constructing counterfactuals may have to come very close to fortune-telling when it is considered that the data and technology belonging to a start-up may be used in a broader scope once internalized by an acquirer that is active in various markets and is conducting R&D activities regarding numerous other alternatives. Furthermore, the fact that such acquisitions are no longer limited to start-ups and that giant companies that can be considered as the leaders in their markets may also become subjects increases the significance of this issue even further.

Since 2016, the OECD has started to hold roundtables, hearings, and conferences regarding the digital economy and competition. Within this scope, the OECD organized the "Competition and Digital Economy" conference in June 2019. A salient point that the OECD expressed was the challenges facing current competition rules vis-à-vis the digital economy. Importantly, the OECD placed this subject (i.e. "how to treat mergers in digital markets") among the five issues to be explored in the future[137].

[137] https://www.oecd.org/competition/digital-economy-innovation-and-competition.htm

Regulators and competition authorities are digging hard to find ways to strengthen and solidify their assessments in digital mergers. Below we examine three recent developments in this regard.

The Facebook/WhatsApp Case

Undoubtedly, one of the most significant cases that led to discussions among the competition authorities regarding the effectiveness of turnover thresholds was the WhatsApp/Facebook merger. Since WhatsApp's turnover in 2013 did not trigger the turnover thresholds in the EUMR, it was considered that the transaction did not have an EU dimension. However, the transaction was reviewed under the national competition laws of Portugal, Spain, and the UK. Pursuant to Article 4(5) of the EUMR, Facebook requested the Commission to examine the transaction within the scope of the referral system. Even though certain significant digital mergers including Facebook/Instagram and Google/Waze deals had avoided the Commission's scrutiny due to the turnover thresholds before, the implications of facing the possibility (though this was not realized due to Facebook's willingness to initiate the referral mechanism voluntarily to let the Commission evaluate the transaction) of letting a USD 22 billion transaction that affects almost 2 billion users worldwide slid by without any examination were quite serious.

As a consequence of the Facebook/WhatsApp incident, creating "safety nets" that would allow authorities to examine digital mega-mergers that do not trigger turnover thresholds became a priority and Bundeskartellamt, along with the BWB, led the way in 2018. In order to fix the so-called "WhatsApp-gap," Germany and Austria introduced a new transaction value threshold that aims to cover cases where current turnover and the purchase price for the company differ to a disproportionate extent[138]. Also, paragraph 2 of the Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG) published by Bundeskartellamt and BWB explicitly stressed that the main goal to introducing this threshold is to close the gap in the system[139]:

> "Section 35 (1a) GWB and Section 9 (4) of the Austrian Cartel Act 2005 (Kartellgesetz, KartG) close a gap in the system of merger control so that it is able to perform its function to the fullest extent in an increasingly dynamic economic environment. This also takes account of the progressive digitalisation and integration of economy and society."

With this amendment, the transaction value threshold became effective in both Austria and Germany[140]. However, introducing such a threshold may create another problem from the perspective of administrative costs. Since this threshold is not industry-specific, it may catch certain transactions that would not create any competition concerns, creating an additional burden on competition authorities.

[138] Paragraph 2 of Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG), para. 3.
[139] Paragraph 2 of Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG), para. 2.
[140] For Germany, the value of the transaction should exceed EUR 400 million and for Austria, the value of the transaction should exceed EUR 200 million.

The Furman Report

Another significant development in relation to competition in digital markets was realized in the UK. "Unlocking the Digital competition Report of the Digital Competition Expert Panel," commonly known as the "Furman Report," was published and revealed innovative recommendations for competition law assessment in the digital era. With regard to big tech-mergers, the Furman Report underscored that the largest five tech companies have made over 400 acquisitions globally in the last 10 years[141]. The report also emphasized that during the last five years, none of the 250 acquisitions that have been realized in digital markets were notified voluntarily to the CMA, and none were called in for investigation, either during the phase 1 or phase 2 levels[142].

A very strong language is preferred in the Furman Report regarding the current approach of competition authorities towards mergers in digital markets, calling for a "reset." As a strategic recommendation, it further pointed out that "the CMA should take more frequent and firmer action to challenge mergers that could be detrimental to consumer welfare through reducing future levels of innovation and competition, supported by changes to legislation where necessary."[143]

With regard to the thresholds applied by the CMA, the Furman Report acknowledges that the share of supply tests may provide flexibility to the CMA in order to catch the mergers. However, the report also recognizes that a transaction value threshold may be considered in the future, should the share of supply test ever becomes insufficient.

In addition to the Furman Report, in July 2019, the CMA published a report called "The Digital Markets Strategy Report". In the report, the CMA classified the potential reform of its merger assessment methodology as the first priority, stating that even though merger assessment tools had been built for the analogue age, it is important to use the existing powers to the fullest extent possible in the digital age as well. This report may constitute a blueprint for the designing of future enforcement action.[144]

The Commission's Position

In 2019, the Commission published a report thoroughly analysing the digital economy and its effects on the competition policy. The report was titled "Competition Policy for the Digital Era" and a whole section was allocated to merger and acquisitions in the digital arena.

The Commission acknowledges that under the current merger control framework, it may have difficulties in catching digital acquisitions due to the relatively low turnover that start-ups may generate. As pointed out above, by their very nature, start-ups

[141] The Furman Report, page. 12.
[142] The Furman Report, page.91.
[143] The Furman Report, page. 93.
[144] CMA's Digital Markets Strategy Report, page. 9.

mostly focus on creating their product and establishing a user base in the short term and view monetisation as a secondary concern. The Commission expressed that it is very well aware of the fact that some digital mergers may get away unnoticed in the current turnover threshold system, while also emphasizing that certain cases have been brought before the Commission via referral systems such as Facebook/WhatsApp and Apple/Shazam.

While concluding the section assessing the potential new thresholds in its in-depth report, the Commission pointed out that although it is following the developments closely, the EU should not change its current system for now[145]:

> "We consider that, against this setting and in light of the difficulties that the introduction of a non-turnover-based threshold into the EUMR would raise, the EU should wait and assess a) how the new transaction value-based thresholds in Austria and Germany play out in practice, and b) whether the referral system would ensure that transactions of EU-wide relevance are ultimately analysed at EU level. Only if major gaps arise should the EUMR be amended. Even then, there will remain a choice between strengthening and improving the referral regime or amending the EUMR's jurisdictional thresholds."

Conclusion

Law needs to catch up with the rapid developments in the world that have certainly accelerated in the new millennium after computers and the internet became inseparable parts of our lives. With the establishment of digital platforms, this change has increased its pace even further along with its scope and dimensions. New markets have been created that have completely unfamiliar characteristics for the regulators, making life extremely difficult for them. The competition rules were among those that felt the effects of transition to a brand-new reality most strongly and even experienced existential crises on some fronts. Now we are living in a digital era in which data has immense influence over our lives, and it is steadily becoming the new "currency" in many respects. The idiosyncrasies of the digital era require the adoption of new approaches and the development of new methodologies for analysing competition in digital markets. As market dynamics are entrenched in the fabric of competition law, the interpretation of the relevant rules has evolved along with the markets themselves and competition law was obliged to face and conquer "unprecedentedness" a few times in its relatively brief history. Today, there is a new challenge in the form of the digital economy, and concrete steps have been taken in the last five years to reconcile the old habits with the new realities. It seems that the digital economy will be the hottest topic in the competition authorities' agendas for a while and it will take some time for the competition rules to take their final form.

[145] Competition Policy for the digital era, page 115.

1.3.6. Behind the Scenes: Google's Fitbit Acquisition

By Seniha İrem Akın

Introduction

Last month, Google confirmed that it had agreed to purchase Fitbit, a company involved in the development and manufacturing of wearable technology for the health and fitness industry with almost 14 million devices sold worldwide in the past year (2018) and 28 million active users[146]. With the rise of wearable technology and devices that generally help consumers to track their health and fitness statuses continuously, smartwatches have become a phenomenon and can be seen on the wrists of almost every technology enthusiast. However, the acquisition raises the question of whether this action of Google is solely caused because of the growing interest in these products and the success of the Fitbit brand or whether there is another purpose that Google has in mind.

The Acquisition

In November 2019, Google officially announced that it was going to buy Fitbit for USD 2.1 billion. The deal is expected to close in 2020 after regulatory approval. With this acquisition in hand, it may seem like Google is trying to enter the smartwatch market in terms of hardware, but when examined closely, it seems like Google may actually have bigger plans. The transaction is subject to clearances from multiple competition authorities and Google is committed to paying Fitbit USD250 million if the deal fails due to antitrust issues. This shows that Google does not consider antitrust rules to be a serious threat before the acquisition. Indeed, Google has valid grounds for believing that clearances will be granted as it occupies very little both in terms of smartwatch hardware and software whereas Apple is the market leader with a share approaching 50%.

While the competition authorities take the different possible anti-competitive results of acquisitions and mergers into consideration, they lag behind when it comes to data and its anti-competitive effects. However, this acquisition may make the competition authorities think twice about the effects of harvesting data and its undeniable critical role in dominance over the markets as much as other variables.

The Software Market

[146] The information was gathered from www.statista.com.

Despite its pixel phones and smart home appliances, Google is not a hardware-driven but a software-driven company. The source of its dominance stems from following imperialistic strategies with its software, collecting huge chunks of data, and eventually monetarizing it with advertisement services. Additionally, the smartwatch market generally comes with the operating system as every product needs one to function. Despite Google taking the lead part in the operating system market, Wear OS did not match up the competition even though Google hoped it to would become the most preferred operating system for smartwatches, just like Android did with the smartphones.

As Android's power reveals, being the go-to operating system means long-term dominance over hardware manufacturers, except Apple. So, Google is always tempted to invest heavily in designing and promoting its operating systems instead of getting deeply involved with hardware. This tendency of Google reveals that the Fitbit acquisition is not about disturbing Apple, which has limited but impenetrable customer portfolio; it is about redesigning and rebranding Watch OS, the failed Android of smartwatches. Watch OS was introduced in 2014, aiming to become the licensable operating system for smartwatches, just like Android did with smartphones. Nonetheless, when the current state of the smartwatch market is examined, Google does not have a place since the biggest smartwatch manufacturers, namely Apple, Samsung, and Fitbit, are run respectively on WatchOS, Tinzen, and Fitbit OS.

Hence, despite its legacy of being an operating system generator, Google failed to make the same impact in the smartwatch market with Wear OS. If Google achieves its goal through this acquisition, it may finally get the chance to stand out in the competition regarding the smartwatch market with its operating system. Nevertheless, this may not be the only reason Google wants to buy Fitbit, as will be explained in the next section.

Health Data

As data becomes an important worthy asset, companies have started to go after it in order to merge their current databases with those of third-party companies to boost the value of the transaction. In the due diligence processes regarding M&A transactions, conscious companies generally focus on the data protection side of the deals, too. However, the prevalence and efficiency of the measures used for such purpose remain questionable. Even though tools such as Data Acquisition Agreements are used or some companies give their customers the choice to opt-out before a transaction that may include transmission of their personal data, these means they do not guarantee full protection for individuals especially for special categories of data such as health data since they lack sanction power and their applicability still relies on vague terms.

In line with this, along with Google's will to show its face in the operating system market with WearOS, another perspective of the acquisition that cannot be overlooked is Google's intention to access the health data of Fitbit customers. Therefore, it may be argued that Google's acquisition is actually a part of a bigger plan which to enter the healthcare industry as once the transaction is closed, it would have access to the health data of 27 million Fitbit users.

Even though Google explicitly stated that "Fitbit health and wellness data will not be used for Google ads,[147]" there are many other ways that a company can exploit health data and even monetize it. For instance, Apple published a press release[148] on its Research App that lets users enrol in three different health studies. This enables Apple to collect a huge amount of health data that it can turn into large-scaled health projects with its well-known business partners such as the Harvard T.H. Chan School of Public Health and the American Heart Association. Yet, Apple makes it clear that it will share data only with the chosen studies and under users' consent, which helps the application to depend on valid legal grounds.

To return to Google, this is not the first attempt for the company to get involved in health data. Previously, Google's name was heard in Project Nightingale, which led Google to become infamous with regards to its approach through privacy. Project Nightingale is basically a health data sharing project financed by Google and Ascension, one of the largest health care systems in the United States, including a chain of 2,600 hospitals, doctors, and other health facilities with tens of millions of patients. However, Google has managed to not breach the HIPAA despite the absence of knowledge and consent of doctors and their patients. This is possible since HIPAA was passed almost two decades ago and currently cannot catch up with the newest digital developments, which require detailed technical legislation. Through the system established by this project, Google employees, even those work at its parent company, have been able to access and download the personal health information of Ascension patients.

These actions and efforts of tech giants like Google and Apple are understandable under the concept of big data in health care that can be nurtured from many sources, one of them being wearable devices. It is believed that the establishment of big data for the health care industry will be revolutionary as it has many advantages for customers/patients. For instance, it is no doubt that it can improve the accuracy and effectiveness of treatments as well reducing the costs. Nevertheless, the beneficiaries of big data take the bitter with the sweet since it will eventually cost users' privacy. Therefore, it is crucial both for the device developers and users of these kinds of projects to find the perfect balance where both sides can enjoy its advantages without disregarding privacy.

Conclusion

It is still not exactly clear how Google will use the user data that Fitbit owns once the transaction is completed. Google may have several motives regarding the concerned acquisition such as maintaining its dominance in the software market. Another obvious reason can be given as the health data to which Google will have access as it is clear that the acquisition also will help Google to benefit from the health data and even monetize it. Hopefully, we will understand in the near future why Google chose to get involved in this transaction and how this will affect Fitbit and its users.

[147] Google's Company Announcement, Helping more people with wearables: Google to acquire Fitbit, 1 November 2019. See more: https://blog.google/products/hardware/agreement-with-fitbit

[148] https://www.apple.com/newsroom/2019/11/apple-launches-three-innovative-studies-today-in-the-new-research-app/

CHAPTER 2

INTERNATIONAL TRADE

2.1. An Evaluation of Amendments in Turkish Customs Law in Light of the Turkey-EU Customs Union

By Ertuğrul Can Canbolat, Hasan Güden, and Emin Kutay Çelebi

Background

Turkey and the EU are linked by a Customs Union Agreement that came into force on 31 December 1995 with Decision No 1/95. The "final phase" envisaged in the Ankara Agreement was to complete the establishment of a customs union between then European Communities and Turkey. On 6 March 1995, the Association Council adopted a Customs Union Decision on implementing the final phase of the customs union between Turkey and the European Communities. In this way, the 22 years of the "transition phase" envisaged in the Additional Protocol was finished as of 1 January 1996 and the final phase was initiated on the way to Turkey's accession to European Union. Decision No 1/95 consists of the following chapters; (i) free movement of goods and commercial policy, (ii) agricultural products, (iii) customs provisions, (iv) approximation of laws, (v) institutional provisions, and (vi) general provisions.

Turkey's obligations that stem from the Decision No 1/95 can be classified as follows: (i) obligations regarding the free movement of goods, and (ii) obligations regarding the legislation alignment.

Obligations Regarding the Free Movement of Goods

The Customs Union covers all industrial products; however, it does not address agriculture (excluding processed agricultural products), services, or public procurement. Bilateral trade concessions apply to agricultural as well as coal and steel products.

According to the free movement principle, products produced in the EU or Turkey, including those wholly or partially obtained or produced from products coming from third countries that are in free circulation in the EU or in Turkey, and products from third countries shall be considered to be in free circulation in the Area of the Custom Union if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in the EU or in Turkey. The area of the Customs Union consists of the customs areas of the EU and Turkey.

Based on the free movement rule, Turkey fulfilled the following obligations for the functioning of Customs Union: (i) import or export customs duties and charges having equivalent effect are wholly abolished; (ii) Turkey aligned itself on the Common Customs Tariff in relation to countries which are not members of the EU; (iii) Turkey incorporated into its internal legal order the Community instruments relating to the removal of technical barriers to trade; and (iv) quantitative restrictions on imports and exports and all measures having equivalent effect were abolished between Turkey and the EU.

Obligations Regarding the Legislation Alignment

Article 8(1) of Decision No. 1/95 obliges Turkey to incorporate into its internal legal order the Community instruments related to the removal of technical barriers to trade. In the same vein, Article 54 requires Turkey to harmonize its legislation regarding areas directly related to the operations of the Customs Union. Therefore, the Customs Union foresees Turkey to align with the acquis communautaire[149] in several essential internal market areas, notably with regard to industrial standards. Areas that are connected with the operations of the Customs Union are stipulated in the paragraph 2 of Article 54:

- Commercial policy and agreements with third countries comprising a commercial dimension for industrial products,
- Legislation on the abolition of technical barriers to trade in industrial products,
- Competition and industrial and intellectual property law,
- Customs legislation.

Accordingly, as of 1 January 1996, Turkey started to abolish customs duties on industrial goods and adopted the Common Customs Tariff of the Community in its trade with third countries. Due to the obligations stemming from Decision No. 1/95, Turkey's foreign trade regime was aligned with the European Union's Customs Code to a large extent. In this context, the EU acquis on technical legislation, intellectual and industrial property rights, competition policy as well as EU legislation on the free movement of goods and common commercial policy are taken into consideration and reflected in the Turkish foreign trade regime.

Alignment to the Customs Legislation of the EU

Article 28 of Decision No. 1/95 requires Turkey to adopt provisions in the following fields based on the acquis: (i) origin of goods, (ii) customs value of goods, (iii) introduction of goods into the territory of the Customs Union, (iv) customs declaration, (v) release for free circulation, (vi) suspensive arrangements and customs procedures with economic impact, (vii) movement of goods, (viii) customs debt, and (ix) right of appeal.

[149] Acquis Communautaire is the accumulated legislation, legal acts, and court decisions which constitute the body of European Union law.

Since 1996, when the customs union was put into effect, Turkey has been in alignment efforts. It is considered that Turkey has reached an advanced level on legislation alignment in the customs controls field. Likewise, in the area of customs legislation, it has been observed that Turkey displays a high level of compliance with both Decision 1/95 and the acquis. Additionally, in many areas of customs control, Turkey's practices meet what would generally be required under the relevant chapters of the acquis[150]. According to the European Union Staff Working Document–Turkey 2019 Report, Turkey maintains a good level of preparation for the customs union. However, even though some progress has been made concerning the rules on managing tariff quotas, duty relief, free zones, and surveillance measures are still considered to be not fully in line with the acquis or Turkey's obligations under the Customs Union[151].

Turkish Customs Law in Light of the Acquis Communautaire

Customs matters are regulated through several acts and by-laws in Turkey. The fundamental instrument that regulates customs matters in Turkey is Turkish Customs Law dated 27 October 1999. The Turkish Customs Law was enacted in parallel to EC Council Regulation No. 2913/92 to make the necessary regulations in customs matters in Turkey in line with the EU rules.

Since the establishment of the Customs Union, the EU has amended several pieces of its customs legislation, which also has obliged Turkey to transpose these changes into its own legislation. The adoption of a new UCC in 2013 by the EU brought new concepts and the need for operational developments, including the electronic exchange and storage of data between customs authorities and between customs authorities and economic operators, centralised clearance, and "single window" and "one-stop-shop" systems that Turkey had to consider in its alignment process. Decision No. 1/96 of the Customs Cooperation Committee was adopted to implement provisions applicable to trade in goods between the EU and Turkey and with third countries, thus introducing an integrated approach for customs. That Decision was replaced by Decision No. 1/2001, which was repealed by Decision No. 1/2006 of the Customs Cooperation Committee. Decision 1/2006 consolidated all decisions of the Committee into a single framework. Turkey adopted its implementing act in 2006 (Decision No. 2006/10895) accordingly[152].

Amendments in Turkish Customs Law

Not withstanding the harmonization that has been realized so far, it is still considered by the European Commission that Turkish customs law has yet to be harmonized with those of the UCC regarding the improvement of risk-based controls and simplified procedures in line with the acquis to facilitate legitimate trade while ensuring security

[150] Evaluation of the EU – Turkey Customs Union, Report of the World Bank, page 47.
[151] European Union Staff Working Document – Turkey 2019 Report, European Commission, page 97.
[152] Study of the EU – Turkey Bilateral Preferential Trade Framework, Including the Customs Union, and an Assessment of Its Possible Enhancement, Final Report 2016, European Commission, page 120.

and safety. In its annual report of 2019 regarding Turkey, the European Commission pointed out that a draft customs law aligned with the UCC had yet to be adopted.

On 24 November 2019, Turkish Customs Law was amended with the Amendment. The Amendment had been anticipated since 2015 and was on the action plan of the Department of the Coordination Council for the Improvement of Investment Environment and Technical Committee of Foreign Trade and Customs. Especially the need to modernize the administrative penalties according to contemporary circumstances in international trade was contemplated as the main reason for this Amendment.[153] Accordingly, on 24 November 2019, the Amendment was passed in the Grand National Assembly of Turkey and published in Official Gazette no. 30941 on 7 November 2019.

Amendments that are deemed to be remarkable within the context of the European Union–Turkey Customs Union can be classified in four categories with respect to their subject matter; (i) transit procedures, (ii) guarantees, (iii) administrative penalties, and (iv) reconciliation.

In order to eliminate ambiguities in calculating the time limits for which goods subject to transit regime may remain in temporary storage areas for a customs-approved treatment or use, Article 52 of the Customs Law has been amended in line with UCC. Pursuant to amended Article 52, when goods are transported within the customs territory of Turkey and which (i) are subject to transit regime, and (ii) are not in free circulation are presented to customs authority, such goods will be subject to Articles 41-50 of the Customs Law.

Prior to the Turkish Constitutional Court's annulment decision dated 22 May 2014 and numbered E:2013/104 K:2014/96, Article 216 of the Turkish Customs Law was as follows: "Repayment by the competent administrations of amounts of customs duties or of surcharge or interest of late payment collected on payment of such duties shall not give rise to the payment of interest by those administrations." However, Article 216 has been found to be in violation of the rule of law principle in Article 2 and the right of property in Article 25 of the Turkish Constitution. Therefore, Article 216 has been rearranged as "Repayment by the competent administrations of amounts of customs duties or of surcharge or interest of late payment collected on payment of such duties' payment of interest shall be paid in accordance with Law No 6183 on Collection Procedure of Public Receivables."

Within the scope of the Amendment, it can be seen that the guarantee provisions have been eased in favour of importers and exporters. A guarantee is a financial cover for customs duties and other charge that are temporarily suspended, and it is required for charges that may be incurred or have been incurred. With the amendment of

[153] General Preamble of Law No. 7190 on Amending the Customs Law.

Article 202, in cases where a guarantee is required, the guarantee shall be limited to the concerned goods' customs duties and other public receivables. Before the Amendment, guarantees were 20% in excess of the goods' customs duties and other public receivables. Parallel with Turkish Customs Law, in order to ensure the receipt of duties and taxes, the UCC requires a guarantee or insurance of duty payment. However, the UCC does not determine the amount of the guarantee, and the amount of guarantee varies by country and circumstance.

Another notable amendment was concerning the reconciliation procedure. Disputes between declarants and customs authorities that concern customs penalties and customs duties may be resolved by two distinct procedures according to Customs Law: (i) appeal and (ii) reconciliation. In addition to the administrative and judicial appealing procedures, the reconciliation procedure has played a major role in resolving customs disputes. Customs penalties and in cases where the amount of customs duty declared by the declarant and the amount determined by the customs authorities differ, the customs authorities and the declarant may resolve such disputes with reconciliation. Prior to the Amendment, reconciliation and appeal procedures could not be triggered simultaneously. With the Amendment, declarants may choose to trigger a separate reconciliation procedure if their appeal application is not concluded. The scope of the reconciliation procedure thus has been extended with the Amendment. Moreover, the principles of confidentiality of reconciliation and prompt enforcement of reconciliation results are incorporated in the Turkish Customs Law. Accordingly, the Amendment also aims to ensure the protection of the declarant's commercial secrets and the prompt application of reconciliation results.

One of the most crucial aspects of the Amendment is that its main intention is to ease customs penalties in favour of declarants. Customs penalties had been long criticised by many importers and exporters for their punitive and destructive results.

According to the Turkish Customs Law, there are two types of penalties:

- Penalties to be charged on operations that result in a tax loss, and
- Fines relating to customs irregularities.

Regarding the goods subject to the provisions of the inward processing regime, processing regime under customs control, and temporary import regime with full exemption, in cases where the amount of declaration and the amount determined by the customs authorities differ, half of the customs duties shall be applied as an administrative fee. However, Article 234 envisages the application of three-fold of the customs duties in cases where the good's value is declared less than it is determined by the customs authorities, as the applicable penalty has not been changed. In cases where the declarants inform the customs authorities of such deficit by themselves, the applicable penalty rate is decreased from 15% to 10%.

Significant amendments on penalty provisions are as follows:

- If the customs authority provides a false explanation to the declarant, no penalty or default interest shall be paid by the declarant;

- In cases where the importation of a good is subject to authorization and the good has nevertheless been imported, the applicable penalty shall be amended from expropriation to (i) return of the good's country of origin, or (ii) transit of good to a third country;

- If it is found that the declaration was made without permission for the goods subject to approvals of the competent authorities, the applicable penalty shall be reduced from 100% to 10% of the bonded value of the concerned good;

- Besides violating the provision of inward processing regime, in cases where goods are found in the declarant's facility, the penalty of two-fold of the customs duties of the concerned goods shall be decreased to the amount of the customs duties. Furthermore, if goods are not subjected to customs procedures in 60 days, an additional penalty equal to goods' customs duties shall be applied.

Conclusions

It can be concluded that the Amendment serves to alleviate the concerns of importers and exporters with respect to punitive customs penalties rather than a comprehensive alignment with EU customs rules. Nevertheless, considering the current economic situation that Turkey faces, the Amendment may help to facilitate trade between the European Union and Turkey whereby ensuring more favourable guarantee provisions and penalties in case of wrongdoings thus providing more all-embracing alternative customs authorities as the declarant dispute resolution stipulated in reconciliation provisions.

2.2. Trade Remedy Investigation in Turkey–Cooperating Parties' Victory

By Ertuğrul Can Canbolat and Hasan Güden

On 9 March 2019, the Ministry announced its final decision regarding an anti-circumvention investigation that had been initiated concerning imports of certain articulated link chain and parts thereof. This case is of significance as it confirms explicitly once more that the exporting companies may enjoy a competitive advantage owing to proper cooperation with the Ministry.

Article 26 of the Regulation sets out the general rule as regards the non-cooperation in trade remedy investigations and, more particularly, on the conduct of the Ministry's analysis in the case of non-cooperation. Accordingly, since the Ministry will not be provided with the information necessary to carry out its evaluations properly in case of non-cooperation, it will anyway continue its investigation and use the facts available (basically those provided by complainants, if any, and those publicly available) as the basis of its determinations.

In this regard, it should further be emphasized that the cooperation covers not only responding to the questionnaire, but also a process of complying with the Ministry's instructions and implementing of an accurately designed strategy that focuses on the quality rather than the quantity of data. Indeed, even if an interested party submits its data, it may still face difficulties during the procedures and miss the opportunity to benefit from an individual treatment, which is more advantageous in most cases and increases the cooperating companies' competitiveness due to a potential lower duty imposed at the end of the investigation. Non-cooperation may result from, among others, missing the deadlines, refusing access, impeding the investigation, submitting inaccurate or misleading information, and cooperating partially.

This recent decision simply reveals the fact that proper cooperation in an anti-circumvention investigation may come with all advantages and an exporting company may be placed in a better position. Indeed, cooperating companies may stand out in the competition thanks to their new position in the market (likely to last longer than the duration of the measure due to the Ministry's power to review the original anti-dumping measures).

In the concerned case, the Ministry examined (i) Turkey's import trends (on both a quantity and value basis), (ii) the subject countries' import trends from China, Taiwan, South Korea, and Malaysia, (iii) the installed production capacities and the actual production of the cooperating companies, and (iv) the data submitted by the cooperating companies and verified by the Ministry. Accordingly, the Ministry resolved, on the basis of the data gathered within the scope of the investigation, to impose the following anti-circumvention measure on imports of certain articulated link chains (and parts thereof) originating in/consigned from India (except Tube Investments of India Limited and Galaxy Chains Pvt. Ltd.), Sri Lanka, Thailand (except Tien Yuen Machinery Mfg., (Thailand) Co., Ltd.), and Spain at the same level as the measure taken for imports from Chinese which has been circumvented[155]:

Investigation & Measure

CN code	Product	Country of Origin/ Consignment	Company	Anti-dumping Measure (USD/Ton)
7315.11.90.00.11 7315.11.90.00.19 7315.12.00.00.11 7315.12.00.00.19 7315.19.00.00.00	Certain chains and parts	India	Galaxy Chains Pvt. Ltd.	0
			Tube Investments of India Limited	0
			Others	1,200
		Thailand	Tien Yuen Machinery Mfg., (Thailand) Co., Ltd.	0
			Others	1,200
		Sri Lanka	All companies	1,200
		Spain	All companies	1,200

Consequently, this case underlines the importance of cooperation with the investigating authorities in trade remedy investigations through the preparation and due submission of all documents such as to help the investigating authorities in conducting their analyses and making determinations in line with the facts of the case and in a genuine way. Therefore, a well-structured management of the cooperation process mostly ensures more favourable results for exporters/foreign producers.

[155] Communiqué No. 2016/19 on the Prevention of Unfair Competition in Imports. It should be emphasized that the concerned communiqué is the Ministry's decision in an expiry review investigation and the original investigation against imports of the subject product from China was completed in 2010. This measure has then been circumvented by some of the exporters located in South Korea, Malaysia, and Taiwan, which has led the Ministry to impose an anti-dumping duty concerning those imports as a result of its anti-circumvention investigation. See Communiqué No. 2013/11 on the Prevention of Unfair Competition in Imports.

2.3. Turkish Investigating Authorities' New Practice? One More Benefit from Cooperation

By Hasan Güden

The Ministry, the investigating authority in charge of conducting the trade remedy investigations launched by Turkey, has a practice of not performing dumping margin calculations in the context of (anti-dumping or anti-subsidy) expiry review investigations. This means for exporters/producers based in countries subject to investigation that they are not given the opportunity to influence the Ministry's determinations on dumping. The Ministry's recent decisions published at the start of 2020 in four expiry review investigations suggests that this administrative practice has changed.

The situation before 2020

As the relevant Turkish legislation grants discretion to the Ministry to conduct a new dumping margin analysis, the authority usually chose to base its determinations of dumping on the margin(s) that had been established in the original investigation. However, cooperating companies were not completely helpless and had other means to influence the outcome of the review investigation.

Dumping represents only one aspect of the analyses made by the Ministry, so that the authority's findings and determinations do not rely solely on data regarding dumping. Any argument against the continuation of a measure may play a crucial role in the Ministry's determinations. Indeed, there have been instances where the Ministry imposed a lower duty rate as a result of cooperation by the parties'.[156]

Do the recent communiqués mark a change in the authority's administrative practice?

In this context, the recent decisions (published on 04.01.2020 and 07.01.2020) made by the Ministry in the context of expiry review investigations have prompted the question of whether the Ministry will, in the future, systematically calculate a new dumping margin in review investigations. The Ministry resorted, in those investigations, to four different methods to determine the normal value used in the computation of a new dumping margin. It also should be borne in mind that the Ministry resorted to the best available information as no exporter/producer cooperated in the context of those four expiry review investigations.

<u>Investigation into instantaneous gas water heaters (HS Code 8419.11.00.00.00) originating in China</u>[157]

[156] See the following cases: expiry review investigations concerning (i) imports of woven fabrics of synthetic and artificial stable fibers from China (Communiqué no 2019/4 dated 31.12.2018) and (ii) imports of welded stainless steel tubes, pipes and profiles from China and Taiwan (Communiqué no 2019/3 dated 31.12.2018) where the Ministry decreased the level of the applicable anti-dumping measures after considering arguments on product nature, imports' effects on the domestic industry's prices and economic indicators or public interest; expiry review investigation concerning imports of ropes and cables from China and Russia (Communiqué no 2016/31 dated 14.07.2016) where the Ministry decided to exclude some of the products from the scope of the anti-dumping measure as they cannot be purchased from the domestic producers.

In this investigation, the Ministry calculated the normal value by using the average unit price of Turkey's worldwide exports (on the basis of the International Trade Center's data) and the export price on basis of the average unit CIF price of the exports of the concerned product imported from China in 2018 (through the Turkish Statistical Institute's data). The Ministry did not establish any dumping margin on that basis.

However, the Ministry emphasized that the export quantity from China during the investigation period was negligible and that a dumping margin was likely to occur in the event that the measure in question terminated. Accordingly, the Ministry determined a dumping margin of 16.05% by comparing (i) the normal value established as the average unit price of Turkey's worldwide exports of the concerned product (on the basis of the International Trade Center's data) with (ii) the likely export price determined as the average unit export price of China's worldwide exports of the concerned product in 2018 (on the basis of the International Trade Center's data).

Eventually, the Ministry concluded that the expiry of measures likely to lead to the continuation or recurrence of dumping and injury and thus decided to continue the imposition of the measures at the same rate.

Investigation into imports of aluminium foil (HS Codes 7607.11 and 7607.19) originating in China[158]

While the Ministry calculated the normal value by adding SG&A costs and a reasonable profit of 10% to the average unit production cost of the like product in Turkey, the export price was determined as the average unit CIF price of the exports of the concerned product made from China in 2018 (on the basis of the Turkish Statistical Institute's data). By comparing the normal value and the export price so established, the Ministry found a dumping margin of 28.4%. As a result, the Ministry concluded that the expiry of the measure likely would lead to the continuation or recurrence of dumping and injury and thus decided to continue the imposition of the measures at the same rate.

Investigation against into imports of laminate flooring (HS Codes 4411.13.90.00.11, 4411.14.90.00.11, 4411.92.90.00.11 and 4411.93.90.00.11) originating in China and Germany[159]

As no producer/exporter from the subject countries cooperated in this investigation, the Ministry established two margins of dumping for both of the subject countries.

Concerning Germany, while the Ministry calculated the normal value by using the German domestic sales prices of the concerned product on the website "Obi.de", the export price was determined as the average unit CIF price of the exports of the concerned product imported from Germany in 2018 (on the basis of the Turkish Statistical Institute's data). As a result, the Ministry found a dumping margin of 23.02%. As regards China, while the Ministry determined the normal value by adding SG&A costs and a reasonable profit to the unit production cost of the like product in Turkey, the export price was based on the average unit CIF price of the exports of the concerned product imported from China in 2018. According to the concerned data, the Ministry was unable to establish any dumping margin.

[157] See Communiqué no 2019/33 dated 04.01.2020.
[158] See Communiqué no 2019/34 dated 04.01.2019.
[159] See Communiqué no 2019/36 dated 04.01.2019.

However, the Ministry stressed that the export quantity from China during the investigation period had been negligible and that a dumping margin had been likely to occur in case of the termination of the measure at hand. The Ministry had then determined a dumping margin of 12.58% by comparing (i) the constructed normal value obtained by adding a reasonable profit to the commercial costs of the Turkish domestic producers to (ii) the export price from China of the concerned product on the website “Alibaba.com”.

As a result, the Ministry concluded that the expiry of measures likely would lead to the continuation or recurrence of dumping and injury and thus decided to continue the imposition of the measures at the same rate.

Investigation into imports of pocket lighters, gas fuelled, non-refillable & pocket lighters, gas fuelled, refillable with electrical ignition system, and parts of lighters (HS Codes 9613.10.00.00.00, 9613.20.00.00.11, 9613.20.00.00.19, and 9613.90.00.00.11) originating in China [160]

The Ministry calculated the normal value by adding SG&A costs and a reasonable profit to the average unit production cost of the like product in Turkey and performed another calculation on the basis of Thailand’s average unit export prices of the concerned product (obtained from the International Trade Center’s data).

As for the export price, the Ministry determined the average unit CIF price of the exports of the concerned product imported from China (on the basis of the Turkish Statistical Institute’s data) and then calculated the average FOB unit price by deducting average insurance and freight costs from the average unit CIF price. Furthermore, the Ministry gathered a price offer via the website “Alibaba.com”, which was on an FOB basis. The authority then added 2% of the value of this offer as insurance and freight costs.

According to the foregoing data, the Ministry was unable to establish any dumping margin. However, the Ministry found the following likely dumping margins: 62% for non-refillable pocket lighters, 127% for refillable lighters with electrical ignition system, and 53% for gas fuelled refillable lighters.

As a result, the Ministry concluded that the expiry of measures likely would lead to the continuation or recurrence of dumping and injury and it thus decided to continue the imposition of the measures at the same rate.

Conclusion

Even though the Ministry resolved to continue the imposition of the measures at the same rate in those investigations, it is significant that it calculated new dumping margins for the subject countries. This new approach could enable producers/exporters subject to investigation in the future to put across their own data on dumping successfully, which means for them the possibility to obtain a more favourable rate for their exports.

[160] See Communiqué no 2019/35 dated 07.01.2020.

CHAPTER 3

REGULATIONS

3.1. Deepfake: An Assessment from the Perspective of Data Protection Rules

By Baran Can Yıldırım and Celal Duruhan Aydınlı

Introduction

Fake content is nothing new and has been in the digital realm particularly since 1990 with the introduction of photo-editing, image creation, and graphic design software such as Adobe Photoshop. The number of them, however, has been alarmingly increasing within the last months. This type of content is difficult to identify as fake thanks to something known as "Deepfake." Deepfake so far has been used to create, among others, malicious hoaxes, fake news as well as adult videos[161].

While this type of content may interfere with a wide range of laws including those related to fraud, crime, and copyright, in this article we will try to layout and focus on its interference with the data protection rules. As such, we do not claim or aim to address every possible aspect regarding the protected rights of individuals.

We will first explain basically what Deepfake is and how it is created, and then discuss how its effects may be relevant to data protection rules.

Technical Summary

The popular name Deepfake comes from the combination of "deep learning" and "fake." It creates problems when the "fake" part is used for purposes that may violate, among others, data protection rules.

Deepfake is a product of Deep Learning (or machine learning), which is a subset of AI and based on a specific method called GANs. GANs are deep neural net architectures comprised of two nets, pitting one against the other. It can reportedly learn to mimic any distribution of data such as images, music, or speech[162]. After the input is scanned, phonemes and visemes are isolated; the alignment of the corresponding data begins to track, reconstruct, and produce the rendered mix, eventuating as the new content. Therefore, GANs may learn to create fake worlds that are very similar to the real world.

As the visibility and thus popularity of Deepfake content grows, demand for better codes that create and develop such content has also been increasing. Open-source platforms such as Github or TensorFlow have been used by developers with a view to increase the intelligence of algorithm patterns and create mobile applications. In this regard, the "quality" of the mobile applications creating Deepfake has increased alarmingly.

There are methods that can detect fake content such as reverse-image search, magnification, and the Uncanny Valley Hypothesis. Although it is not the very purpose of this article, we will explain these methods briefly before moving on to the legal aspect of the Deepfake.

Reverse-Image Search Method[163]

The method relies on the logic of searching for the used images or videos on the internet if the creator has supplied the content from the internet itself, as in the Gonzalez incident[164]. However, this method is regarded as the most basic detection process and it is relatively easy to be crossed by experienced developers.

Magnification Method[165]

As even behavioural actions can be implemented in the fake content, it has been concluded that detecting the differences of the biometric data of the victim (such as gait recognition, gaze checks, or heart rate monitoring) could be used to identify whether the content is real or fake.

The Valley Hypothesis[166]

Masahiro Mori's hypothesis is based on people's emotions about robots and automatons. According to the idea, the human likeness of a robot affects people's feelings positively, but beyond a similarity limit, humans tend to develop a strange sense of revulsion or aversion. According to the Uncanny Valley Hypothesis, the incompleteness of the whole mimics and facial expressions might have the chance to develop awareness with a close study.

Could Deepfake Content Itself be regarded as Personal Data?

The fundamental principle of every data protection set of rules, as the name suggests, is to protect the personal data of the data subjects (i.e., the people). Article 4/1 of the GDPR of the European Union, for instance, defines personal data as follows:

"'Personal data' means any information relating to an identified or identifiable natural person ('data subject')"

Therefore, in order to speak of personal data, we first need (i) information and (ii) an identifiable natural person, (iii) to which such information is related. Then the question of how we should define the identifiable natural person arises. In this regard, the same article reads as follows:

"an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person"

[163] https://iapp.org/news/a/privacy-law-and-resolving-deepfakes-online/
[164] https://www.telegraph.co.uk/news/2018/03/26/fake-images-parkland-shooting-survivor-emma-gonzalez-tearing/
[165] https://insights.sei.cmu.edu/sei_blog/2017/08/real-time-extraction-of-biometric-data-from-video-1.html
[166] https://spectrum.ieee.org/automaton/robotics/humanoids/the-uncanny-valley

In Deepfake videos, we generally see the face and/or body of a real person (i) talking with a voice that is very similar to their actual voice, and (ii) acting and using gestures in a way that they usually do in real life. However, the face, body, voice, acts or gestures are actually not their own; they are created by, among others, combining through software a lot of their actual pictures, voices, videos, etc. The content therefore in a sense is artificial animations or graphics created by the developer. Another type of Deepfake videos is when the created face is imposed on another person's actual body. In this case, the body is not created and belongs to someone real.

In the latter scenario, it should be clear that the body is the personal data of the relevant data subject. The former scenario, however, requires an interpretation of the abovementioned definition as to whether such created faces or bodies are the personal data of the victim.

Misuse of a created fake content representing someone who is not actually acting or speaking as in the edited video has the potential to affect the individuals' prestige/reputability even if the content's fake nature can be distinguished by a reasonable person's eye. However, data protection rules cannot protect the data subject unless the fake content is regarded as personal data. In this context, because of the fake nature of the content, consideration of data protection rules would be irrelevant because the content itself does not belong to a real individual. On the other hand, it might be argued that even the positive use of the person's name or mimics without the data subject's consent might constitute a personal data violation. In light of the above, if the fake content may be considered information that is related to an identifiable natural person, then such fake content should be protected within the scope of the GDPR. Such protection grants the relevant natural person the right to, among others, request the deletion of the fake content and request compensation if any damage is suffered as a result of an "unlawful processing of personal data" (the concept is discussed below). It should be noted that the assessment above discusses whether the fake content may be regarded as personal data (and the protection thereof). The assessment of whether the action of creating such content may constitute a violation of data protection rules is discussed below.

Unlawful Processing of Personal Data

Regardless of whether the Deepfake content may be regarded as personal data, the concept of "the processing of personal data" is of importance to evaluate the legality of creating the fake content within the scope of the data protection rules.

As defined in Article 4/2 of the GDPR,

"'processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction."

In light of the above, almost every action related to personal data, including collecting and altering, which are of special importance for creating the Deepfake content, may be considered processing of personal data. As explained above, the fake content is generally created by, among others, combining through software a lot of the victim's (data subject's) actual pictures, voices, videos, all of which are regarded as personal data. Therefore, there is no doubt that the personal data of the victim is processed at least while the fake content is being created. Then the question of whether such processing is lawful arises.

The processing of personal data is lawful so long as it is based on at least one of the conditions stated in the GDPR. The most common grounds for processing the personal data are (i) consent, which requires the explicit consent of the data subject in which they allow processing of their personal data for specific purpose(s); and (ii) legitimate interest of the data processor, which means the processing is required for the legitimate interest of the data controller. The full list of grounds, which are six in total, are listed under Article 6 of the GDPR and may be found here (and their recitals may be found here).

We consider none of these conditions is likely to be met in creating the fake content, especially taking into account that the fake content is generally created to harm the victim.

Conclusion

Apart from the well-established general remedies of law, such as and depending on the jurisdiction, (i) monetary compensations within the scope of tort law, (ii) criminal sanctions, (iii) requests as per the data protection rules (including request of erasure and compensation), and (iv) blocking access to the harmful or fake content, there is no specific set of rules that addresses directly Deepfake products and the liability of the creator and/or publisher. That being said, potential remedies are being discussed in different fields such as defamation, privacy, copyright infringements, criminal acts, etc. For instance, "Defending Each and Every Person from False Appearances by Keeping Exploitation Subject to Accountability Act of 2019"[167] was proposed by Yvette Clarke (of NY) in the U.S. House of Representatives "to combat the spread of disinformation through restrictions on deep-fake video alteration technology," which aims to criminalize creating Deepfake content.

As the quality of Deepfake grows, we are more likely to observe more infringements in various fields. Although certain authorities have started to take steps to fight the potential negative effects with legal remedies, such action is very likely to take time to catch up with the issues at this point, considering the speed of the disruptive technologies. In this regard, technological remedies are being used in the related field such as authenticated alibi services or cybersecurity precautions.

Either way, it is certain that both lawmakers and white hat developers have to act promptly and precisely in order to prevent Deepfake products from affecting vital issues such as taking evidence in courts or even conflicts between sovereign states considering the negative potential effects of these contents.

While the main object of this article is to raise awareness about an ongoing development of a fresh area of potential violations with a focus on data protection rules, it is without a doubt that there are a lot to discuss and consider on many different fields that may be affected or related with Deepfake.

[167] https://www.congress.gov/bill/116th-congress/house-bill/3230/text

3.2. CJEU's Planet49 Decision: An Update on Valid Consent for Cookie Usage

By Barış Yüksel, Baran Can Yıldırım, and Fırat Eğrilmez

On 1 October 2019, the CJEU issued a decision (i.e., Planet49 Decision) given pursuant to the preliminary ruling procedure upon the German Federal Court of Justice's inquiry regarding interpretation of data protection and e-privacy rules applicable in the EU.

The Planet49 ruling of the CJEU may be considered one of the most significant decisions given until now as it provides detailed insight into how data protection rules regarding valid consent shall be applied in a uniform manner within the jurisdictions of EU member states when data is collected/processed by using cookies.

In this regard, the ruling sheds light on some controversial issues that could not have been clarified through a strict reading of the applicable rules. These issues include, among others, (i) whether continued browsing of a website per se may constitute a valid consent, (ii) whether a pre-ticked box may constitute a valid consent for placing cookies on website users' devices, and (iii) whether the answers of the above apply to cookies that do not collect personal data.

On the other hand, the ruling leaves out in the open some very important other issues such as (i) whether cookie walls, which are basically banners that do not allow the user to browse the website unless they consent that cookies be placed on their devices, are admissible, and (ii) whether subsequent use of consented cookies may constitute a lawful processing based on the previously given consent.

In this article, we will first lay out the background of the case and then move on to discuss the CJEU's guidance towards the abovementioned issues. Finally, we will briefly discuss what this decision should mean to data processor websites.

Key Facts of the Case

The preliminary ruling request was referred to the CJEU by a German Court in a dispute between Planet49, an online gaming company, and the German Federal Union of Consumer Organisations and Associations/Federation of Consumer Organisations, wherein Planet49 had organized a promotional lottery by which the participants are required to give consent for the transfer of their personal data.

To put it more clearly, in 2013, Planet49 organised a promotional lottery on its website, through which it required the internet users wishing to participate in the lottery to give consent for the transfer of some of their personal data (i.e., postcodes, names, and addresses), which could then be used for marketing purposes, to Planet49's sponsors and cooperation partners. The mechanism for consent as to the transfer of the said data to third parties was designed by Planet49 via a checkbox without a preselected tick (first checkbox), including a body text informing the participants about the extent of the data transfer and to whom the data could be transferred. The body text indicated that with the consent provided by the participant, Planet49's sponsors and partners may provide them with offers by post, telephone, e-mail, or SMS and that the consent could be revoked at any time. Prospective participants were required to tick this first checkbox in order to become eligible to participate in the lottery.

As a part of the participation process, there was another checkbox (second checkbox) containing a preselected tick indicating that by not reversing the pre-selected tick in the checkbox, the participant gave consent to Planet49 to set cookies that track the participants' surfing and use behaviour on the websites of Plante49's advertising partners and to receive ads based on their interests.

An appeal was brought before the German Federal Court of Justice concerning a dispute between the parties on the ground that the consent requested by Planet49 through the first and second checkboxes did not meet the requirements set forth by the BGB and the CJEU decided that the success of the appeal process is dependent upon the interpretation of the following questions by the CJEU, via a preliminary ruling:

- Does giving permission by a pre-checked checkbox, which the user must deselect to refuse his/her consent, constitute valid consent as per the ePrivacy Directive and the GDPR?

- Does it make a difference if the information stored or accessed is deemed as personal data within the meaning of the ePrivacy Directive?

- What is the scope of the information that is required to be provided to the user in a clear and comprehensive manner per the ePrivacy Directive, and shall the information include duration of the operation of the cookies and detail the third parties that are given access to the cookies?

CJEU's Guidance

The CJEU started with interpreting the question as to whether a pre-checked checkbox could be deemed as valid consent when users' information will be stored or the information that is already stored in their terminal equipment (for example, computers) will be accessed via cookies.

The CJEU indicated that as per article 5(3) of the ePrivacy Directive, the user must provide consent for the usage of cookies in its terminal equipment, although the ePrivacy Directive does not expressly set forth how such consent should be provided. Referring to Recital 17 of the ePrivacy Directive to that end, the CJEU expressed that the consent must constitute a freely given, specific, and informed indication of users' wishes, which may be manifested in the form of "ticking a box when visiting an internet website." Although the CJEU does not refer to the Recitals of the GDPR in discussing the requirements of a valid consent, it is worth to mention that recital 32 of the GDPR has exactly the same wording as Recital 17 of the ePrivacy Directive, and reads as follows: "[Establishing valid consent] could include ticking a box when visiting an internet website."

The CJEU further indicates that the ePrivacy Directive refers to Directive 95/46 with regards to the definition of "consent," and sets forth that while Article 2(h) of the Directive 95/46 defines "the data subject's consent" as "any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed," as per article 7(a) of the Directive 95/46, processing of data is conditional upon the data subject's consent given in an "unambiguous" manner.

The CJEU interpreted that in order for users to give such unambiguous consent, they need to perform an active behaviour and accordingly, it is objectively impossible to deem user consent given by not deselecting a pre-ticked checkbox as valid, even if the user is informed.

It is also worth mentioning that the consent within the meaning of the ePrivacy Directive was construed as an indication of the data subject's wish, which shall be "specific." In that sense, the CJEU indicated that the consent must relate specifically to the activity of data processing and wishes manifested by the data subject for other purposes could not be interpreted as their consent. The CJEU applied this approach to the relevant case as expressing that the user's activity of selecting the button to participate in the promotional lottery does not constitute a sufficient indication of the data subject's valid consent to the storage of the cookies.

In light of the determinations made as to the first inquiry, it may be concluded that continued browsing cannot constitute a valid consent within the meaning of the data protection rules for placing cookies on the users' devices, as such continued browsing does not present an active behaviour indicating the consent.

As regards the second inquiry, the CJEU emphasized that the rules set forth in the ePrivacy Directive are applicable in cases where "storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user." Moreover, the CJEU added that the data which Planet49 intended to collect and process, was personal since the cookies placed by Planet49 were thought to contain a number which assigned to the registration data of a given user, who - as a pre-requisite for participating to the lottery - was required to submit his or her name and address and therefore linking the cookie with users' personal information constitutes processing of personal data. Nevertheless, the CJEU did not distinguish between personal data and non-personal data with regards to the application of the above. Indeed, the CJEU stated that the purpose, as well as the mere wording of the Article 5(3) of the ePrivacy Directive, was to protect the "user from interference with his or her private sphere, regardless of whether or not that interference involves personal data."

Lastly, as to the third question, wherein it was inquired that Article 5(3) of the ePrivacy Directive shall be interpreted in a way that the data processor is required to provide information on the duration of cookie operations and whether third parties have access to the cookies, or not, the CJEU initially noted, by pointing out the requirement of fair data processing, that "clear and comprehensive information in accordance with Directive [95/46]" shall be provided to the users before the consent was granted.

Moving on, the CJEU noted that Article 10 of Directive 95/46, which is referred to by both GDPR and ePrivacy Directive, provides a detailed list of information that is required to be provided by the data controller to the data subject if the data related to them is collected. As per the list, it is underlined that the following items are clearly required to be provided to the data subject when their data is collected:

- identity of the data controller,
- purposes of the data processing, and
- the data recipients/categories of data recipients.

Noting that the "duration of data processing" is not listed among the information set forth by Article 10 of the Directive 95/46, the CJEU interpreted from the provision thereof, which reads: "Member States shall provide that the controller (...) must provide a data subject (...) with at least the following information (...)", that the items listed in Article 10 is not exhaustive. Furthermore, the CJEU expressed that the duration of data processing is a necessary item, regarding which the data subject shall be informed to ensure fair and transparent processing by referring to Article 13(2)(a) of the GDPR. Thus, the CJEU concluded that information on the duration of data processing shall be provided to the data subject for data collection with cookies to be deemed as fair data processing.

What's New?

While the Planet 49 Decision sheds lights either directly or indirectly on the issues surrounding what constitutes valid consent in placing cookies on users' devices when they navigate through the relevant website, some important issues are left out in the open. The most significant examples for the former may be listed as follows:

- pre-ticked boxes do not demonstrate valid consent,
- continued browsing is not likely to amount to valid consent, as valid consent requires "active behaviour with a clear view",
- the aforesaid rules apply to both personal and non-personal data.

On the other hand, it is still not clear whether cookie walls, as a wide-spread practice among websites, would violate data protection rules, which block the view of a website unless the user consent to placing cookies in their devices. Similarly, the legality of the subsequent use of already consented cookies was not pointed out in the Planet 49 Decision.

With the GDPR's entry into force in 2018 (and prior to the Planet49 decision), the ambiguity pertaining to the question as to which elements should valid consent include, in cases where the data subject is asked for his/her consent for data processing via cookies, has already been eliminated to a certain degree, since Recital 32 of the GDPR indicates that the consent should be given by "a clear affirmative act" and exemplifies "ticking a box when visiting a website" for and excludes "silence, pre-ticked boxes or inactivity" from valid consent.

Recital 173 and Article 95 establishes a lex generalis-lex specialis relationship between the GDPR and the ePrivacy Directive, wherein provisions of the GDPR apply to all cases related to the subject matter unless the case at hand is specifically regulated by the ePrivacy Directive. Therefore, the standard set forth in the GDPR, which deems consent valid when it is "a clear affirmative act," also applies to cases that fall within the scope of the ePrivacy Directive and if the ePrivacy Directive requires otherwise.

However, prior to the GDPR's entry into force, it was indeed ambiguous whether to accept pre-ticked boxes or other passive ways of approval for data collection as valid consent, when a data controller aimed to collect information via cookies. For instance, Directive 2009/136/EC of 25 November 2009, which amended the ePrivacy Directive, indicated that the user's consent may be given by way of alternating the browser or another application's settings, in its Recital 66. Although Directive 2009/136/EC emphasized the significance of providing users with clear and comprehensive information as well as enabling them to refuse data collection, in the most user-friendly manner as possible, before deploying cookies, it suggested that valid consent for data collection via cookies may be given in a relatively passive action (i.e., by usage of browser settings).

It is also noteworthy to mention that, Opinion 1/2008 on data protection issues related to search engines of the Working Party formed as per Article 29 of Directive 95/46 indicated that the responsibility for data processing via cookies "cannot be reduced to the responsibility of the user for taking or not taking precautions in his browser settings," contrary to what Directive 2009/136/EC put forth.

All in all, it should be noted that there was an ambiguity as to what constitutes valid consent when there is data collection or processing via cookies, prior to the GDPR's entry into force. In that sense, the Plantet49 Decision of the CJEU represents a milestone, as it further contributes to the GDPR for removing the ambiguity present prior to the GDPR's entry into force by providing concrete interpretation regarding both the GDPR and other related rules (i.e., the ePrivacy Directive and Directive 95/46) in conjunction with the GDPR and sheds light on the interplay between them.

3.3. A Modernized Robinson List: Turkey Introduces Its Commercial Electronic Message Management System

By Baran Can Yıldırım and Celal Duruhan Aydınlı

Turkey introduced the System namely IYS on 4 January 2020 through the EM Amendment[168]. With the EM Amendment, companies (or persons) (Service Providers) that send commercial electronic messages[169] for marketing purposes are obliged to comply with certain rules, including being registered with the IYS, a system similar to www.donotcall.gov of the U.S. Federal Trade Commission[170] or the Telephone Preference Service of the U.K. Office of Communications,[171] all of which serves as a Robinson list of the consumers (Recipients)[172].

The new System is considered to be a part of Turkey's recent and rapid developments in the field of data protection. Throughout this article, we will explain the details of the System and then discuss the steps to be taken for compliance.

Commercial Electronic Message Management System

In accordance with the EM Amendment, a centralized system (IYS) shall be established that will allow (i) the Service Providers to obtain permission to send commercial electronic messages, and (ii) the recipients of such commercial electronic messages to opt-out from the communications. The IYS also shall be authorized to handle the complaints made by the Recipients and conduct investigations regarding unsolicited communications.

All Service Providers sending commercial electronic messages are obliged to register with the IYS (https://iys.org.tr/), although the system is yet to be open for registration, which appears to contradict the timeline brought by the EM Amendment as the registration period should have started as of 4 January 2020. The website states that the system will be up and running soon for the Service Providers and offers a free notification service (through e-mail) for whoever wishes to be notified when the System is up.

The deadline for the Service Providers to register with the IYS is 1 June 2020. As such, the Service Providers are required to upload their lists, which include the Recipients who gave their permission for communications. The Recipients then through the System will be able to see the Service Providers that has identified them as permissioned contacts. The Recipients will be able to reject the entries of the Service Providers by 1 September 2020 through the System, after when the consumers who have not rejected

[168] Regulation on the Amendment of the Regulation on Commercial Communication and Commercial Electronic Messages was published on 4 January 2020 dated and 30998 numbered Official Gazette (https://www.resmigazete.gov.tr/eskiler/2020/01/20200104-2.htm).

[169] "Commercial Electronic Message" is defined under Article 4 of the Regulation on Commercial Communication and Commercial Electronic Messages as messages sent for commercial purposes through data, voice, or video message by electronic means such as telephone, call-center, fax, IVR, smart voice mail systems, e-mails, SMS, etc.

[170] https://www.donotcall.gov/

[171] http://www.tpsservices.co.uk/telephone-preference-service.aspx

[172] A Robinson list provides the list of people who do not wish to receive marketing transmissions.

the entries will be deemed to have given their permission for the communications. However, they will always have the right to opt-out from the communications.

If a Service Provider has taken a person's permission for the communications with a different method than using the System, such permission shall be reported to the System within three business days by the concerned Service Provider. If a Service Provider fails to report the permission to the System, such permission shall be deemed invalid. The three-day period also applies to opting out by the consumer, who will be notified following the permission having been reported to the System. As also described in the "citizens" section of the System (https://iys.org.tr/vatandaslar), consents shall be easily monitored and managed by the recipients through the System.

Until today, complaints related to unsolicited commercial electronic messages have been made via e-Devlet (Turkey's electronic government system) or the Turkish Ministry of Trade's website. Following the EM Amendment, complaints will also be made through the System.

Compliance with the System

In order to comply with what the EM Amendment has brought, the following steps should be followed:

- Assessing whether the right to send commercial electronic messages to the Recipients has been obtained from the Recipients. In this regard, the Service Providers should make sure that they have the means to prove if needed the approval of the Recipient;
- Establishing a process that can communicate with the System's interface and that has all the elements the System requires;
- Registering with the System by 1 June 2020
- Providing the required opt-in and opt-out processes brought by the System. Service Provides should register with the System by 1 June 2020;
- Updating the policies and inventories such as the Data Storage and Destruction Policy and the Personal Data Inventory (which are required by the data protection rules) in accordance with the EM Amendment.

Conclusion

The System aims to provide a centralized mechanism for the Recipients of electronic commercial messages where they will be able to see and edit which Service Providers are allowed to send electronic commercial messages and the means of communication. The IYS website also states that the Recipients will be able to reach the System through different platforms including its mobile application, website, and call-center, which will be instantly synchronized.

The System is expected to provide certainty and transparency to the Recipients whereas it imposes certain obligations on the Service Providers. The Service Providers, in that regard, should take the necessary steps as soon as possible to ensure compliance with what the EM Amendment has brought in order to both avoid administrative fines and to build trust with the Recipients.

3.4. Banks under the Scrutiny of the Turkish Data Protection Authority

By Baran Can Yıldırım and Seniha İrem Akın

Since the enactment of the DP Law, the banking sector has become a field subject to the close examination of the DPA. It is no surprise that banks have been investigated by the DPA several times and will be under scrutiny many more times due to the fact that their daily operations include significant amounts of personal data. As such, banks need to realize their responsibilities arising under the DP Law as soon as possible and take the necessary step without delay. Here, the actions taken by the DPA regarding banking sector, and banks in particular, will be explained.

Data Breaches

As provided in Article 12(5) of the DP Law, a data breach occurs when "personal data are acquired by others through unlawful means." In the case of a data breach, the data controllers are obliged to notify the data subject(s) and the DPA of such situation as soon as possible, within 72 hours to be specific. According to the DP Law, if necessary, the DPA may announce such situation on its website or by other means it deems appropriate.

In Turkey, the banking sector has been the business field that has encountered data breaches by far the most. So far, the DPA has published five public announcements regarding data breaches notified by banks, namely Garanti BBVA[173], İşbank[174], Denizbank,[175] TEB[176], and ING[177]. When these five DPA announcements are evaluated, it can be seen that there are some similarities between these incidents. First of all, all of these data breaches occurred as a consequence of the actions of bank staff. While some of these happened simply due to personnel negligence, some of which occurred as a result of their misconduct. This shows the importance of training the employees and effective administrative measures in a company. In addition, another similarity between these data breaches is that all of them were revealed as a result of either internal audits or examinations carried out by the Banks Association of Turkey through the "Risk Center," an institution that gathers risk information on the customers of crediting and other financial institutions. This also shows the significance and role of periodic internal and external audits carried out by banks concerning data privacy.

The Resolution & Decision

Under Article 16(6), the DPA is entitled to adopt and publish resolutions whenever it determines that the violation is prevalent. In its resolution[178] dated 21 December 2017

[173] https://www.kvkk.gov.tr/Icerik/6580/Kamuoyu-Duyurusu-Veri-Ihlali-Bildirimi-T-Garanti-Bankasi-A-S-">https://www.kvkk.gov.tr/Icerik/6580/Kamuoyu-Duyurusu-Veri-Ihlali-Bildirimi-T-Garanti-Bankasi-A-S-

[174] https://www.kvkk.gov.tr/Icerik/5526/Kamuoyu-Duyurusu-Veri-Ihlali-Bildirimi-Turkiye-Is-Bankasi-A-S-

[175] https://www.kvkk.gov.tr/Icerik/5516/Kamuoyu-Duyurusu-Veri-Ihlali-Bildirimi-DenizBank-A-S-

[176] https://www.kvkk.gov.tr/Icerik/5492/Kamuoyu-Duyurusu-Veri-Ihlali-Bildirimi-Turk-Ekonomi-Bankasi-A-S-

[177] https://www.kvkk.gov.tr/Icerik/5375/Kamuoyu-Duyurusu-Veri-Ihlali-Bildirimi-ING-Bank-A-S-

[178] https://www.kvkk.gov.tr/Icerik/4114/2017-62 https://www.kvkk.gov.tr/Icerik/4114/2017-62

and numbered 2017/62, the DPA adopted a resolution on the protection of personal data in service areas such as reception desks, box offices or front desks. The DPA decided that public and private institutions/organizations which provide services in adjacent order together with more than one employee, are under obligation to take the necessary technical and administrative measures (i) to prevent unauthorized persons from taking part in places such as reception desk, box office or front desk, and (ii) to prevent service recipients from hearing, seeing, learning, or obtaining personal data belonging to each other when they receive services at the same time and near each other. This resolution especially binds banks since the banking and health sectors are especially highlighted by the DPA in the concerned resolution. It is important to note here that the DPA can apply Article 18, which enables it to impose administrative fines on private banks or to notify public banks of disciplinary actions to be taken with regards to the officers and other public officials who serve under the relevant public institution/organization, in case of any action in conflict with this resolution.

Although the DPA has to publish resolutions, it does not always have to publish its decisions. However, a published decision[179], dated 18 September 2019 and numbered 2019/277, is directly linked to the banking sector as the DPA imposed an administrative fine of TRY 100,000 on a bank (he name of which was not disclosed) due to its failure to take all necessary technical and organizational measures for providing an appropriate level of security to prevent the unlawful processing of personal data. Articles 4(c) and 4(ç) provide personal data to be processed for specified, explicit, and legitimate purposes and the data to be relevant, limited, and proportionate to the purposes for which it is processed. In this case, the data provided to the bank by the customer is processed for another purpose, given to him/her in order to reach his/her spouse, which was beyond the scope of the initial processing activity. Thus, such processing was found to be in violation of Articles 4(c) and 4(ç). In addition, the concerned customer also applied to the bank in order to obtain information about how and why the contact information provided by him/her had been used by the bank for other purposes. Here, the DPA also instructed the bank to act in accordance with the Communiqué on the Procedures and Principles of Application to the Data Controller since it found that informing customers that they can learn the details regarding processing activities concerning their data by calling the bank's Service Line is insufficient.

Conclusion

As can be inferred from the above, the DPA has taken a considerable number of actions regarding the banking sector due to the tendency of the sector to deal with loads of personal data in almost all of their operations. Inevitably, banks have more responsibility and liability as the applications of the DP Law evolves. As a final note, the right move for banks would be to take the necessary and adequate steps as soon as possible and train their staff on data privacy.

[179] https://kvkk.gov.tr/Icerik/5545/2019-277

The Output® Selected Essays is a recollection of what ACTECON Team has published throughout the year in various platforms.

It comprises a mixture of our essays, case summaries and articles on recent developments that we have selected during 2019 in competition law, regulation and international trade areas.

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