

THE PUBLIC
COMPETITION
ENFORCEMENT
REVIEW

THIRTEENTH EDITION

Editor
Aidan Synnott

THE LAWREVIEWS

THE PUBLIC
COMPETITION
ENFORCEMENT
REVIEW

THIRTEENTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Aidan Synnott

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGER

Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Tommy Lawson

PRODUCTION AND OPERATIONS DIRECTOR

Adam Myers

PRODUCTION EDITOR

Anna Andreoli

SUBEDITOR

Martin Roach

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

© 2021 Law Business Research Ltd

www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at March 2021, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-818-5

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ACTECON

ANJIE LAW FIRM

ASSEGAF HAMZAH AND PARTNERS

BAKER & MCKENZIE (GAIKOKUHO JOINT ENTERPRISE)

BREDIN PRAT

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ

DRYLLERAKIS & ASSOCIATES

GOODMANS LLP

HANNES SNELLMAN ATTORNEYS LTD

LEE AND LI, ATTORNEYS-AT-LAW

LEÇA ABOGADOS

LINKLATERS C WIŚNIEWSKI I WSPÓLNICY SP K

LLOREDA CAMACHO & CO

MARVAL, O'FARRELL & MAIRAL

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

URÍA MENÉNDEZ PROENÇA DE CARVALHO

VEIRANO ADVOGADOS

WHITE & CASE LLP

CONTENTS

PREFACE.....	v
<i>Aidan Symmott</i>	
Chapter 1 ARGENTINA.....	1
<i>Miguel del Pino and Santiago del Rio</i>	
Chapter 2 BRAZIL.....	16
<i>Mariana Villela, Leonardo Maniglia Duarte and Vinicius da Silva Cardoso</i>	
Chapter 3 CANADA.....	27
<i>Michael Koch, David Rosner and Justine Johnston</i>	
Chapter 4 CHINA.....	39
<i>Michael Gu</i>	
Chapter 5 COLOMBIA.....	54
<i>Enrique Álvarez and Dario Cadena</i>	
Chapter 6 FINLAND.....	67
<i>Mikko Huimala, Lauri Putkonen and Meri Vanhanen</i>	
Chapter 7 FRANCE.....	79
<i>Olivier Billard and Igor Simic</i>	
Chapter 8 GREECE.....	92
<i>Emmanuel Dryllerakis and Cleomenis Yannikas</i>	
Chapter 9 INDONESIA.....	112
<i>HMBC Rikrik Rizkiyana, Farid Fauzi Nasution and Vovo Iswanto</i>	

Contents

Chapter 10	ITALY	123
	<i>Marco D'Ostuni, Giuseppe Scassellati-Sforzolini, Luciana Bellia, Michael Tagliavini and Francesco Trombetta</i>	
Chapter 11	JAPAN	141
	<i>Junya Ae, Michio Suzuki, Ryo Yamaguchi and Lisa Nagao</i>	
Chapter 12	MEXICO	153
	<i>Luis Gerardo García Santos Coy, Carlos Mena-Labarthe, Sara Gutiérrez Ruiz de Chávez and Diego Torres de Nicolás</i>	
Chapter 13	POLAND	167
	<i>Anna Laszczyk and Wojciech Podlasin</i>	
Chapter 14	PORTUGAL	178
	<i>Tània Luísa Faria, Margot Lopes Martins and Guilherme Neves Lima</i>	
Chapter 15	SWEDEN	200
	<i>Peter Forsberg, Johan Holmquist and David Olander</i>	
Chapter 16	TAIWAN	211
	<i>Stephen Wu, Rebecca Hsiao and Wei-Han Wu</i>	
Chapter 17	TURKEY	225
	<i>Bahadır Balkı, Ertuğrul Can Canbolat and Caner K Çeşit</i>	
Chapter 18	UNITED KINGDOM	235
	<i>Marc Israel, Kate Kelliber and Robert Eyres</i>	
Chapter 19	UNITED STATES	273
	<i>Aidan Synnott and William B Michael</i>	
Chapter 20	VENEZUELA	293
	<i>Alejandro Gallotti</i>	
Appendix 1	ABOUT THE AUTHORS	305
Appendix 2	CONTRIBUTORS' CONTACT DETAILS	323

PREFACE

In the reports from around the world collected in this volume, we continue to see international overlap among the issues and industries attracting government enforcement attention. Of particular note this year, many chapters discuss the covid-19 pandemic and related competition matters, including price-gouging investigations and policy statements on collaborations to fight the pandemic. Relatedly, several jurisdictions paid particular attention to sectors such as healthcare, online commerce and retail food. Despite the pandemic, competition enforcement in many jurisdictions continued in line with past practice, while a few jurisdictions saw record fines or activity in certain areas. Meanwhile our contributors from Mexico describe a ‘challenging political environment’ related to competition enforcement.

Several agencies, including those in Argentina, Japan, Poland and the United States had a change in leadership. Perhaps the most significant change comes from the United Kingdom. That chapter provides an informative overview of the UK competition law regime post-Brexit and discusses the competencies and priorities of the Competition and Markets Authority (CMA) as the United Kingdom emerges from the transition period under the European Union Withdrawal Agreement. Our authors note an active agenda for the CMA. Now, for example, ‘global mergers can expect to face parallel reviews on both sides of the English Channel.’

Merger review and enforcement activity remains robust. The chapters that follow note activity in many sectors and several overlapping investigations. Of particular note, both the UK and US chapters discuss the *Sabre/Farelogix* transaction, which was allowed by a court in the United States but blocked by the CMA. We also learn that in 2020, the French Competition Authority blocked a merger for the first time ever. Our authors note that the merger ‘would have created a duopoly between the hypermarket retailers Carrefour and E Leclerc in the conurbation of Troyes city’. Our contributors from Poland note that authorities there issued a record number of merger decisions, and the chapter from Indonesia notes an increase in merger filings there ‘partly due to the expansion of the scope of mergers and transactions that must be notified’ to the Indonesia Competition Commission. Enforcers in several jurisdictions issued merger enforcement guidance. The UK published draft merger assessment guidelines, French authorities published new merger control guidelines and the US federal enforcement agencies published vertical merger guidelines.

The policing of cartels remains a focus of competition agencies around the globe. Japan issued fines for bid rigging in the construction industry. The Canadian Competition Bureau concluded investigations into municipal contract bid-rigging. Greek authorities also conducted several bid-rigging investigations, including in construction and security services. A price-fixing investigation in the banking sector in Greece ‘triggered the biggest dawn-raid ever witnessed’ to date. Cartel fines in Taiwan ‘soared in 2020,’ our authors note, as a result

of fines issued in connection with the hard disk drive suspension products cartel matter there. Portuguese authorities also levied their largest fines ever. These were in cases involving telecommunications services and in the retail food sector.

Digital platforms have continued to attract scrutiny and regulatory action worldwide. Several agencies established groups specifically focused on this area. For example, Japan enacted a Digital Platform Transaction Transparency Act and established an Office of Policy Planning and Research for Digital Markets. French authorities have created a dedicated Digital Economy Unit and are investigating the digital sector. Greek authorities launched a sectoral inquiry into e-commerce and fintech. Several jurisdictions are also investigating digital platforms. Italy is pursuing investigations into Amazon, Apple and Google; Canada is investigating Amazon; France implemented interim measures against Google. And of course the enforcement authorities in the United States filed antitrust cases against Google and Facebook. Turkish authorities are also investigating platforms and are working on a Digitalization and Competition Policy Report. The Mexican COFECE published a Digital Market Strategy and 'created a special Digital Market Division'.

In addition to digital platforms, pharmaceutical companies are also seeing attention from competition enforcement authorities around the globe. For example, UK and Japanese authorities took actions against bid rigging in this sector. Turkey conducted an investigation into alleged collusion for eye treatment drugs. The French Competition Authority also imposed fines in this area. The Italian Council of State upheld a fine imposed by competition authorities there against a pharmaceutical company for 'excessive prices' for certain drugs. Canada concluded an inquiry into conduct involving the ability of generic pharmaceutical manufacturers to access samples of branded drugs for regulatory purposes. The United States also took notable action against pharmaceutical companies.

Another area of similarity is enforcement against resale price maintenance (RPM). Several jurisdictions took actions against such practices. We read that the UK has 'a renewed focus' in this area and concluded a matter involving musical instruments. Musical equipment RPM also attracted regulatory attention by Polish authorities. And resale price maintenance and other potential violations in the Greek wristwatch industry generated a statement of objections from authorities there. Finnish authorities recommended a penalty for a hardware company for engaging in resale price maintenance.

In the coming year, we will watch with interest to see how enforcers around the world approach these (and perhaps other) common areas of interest.

Aidan Synnott

Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
March 2021

TURKEY

*Bahadır Balkı, Ertuğrul Can Canbolat and Caner K Çeşit*¹

I OVERVIEW

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

The Turkish Competition Board (TCB) is the decision-making body of the TCA. The TCB is vested with special power to enforce the competition rules regarding restrictive practices, abuse of dominance and mergers as well as drafting and enacting secondary legislation (i.e., regulations and communiqués) as to the implementation of the Competition Law, providing opinion on the amendments to be made to the legislation with regard to the competition law and monitoring legislation, practices, policies and measures of the other countries, concerning agreements and decisions limiting competition. It should be noted that the TCA is closely watching the developments on global competition law enforcement, especially those made by the European Commission.

In 2020, the TCB made 355 decisions (65 relating to competition violations, 220 relating to merger control, 34 relating to negative clearance or individual exemption, 34 relating to other issues, and two upon a judicial review) and concluded 26 investigations concerning various industries (e.g., financial institutions, information technologies and platform services, cement and ready-mixed concrete markets, fuel, natural gas and autogas markets, port management, mail and cargo services, professional activities, home appliances, furniture, healthcare services, telecommunications, and fertiliser products). The TCB imposed more than 2 billion Turkish lira in administrative fines on the investigated undertakings. Additionally, the TCA publicly announced that it had launched five investigations concerning retail chains and their suppliers, a case concerning the ‘circle of five’ (namely BMW, Daimler, Volkswagen, Audi and Porsche), online auto and real estate platform services, private hospitals and mask producers, and opened four in-depth reviews (Phase II).²

That being said, the TCA has recently focused more on the innovation-driven industries and price hikes or market distortions during the covid-19 outbreak, both of which are in line with the global trends. In effect, technology has advanced rapidly and penetrated all sectors, which has increased the share of intelligence-intensive sectors in global competition and made innovation an important parameter of competition. Furthermore, the ‘internet of things’ and ‘big data’ have gained importance in many sectors, especially in segments close to consumers such as retail, and have become one of the determinants of market power.

1 Bahadır Balkı is a managing partner, Ertuğrul Can Canbolat is a senior associate and Caner K Çeşit is an associate at Actecon.

2 Please bear in mind that the TCA is not obliged to publicly announce all of the investigations or in-depth examinations initiated.

On 30 January 2020, the TCA announced that it had started working on the Digitalisation and Competition Policy Report.³ Furthermore, to ensure that the TCA can act proactively by closely monitoring the digital economy and potential competition law violations that platforms can create, the additional job descriptions are included in the task description of the Strategy Development Department Presidency of the TCA.⁴ Also, the TCA initiated a sector inquiry concerning e-marketplace platforms.⁵ The competition issues in the digital markets were debated at the Istanbul Competition Forum, which was held remotely on 17 December 2020.⁶

Moreover, the TCA attached enormous significance to the effects of the covid-19 pandemic on both the industries and consumers. In this context, the TCA even made announcements in which it warned the market players that price increases and market distortions within the supply chain may not be tolerated.⁷ In addition, the TCA closely monitored the whole economy and did not hesitate to take further action when it suspected a violation of competition.

In addition to the foregoing, 2020 was also a special year for the competition law policy in Turkey due to the amendments made in the Competition Law⁸ which modified or clarified certain legal standards and also introduced new mechanisms, namely *de minimis* principle, significant impediment of effective competition test, behavioural and structural remedies for anticompetitive conduct, settlement and commitment mechanisms. In addition, the TCA has published its Guidelines on the Examination of Digital Data during On-Site Inspections⁹ and opened the draft communiqués on the *de minimis* principle¹⁰ and commitment mechanism¹¹ to public consultation.

From the beginning of 2021, it appears that the TCA will continue scrutinising the innovation-driven markets as well as the pricing practices of the undertakings. So far the TCA has announced that it has initiated five investigations: one against *Facebook/WhatsApp* for data-sharing practices, another against a Turkish producer of pulses and cereals for resale price

- 3 The TCA's announcement on 30 January 2020. <https://www.rekabet.gov.tr/tr/Guncel/rekabet-kurumu-dijitallesme-ve-rekabet-p-874d77d25943ea118119005056b1ce21>.
- 4 The TCB's decision dated 07 May 2020 and numbered 20-23/307. <https://www.rekabet.gov.tr/en/Guncel/competition-board-puts-digital-economy-u-3ea6ef4d5993ea11811a00505694b4c6>.
- 5 The TCB's decision dated 11 June 2020 and numbered 20-28/353-M. <https://www.rekabet.gov.tr/en/Guncel/competition-board-launched-a-sector-inqu-513a2d5acbdbea11811e00505694b4c6>.
- 6 <https://www.rekabet.gov.tr/tr/Guncel/dijital-piyasalardaki-rekabet-sorunlari--98a2d9d74640eb118132005056b1ce21>.
- 7 The TCA's public announcements on 23 March 2020 and 25 March 2020 regarding price increases in the fresh fruits and vegetables market: <https://www.rekabet.gov.tr/en/Guncel/public-announcement--afe54447272ea118125005056b1ce21>, <https://www.rekabet.gov.tr/tr/Guncel/rekabet-kurumu-baskani-birol-kule-nin-ya-19def560896eea11811700505694b4c6>.
- 8 The Law No 7246 Amending the Law on the Protection of Competition was adopted and enacted by the Grand National Assembly of Turkey on 16.06.2020 and was published in the Official Gazette dated 24.06.2020 and numbered 31165 and entered into force.
- 9 Adopted with the TCB's decision dated 8 October 2020 and numbered 20-45/617. <https://www.rekabet.gov.tr/Dosya/guidelines/guidelines-on-the-examination-of-digital-data-during-on-site-inspections1-20201120154515821-pdf>.
- 10 <https://www.rekabet.gov.tr/tr/Guncel/rekabeti-kayda-deger-olcude-kisitlamadig-17f5447afe14eb11812100505694b4c6>.
- 11 <https://www.rekabet.gov.tr/tr/Guncel/taahhut-teblig-taslagi-kamuoyu-gorusune-d715c559af30eb11812300505694b4c6>.

maintenance, and one against banana wholesalers, one against home appliances suppliers and distributors for online sales restrictions and another against an online bookseller on data portability issues..

It completed six investigations into the spare parts certification, wheat flour, association of pharmacies, eye disease drugs and ticketing and fixed broadband internet sectors.

II CARTELS

i Definition of a cartel

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

However, the Competition Law does not provide a definition of practices deemed to be a cartel. Instead, the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position (Regulation on Fines), which further stipulates the procedures and principles relating to the fines to be imposed due to a violation of the Competition Law, defines the cartel as follows: agreements restricting competition or concerted practices between competitors for fixing prices; allocation of customers, providers, territories or trade channels; restricting the amount of supply or imposing quotas, and bid rigging.

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

Lastly, Paragraphs 44 and 57 of the Guidelines on Horizontal Cooperation Agreements sets out that exchange of competition-sensitive information among rivals (e.g., future prices, outputs or sales amounts) is deemed a cartel if it shows the nature of an agreement with the object of fixing prices or quantities.

ii Fines for cartel behaviour

As per Article 16(3) of the Competition Law, to those who commit behaviour prohibited in Articles 4 of the Competition Law an administrative fine shall be imposed of up to 10 per cent of annual gross revenue of undertakings and associations of undertakings or members of such associations to be imposed a penalty, generated by the end of the financial year preceding the decision, or generated by the end of the financial year closest to the date of the decision if it would not be possible to calculate it and which would be determined by the TCB.

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

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

- a* between 2 and 4 per cent for cartels; and
- b* between 5 per mille and 3 per cent for other violations of the undertaking's turnover.

Reviewing the mitigating¹² and aggravating¹³ factors, the TCB is entitled to increase the fine percentage up to 10 per cent of the company's turnover achieved within the previous year.

That said, there are no criminal sanctions in the cartel enforcement of the TCA, except bid rigging in public procurement. If the TCB determines bid rigging in public procurement, it would be possible for the TCA to report this cartel activity to prosecution office.

iii Leniency programme

The Leniency Regulation is the main legislation regulating the requirements and procedures that shall be satisfied in order to apply for a leniency in Turkey. The Leniency Regulation provides immunity or the possibility of a reduced fine for infringements that could qualify as cartels.

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

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

- a* submit information and evidence in respect of the alleged cartel including the products affected, the duration of the cartel, the names of the undertakings party to the cartel, specific dates, locations and participants of cartel meetings;
- b* not conceal or destroy information or evidence related to the alleged cartel;
- c* end its involvement in the alleged cartel except when otherwise requested by the assigned unit on the ground that detecting the cartel would be complicated;
- d* keep the application confidential until the end of the investigation, unless otherwise requested by the assigned unit; and
- e* maintain active cooperation until the TCB takes the final decision after the investigation is completed.

12 Such as provision of assistance to the examination beyond the fulfillment of legal obligations, existence of encouragement by public authorities or coercion by other undertakings in the violation, voluntary payment of damages to those harmed, termination of other violations, and occupation of a very small share by practices subject to the violation within annual gross revenues.

13 Such as recidivism of the violation, maintaining cartel after the notification of the investigation decision, not meeting the commitments made for the elimination of the competition problems within the scope of Article 4 or 6 of the Competition Law, providing no assistance with the examination, coercing other undertakings into the violation.

iii Settlement mechanism

The settlement mechanism was introduced within the amendments made to the Competition Law in 2020. After initiating an investigation, the TCB may, on the request of the parties concerned or on its own initiative, start the settlement procedure, considering the procedural benefits that may arise from a rapid resolution of the investigation process and the differences in opinion concerning the existence and scope of the infringement. Before the notification of the investigation report, the TCB may come to a settlement with the undertakings and associations of undertakings under investigation that acknowledge the existence and scope of the infringement. As a result of the settlement procedure, a discount of up to 25 per cent may be applied to the administrative fine. If the process is concluded with a settlement, the parties to the settlement may not take the administrative fine and the provisions of the settlement text to court. Although the settlement mechanism is envisaged in Article 43 of the Competition Law, the secondary legislation related to it has not been adopted yet.

iv Significant cases

The most significant case in cartel enforcement was against Novartis and Roche. The TCB fined Novartis' and Roche's local businesses a total of 278.5 million Turkish lira for colluding to promote the usage of eye treatment Lucentis over its cheaper alternative Altuzan. The case is very significant because of its international nature. Indeed, similar practices of Novartis and Roche were fined €182.6 million and €444 million by the Italian Competition Authority and the French Competition Authority, respectively. Furthermore, a separate investigation into agreements between Novartis and Roche for eye treatment drugs was conducted by the Spanish Competition Authority.

The other important cartel enforcement of the TCB was related to autogas LPG and fuel stations in a province of Turkey after WhatsApp messages were accepted as evidence disclosing infringement. While assessing WhatsApp messages, the TCB determined that the existence of any employee of an undertaking in a WhatsApp group of undertakings under investigation demonstrates the involvement of that particular undertaking in the violation. Although the TCA defined the violation as a cartel, it refrained from imposing large fines considering the low profit margin of the stations in the autogas LPG and fuel market.

v Trends, developments and strategies

The TCA revealed six cartel activities between January 2020 and February 2021. These cases cover autogas LPG and fuel markets, traffic signalling, ready-mixed concrete, auto expertise services, water chemicals and eye treatment drugs.

The trend this year was the price increases in various sectors following the fluctuation of the Turkish lira. The TCA monitored the undertakings' behaviour to determine whether any price increases stemmed from incremental costs or anticompetitive activities. Furthermore, the TCA used its powers to protect the competitive market structures after the spread of covid-19 pandemic.

vi Outlook

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

As a matter of fact, the TCA is conducting investigations into almost all of the mentioned markets. While the supermarkets are a clear priority for the TCA, new and second-hand automotive, road and sea transport, and hot air balloon and tourism markets are also under scrutiny. Moreover, the TCA is investigating an alleged gentlemen's agreement between private hospitals.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

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

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

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

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

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

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

i Significant cases

In terms of restrictive horizontal agreements, the TCA's most high-profile case related to the market for voluntary insurance for big projects with high-risk capacity (including project financing). In consequence of the investigation, the TCB fined Allianz, Dubai Starr, Eureko, HDI and Sompō Japan for information exchange in certain coinsurance businesses.

There was a hybrid case against post and cargo companies that included both horizontal and vertical restriction of competition allegations. After the investigation, the TCB assessed customer restriction practices as a vertical restriction and imposed fines on DHL, TNT, UPS, and Yurtiçi Kargo for a total amount of approximately 61 million Turkish lira for customer restriction. There were 36 cargo and logistics companies involved in the investigation, but the TCB concluded that only four had infringed competition due to the vertical nature of the practices.

One of the most significant restrictive vertical agreements cases was against Baymak, a manufacturer and distributor of heating systems. The TCB imposed an administrative monetary fine of approximately 27 million Turkish lira against Baymak for the violation of Article 4 of the Competition Law through resale price maintenance practices, restrictions on online sales and non-compete obligations with a duration exceeding five years.

Moreover, the TCB maintained its tough stance against resale price maintenance and imposed a record fine on fuel distributors. The TCA asserted that some documents and findings obtained during the on-the-spot inspections carried out at the premises of the concerned undertakings created the suspicion that those undertakings determined the pump sales prices of their dealers. Furthermore, when (1) the ceiling prices notified to the Energy Market Regulatory Authority and their dealers by the concerned undertakings and (2) minimum prices applied by their dealers are compared, it was determined that the pump sales prices of the dealers were equal to the recommended prices set by the concerned undertakings. Consequently, in March 2020, the TCB imposed a hefty fine amounting to approximately 1.5 billion Turkish lira in total on four undertakings operating in the fuel distribution sector, namely BP, OPET, PO and Shell. However, in January 2021, the Ankara Administrative Court stayed the execution of the fine against OPET on the grounds of lack of concrete evidence.

On the other hand, abusive practices of dominant undertakings were also on the TCA's radar. The TCA concluded two investigations against Google's economic unity. In the first, the TCB decided that Google violated Article 6 of the Competition Law by disadvantaging competitors offering shopping comparison services, complicating the activities of competing undertakings and distorting competition in the shopping comparison services market. The TCB consequently issued a fine amounting to 98 million Turkish lira. On 29 July, Google announced that starting from 10 August, it would remove shopping ads (or 'the Shopping Unit') from its search pages in Turkey. According to the tech giant, the decision was taken because of the uncertainties surrounding the fate of the remedy package that it had proposed to comply with the TCB's decision.

In the second case, the TCB fined Google 196.7 million Turkish lira after ruling that Google was abusing its dominance in the general search services market. The main allegations in the decision were that Google hindered the activities of other undertakings by abusing its dominant position through its updates to general search services and unfairly using AdWords. The TCB ruled that Google had placed paid advertisements at the top of search results that did not clearly carrying the characteristics of advertisements. In addition to the monetary fine,

Google was obliged to submit remedial measures to terminate its anticompetitive behaviour and ensure fair competition within six months and must continue to present compliance measures and annual reports for five years.

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

ii Trends, developments and strategies

The TCA's enforcement against restrictive agreements covers a variety of services. There was no specific priority for the TCA. However, it seems that the TCA adopted a stricter approach to vertical restrictions, especially resale price maintenance.

Obviously, the TCA's investigations show that digital markets are the priority of the TCA in terms of abusive practices. The TCA was much faster than the European Commission while investigating alleged abusive practices of digital platforms. Therefore, we can say that the TCA wants to be a reputable competition authority in enforcement on digital markets.

iii Outlook

There are certainly unresolved issues on the agenda of the TCA. Similarly to the European Commission, the TCA is investigating the 'circle of five' (BMW, Daimler, Volkswagen, Audi and Porsche). The following allegations are being analysed by the TCA:

- a* under the scope of the cooperation for security between the Circle of Five, the maximum speed at which adaptive cruise control can work and the maximum speed at which roofs can be opened and closed was set;
- b* within the scope of the cooperation for environment, the use of a petrol particulate filter was prevented and its roll-out was delayed;
- c* sensitive information regarding selective catalytic reduction (SCR) technology (SCR software and dosing strategy including certification and cost elements) was shared; and
- d* the size of AdBlue tanks was determined.

Investigations regarding vertical restrictions are also ongoing. The TCA is separately investigating Groupe SEB, Philips and DYO.

On the abuse of dominance side, the TCA is conducting two investigations against a local tech giant, Sahibinden.com, particularly operating in the market for online platform services, for renting and selling vehicles and real estate. While one of the investigations is related to excessive pricing, the subject of the other investigation is not publicly available. The TCA is also investigating Google's local search and accommodation comparison services and local online platform Hepsiburada's various practices. Another interesting investigation initiated by the TCA is against online bookseller Nadirkitap.com's restriction of data portability. Furthermore, the TCA's investigation against Facebook and WhatsApp reveals that it is prioritising data-related practices.

Besides the digital sector, the TCA is also examining possible exclusivity practices undertaken by Unilever and Diageo's subsidiary, Mey İçki.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The TCA has the power to conduct market studies. As mentioned in this work, there are market studies concerning digitalisation, online marketplaces and online advertising. Moreover, the TCA has published its interim findings regarding fast-moving consumer goods. The report offers critical insights for the fast-moving consumer goods retail sector, which goes beyond competition law enforcement.

On the other hand, regulations in the regulated markets such as energy and telecommunications do not categorically exclude the application of the competition rules to possible anticompetitive behaviour where sector-specific regulations and competition rules overlap. However, if there is a type of behaviour that is against the sector-specific regulation, it may be analysed in the context of the sector-specific regulation even it is reviewable within the scope of the Competition Law. Additionally, behaviour based on another law may not be accepted as an infringement of the Competition Law. In these circumstances, the TCA carries out its duty to undertake competition advocacy and provides opinions to the other public administrations.

V STATE AID

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

VI MERGER REVIEW

The main legislation on merger review is Article 7 of the Competition Law and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board. With the amendment made in Article 7 of the Competition Law; the significant impediment of effective competition (SIEC) test was adopted by the Turkish competition law system instead of the ‘dominant position test’ regarding the merger or acquisition to provide parallelism with EU legislation. Thus, in addition to prohibiting the creation or strengthening of a dominant position, transactions that can significantly reduce competition are also prohibited.

However, the secondary legislation has not been amended yet. Therefore, it is not possible to predict the TCA’s enforcement strategy in the context of the SIEC test. However, the recently initiated final examinations of the acquisition of sole control of Eaton Corporation’s hydraulic business by Danfoss and the acquisition of the sole control of Europa Multipurpose Terminals by DFDS imply that the TCA is moving towards stricter merger control.

i Significant cases

The TCB conditionally cleared a tie-up between Fiat and Peugeot. The TCB found the takeover would not cause a significant reduction in competition in the sector for the production and sale of private cars and light commercial vehicles of a gross weight of 3.5 to 6 tonnes. However, in the market segment for the production and sale of light commercial

vehicles of up to gross weight of 3.5 tonnes, the deal was found to bear the potential of reducing competition. The TCB decided to grant conditional approval to the deal, taking into account commitments offered by FCA and Koc Holding.

ii Trends, developments and strategies

In 2020, the TCA examined 220 merger and acquisition transactions. There was an increase in the number of M&A transactions examined by the TCA in 2020 compared to the number in 2019. The period in which the notified M&A transactions were concluded by the TCA in 2020 was approximately 18 days following the date of final notification. In 2020, most of the M&A transactions were realised in the production, transmission and distribution of electricity markets. In 2020, with regards to transactions in which the target company is Turkish, the highest transaction value was realised in the field of the activities of the monetary intermediary institutions.

iii Outlook

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

VII CONCLUSIONS

The main message of 2020, during which many plans and initiatives were disrupted by the pandemic, is that competition must be preserved in the digital world. The topic of competition law in the digital era is among the most debated in Turkey. Pricing policies and hikes (especially those in the food and pharma sectors) have been and will continue to be under special focus of the TCA. In addition, in 2020 we observed several interesting cases that brought clarity to certain competition law issues and principles; competition law reform in Turkey that finally brought its rules into fuller conformity with EU standards, including the development of the secondary legislation for a better understanding of the law provisions; and debates on the role of competition law in the digital world and sustainability.

ABOUT THE AUTHORS

BAHADIR BALKI

Actecon

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

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

ERTUĞRUL CAN CANBOLAT

Actecon

Ertuğrul Can Canbolat has extensive knowledge of and experience on all aspects of competition law. Ertuğrul provides legal consultancy services regarding day-to-day competition and regulatory compliance, investigations initiated by the Turkish Competition Authority, merger control issues related to both domestic and cross-border mergers as well as exemption applications and representing clients in judicial review proceedings. Furthermore, Ertuğrul assists in defending local and international clients before the Ministry of Economy in anti-dumping investigations.

He graduated with an LLM degree in international commercial law from the University of Exeter, UK with distinction and graduated from Bilkent University, School of Law in 2011 and finished at the Austrian High School in Istanbul in 2006. He wrote a dissertation on the intersection between competition law and intellectual property law and he received the Dean's commendation for academic excellence. Before joining Actecon in 2015, Ertuğrul worked at several reputable law firms dealing with the issues regarding competition law, M&A, regulatory matters, public procurement law, commercial law, law of obligations, intellectual property law and privatisation.

CANER K ÇEŞİT

Actecon

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

ACTECON

Camlica Kosku, Tekkeci Sok. No. 3-5

Arnavutkoy

Besiktas

34345 Istanbul

Turkey

Tel: +90 212 211 50 11

Fax: +90 212 32 22

bahadir.balki@actecon.com

ertugrul.canbolat@actecon.com

caner.cesit@actecon.com

www.actecon.com

an LBR business

ISBN 978-1-83862-818-5