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ACTECON

The TCA's Tough Stance towards Information Exchanges through Associations of Undertakings

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Dear reader,

We have good news - Turkey continues improving its Competition Law. Now, we have the Settlement Regulation in place. With the introduction of the settlement procedure into the Turkish Competition Law, another step has been taken towards harmonization of the Turkish Competition Law with the European Union legislation. Investigations conducted by the Turkish Competition Authority ("**TCA**") can now benefit more from procedural economy. The enactment of this secondary legislation to guide undertakings and associations of undertakings in a more detailed and precise manner may undoubtedly lead more undertakings to resort to this path.

In this issue, you may also see how courts play a crucial role in shaping the Competition Law. In this regard in Turkey, we draw your attention to Henkel RPM case (and to a crucial argument of the Court while overturning the TCA's decision which argued that there was still a willingness to conduct meetings with retailers who priced below the recommended price level); and to Ro-Ro companies collective price setting case (about standard of proof/lack of evidence). In the European Union ("EU") the General Court upheld the European Commisson's ("EC") decision in Altice gun-jumping case with only a small reduction in fine. This is a reminder (once again) to the companies that the competition authorities take merger control rules and formalities very seriously.

The TCA does not stop dealing with the RPM practices. Have a look at our article on the small household appliances sector case in this regard. Especially nowadays, RPMs are under the strict scrutiny of the TCA, emphasizing (or reminding) to the undertakings that intervening in the resale prices of their buyers in various ways is not OK. Directly intervening in the prices of buyers in a distribution channel or cautioning the distributor(s) to intervene in the resale prices of their buyers, imposing sanctions on undertakings that disrupt price stability, such as terminating the internet sales of the dealers or removing them from online channel constitute severe violations of the Turkish Competition Law.

As regards to the area of there have been some changes to the export formalities. Several expiry review investigations and anti-dumping cases have been initiated by the Turkish Ministry of Trade. We also draw your attention to the overview of the antidumping duties that are set to by the first half of 2022.

The Data Protection Authority of Turkey has produced several important documents, e.g., Guidelines on the issues to be considered when processing biometric data and Recommendation on protection of personal data in the field of artificial intelligence.

And finally, we invite you to discover our Special Focus section, which we are introducing with this issue of the Quarterly Output.

Kind regards,

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In this issue:

Henkel RPM Decision Overturned by the Council of State: New Standard of Proof in RPM Cases?

*On 21 September 2021, the Council of State found that the TCA's earlier infringement decision imposing an administrative monetary fine on Henkel Turkey for determining its customers' resale prices ("**Henkel Decision,**" 19 August 2018, no. 18-33/556-274) was contrary to law.*

In 2018, the TCA initiated a full-fledged investigation to determine whether Henkel Turkey had been determining the resale prices of its customers. As a result of its analysis during the investigation stage, the case team opined for no imposition of an administrative monetary fine against Henkel Turkey. Contrary to the case team's assessment, the Board found the findings and evaluations sufficient to conclude on the presence of an infringement. Indeed, the Board based on the findings and information collected during the investigation resolved to impose an administrative fine of approximately TRY 7 million against Henkel Turkey due to resale price maintenance.

Further to the Board's infringement decision, Henkel Turkey initiated an action for annulment. The Court of First Instance and the regional administrative court decided to reject the stay of execution and annulment requests of Henkel Turkey (i.e., they found that the TCA's Henkel Decision was indeed compliant with the law). The case was then brought before the Council of State, which reversed the regional administrative court's decision by finding the TCA's Henkel Decision contrary to the law.

The Council of State examined the findings of the case and concluded that (**i**) Henkel Turkey was still willing to conduct meetings with retailers that priced Henkel products below the recommended price level, (**ii**) its conduct did not exceed the

level of a "reprehension" towards the retailers' prices and thus, (**iii**) the presence of "a pressure or incentive behaviour" could not be put forth. The Council of State stated that it confirmed that there was not even a statement that could be understood as an intervention by Henkel Turkey.

Considering its assessment provided above, the Council of State concluded in the TCA's Henkel Decision that "the infringement allegations were not evidenced by clear and concrete data and evaluations" and thus the concerned decision had been unlawful.

Çiçeksepeti's Revised Commitments Accepted

*On 5 August 2021 the TCA accepted the revised commitment package offered by Çiçeksepeti İnternet Hizmetleri A.Ş ("**Çiçeksepeti**") (decision dated 08 April 2021 and numbered 21-20/250-106). Çiçeksepeti is an online floral and gourmet food and gift retailer operating in Turkey. The TCA, despite rejecting the first commitment package, deemed the revised package sufficient to remedy the competition concerns and terminated the investigation concerning Çiçeksepeti.*

In summary, Çiçeksepeti committed to:

- notify its dealers that they are unconstrained in dealing with rival online platforms and they are in no way under any contractual or de facto obligation suggesting otherwise;
- immediately add the notification stated above to its contracts;
- notify florists it will approach to establish new dealerships that they are unconstrained to deal with rival online platforms;
- determine the supply amount on special days by mutual agreements that will be reached with the dealers. If the final agreed amount falls below the recommendation made by Çiçeksepeti, Çiçeksepeti will not take this into consideration during the performance review of that dealer or when directing orders to it.

The TCA found the above-mentioned commitments sufficient to remedy the competition concerns and put an end to the antitrust investigation concerning Çiçeksepeti.

TCA Sanctioned Cooperation between Roche and Novartis to Promote Lucentis

*On 13 September 2021 the TCA published its decision regarding the allegation that Novartis Sağlık Gıda ve Tarım Ürünleri San. ve Tic. A.Ş. ("**Novartis**") and Roche Müstahzarları San. A.Ş. ("**Roche**") violated Article 4 of the Turkish Competition Law by jointly promoting the use of the drug named Lucentis, which is more expensive than the drug named Altuzan, both of which are used in the treatment of eye disease.*

The TCA stated that although the use of Bevacizumab, sold under the brand name Altuzan, in intraocular treatments was encouraged worldwide, it was unreasonable for Roche to act in the opposite direction in terms of the strategic preferences and commercial interests of what is expected of an independently operating undertaking. The TCA made this assessment as Bevacizumab is considered to have a significant price advantage compared to Ranibizumab, sold under the brand name Lucentis. In addition, the TCA evaluated Roche's argument that the product is not suitable for use in related treatments, not requesting the addition of these indications to the license, and not developing a single-use form for these treatments, as unreasonable.

The TCA also observed that Novartis spreads negative publicity about the rival product Altuzan to doctors and public authorities, claiming that its use in intraocular treatments leads to undesirable results (endophthalmitis). The TCA declared the conduct of Novartis a violation of Article 4 of the Turkish Competition Law. According to the TCA's determinations, the two companies acted together to promote the use of Lucentis rather than Altuzan in the treatments used intraocularly, which constituted another violation of competition law.

The TCA assessed that (i) Lucentis, which is sold by Novartis, and (ii) Altuzan, which is sold by Roche in the Turkish market, are substitutes for each other in the market of intraocularly used anti-VEGF molecules. The TCA determined that Novartis and Roche are competitors in the relevant product market and

therefore the cooperation agreement between them constitutes a horizontal agreement. Accordingly, the TCA considered that the aforementioned agreement between Novartis and Roche to act together in the relevant product market to promote Lucentis excessively restricts the competition between the parties.

The TCA determined that Novartis and Roche jointly worked on deterring the use of the more affordable Altuzan by doctors, which resulted in a significant cost increase in the health system. The TCA also evaluated that there was no development or improvement within the scope of subparagraph (a) of Article 5 of the Competition Law in the relevant product market. On the contrary, the TCA observed that irreparable damages has arisen on the demand side of the consumers within the scope of subparagraph (b) of the same article. As a result, the TCA concluded that Roche and Novartis cannot benefit from individual exemption within the scope of Article 5 of the Competition Law.

As a result of the evaluations made by the TCA, it was concluded that Novartis and Roche violated Article 4 of the Turkish Competition Law, and thus these companies were fined approximately TRY 167 million and approximately TRY 113 million, respectively.

Sahibinden.com Excessive Pricing Case: No Violation Found or Fines Imposed This Time

*The TCA (re)investigated and on 12 July 2021 decided that the online platform Sahibinden Bilgi Teknolojileri Pazarlama ve Ticaret A.Ş. ("**Sahibinden.com**") did not violate the Turkish Competition Law by way of excessive pricing.*

The TCA decided that Sahibinden.com did not violate Article 6 of the Turkish Competition Law during the investigated period of 2015-2017 by means of applying excessive pricing although the company enjoys a dominant position in the market for "online platform services of providing ad spaces to corporate customers for selling/renting real estate" and for "online platform services of providing ad spaces to corporate customers for vehicle sales." Consequently, it was concluded that there was no need to impose any administrative fines on Sahibinden.com in accordance with Article 16 of the Turkish Competition Law.

Interestingly, in October 2018, the TCA had found the violation of the Turkish Competition Law through "excessive pricing" by Sahibinden.com and imposed an administrative fine of approximately TRY 10.7 million on Sahibinden.com. However, in December 2019, the 6th Chamber of Ankara Administrative Court annulled the TCA's infringement decision on the grounds that the TCA's findings had been based on evaluations made for hypothetical situations and not on material evidence.

Small Household Appliances Sector Faces Heavy Fines: RPM Practices and Online Sales Restrictions

*On 24 August 2021, the Turkish Competition Board ("**Board**") published its reasoned decision regarding its investigation into the allegation that Groupe SEB İstanbul Ev Aletleri Ticaret A.Ş. ("**Groupe SEB**") and İlk Adım Dayanıklı Tüketim Malları Elektronik Tekstil İnşaat ve İletişim Hiz. San. Tic. Ltd. Şti. ("**İlk Adım**"), operating in the small household appliances sector, violated Article 4 of the Turkish Competition determining the resale prices of dealers and by restricting internet sales of the said dealers and other resellers.*

Regarding the determination of the resale prices, the Board evaluated that Groupe SEB intervened in the resale prices in various ways. It assessed that Groupe SEB directly intervened in the prices of dealers in its own distribution channel and also warned its distributor, İlk Adım to also intervene in the resale prices of its own dealers. The Board also determined that Groupe SEB imposed sanctions on some undertakings that disrupted price stability, such as terminating the internet sales of the dealers and removing some dealers who perform physical sales from the online channel. The Board determined that İlk Adım intervened in the resale price of its dealers, with or without any warning or request from Groupe SEB. In this respect, the Board stated that İlk Adım was an independent undertaking, therefore, even if Groupe SEB indeed issued warnings, İlk Adım was responsible for forcing the dealers in its own distribution network into compliance with suggested prices and intervening in the prices of its own dealers. Considering the foregoing considerations, the Board concluded that the aforementioned actions carried out by İlk Adım and Groupe SEB constituted resale price maintenance, a conduct forbidden by Article 4 of the Turkish Competition Law.

Regarding the restriction of internet sales, the Board observed that in certain cases Groupe SEB directly intervened in the online sales of its dealers. The Board also observed that when it intended to intervene in the dealers of İlk Adım, Groupe SEB contacted the executives of İlk Adım and requested a restriction or obstruction. The Board determined that the aforementioned restriction or obstruction conduct was used both as a sanctioning tool to ensure the stability of resale prices and as an action aimed at directly restricting competition. The Board evaluated that even if Groupe SEB issued warnings to İlk Adım, İlk Adım's own purpose was also to interfere with the internet sales of its own dealers. For this reason, the Board assessed that İlk Adım's relevant conduct constituted the restriction of passive sales pursuant to Article 4 of the Turkish Competition Law.

The Board also pointed out that as the actions of Groupe SEB and İlk Adım constituted restrictions of passive sales, those agreements could not be able to benefit from block exemption pursuant to Communiqué No. 2002/2. Additionally, the Board made an assessment pursuant to Article 5 of the Turkish Competition Law and accordingly concluded that the conduct did not fulfil the requirements for an individual exemption.

According to the reasons explained above, the Board concluded that Groupe SEB and İlk Adım violated Article 4 of the Turkish Competition Law by maintaining the resale prices at the final point of sale and by restricting the sales of the said points through Internet. Accordingly, the Board decided to impose an administrative fines of approximately TRY 27 million on Groupe SEB and approximately TRY 647 thousand on İlk Adım.

Biletix Evades Fines Despite Market Foreclosure

*On 12 August the TCA published its reasoned decision in relation to the Biletix case (No. 21-04/53-22, dated 21 January 2021) ("**Biletix Decision**"). The Biletix Decision is peculiar since the TCA even after holding that Biletix had foreclosed the relevant market to its competitors and thereby had infriged Article 4 of the Turkish Competition Law (and ruling that Biletix did not fulfil either of the cumulative criterion stipulated under Article 5 of the Turkish Competition Law for an exemption) opted not to impose administrative fines. It simply held that Biletix shall refrain from entering into contracts that contain exclusivity clauses, or which contain clauses that create de-facto exclusivity and refrain from such [exclusivity] practices.*

As known, an exemption evaluation under Article 5 is superfluous, unless Article 4 of the Turkish Competition Law is infringed. However, the TCA, after outright stating that Article 4 had been violated and, having decided that Biletix Bilet Dağıtım Basım ve Ticaret A.Ş ("**Biletix**") had not fulfilled either of the cumulative conditions stipulating under Article 5, refrained from imposing administrative fines on Biletix.

The TCA held that, while indirect network effects in the market constituted an already present obstacle for competitor undertakings in reaching an adequate customer base, the exclusivity agreements that Biletix entered into with organizers exacerbated this effect. Biletix's argument that it had not eliminated competition in a significant part of the relevant market was rejected by the TCA.

In addition, the TCA stated that exclusivity agreements eliminated the already limited chance of working with a competitor platform, due to the presence of a dominant undertaking (Biletix) and indirect network effects.

In light of the above, even though the TCA is of the opinion that Biletix foreclosed the market to its competitors and did not fulfill the cumulative conditions stipulated under Article 5 of the Competition Law (thereby infringed Article 4 of the Competition Law), it refrained from imposing administrative fines on Biletix.

Settlement Regulation in Turkey: Loading Completed

*On 15 July 2021 the Regulation on the Settlement Procedure in Investigations Concerning Agreements, Concerted Practices, and Decisions Restricting Competition, and Abuse of Dominant Position ("**Settlement Regulation**") came into force in Turkey. The document stipulates the procedures and principles of settlement with undertakings subject to investigations which concern prohibited activities under Article 4 (which prohibits agreements that are restrictive of competition) and Article 6 (which prohibits the abuse of dominance) of the Turkish Competition Law. With the implementation of* the *settlement procedure,* the *TCA aims to swiftly terminate the violations and the investigation process of these violations to reduce public costs.*

The Settlement Regulation elaborates the settlement procedure, which is regulated by Article 43 of the Turkish Competition Law. As such, undertakings, and associations of undertakings under investigation the Settlement Regulation, they accept their involvement to conducts that are prohibited by Articles 4 and 6 of the Turkish Competition Law and the scope of the violation until the delivery of the investigation report.

The TCA may initiate the settlement process *ex-officio* or pursuant to a request from the parties concerned. The Settlement Regulation provides that, in case a settlement is reached, a 10% to 25% reduction in the fine is to be applied. It is important to note that once the settlement request in accordance with the Settlement Regulation is made, it cannot be withdrawn. Moreover, it is set forth that the TCA shall cease the investigation with a final decision within 15 days from the date it adopts the settlement text. The final decision also includes the administrative fine to be imposed. If the parties settle with the TCA, the subject matter of settlement and the amount of the administrative fine cannot be challenged in the competent courts.

It must be noted, however, that the initiation of the settlement negotiations does not mean that the parties to the settlement negation have accepted the alleged infringement. The parties can withdraw from the negotiations any time, prior to submitting the negotiation letter. Furthermore, if the parties withdraw from the negotiations, the TCA cannot base its final judgement on the statements submitted during the settlement negotiations. Following the termination of the negotiations, the normal course of the investigation shall resume.

The Settlement Regulation places high emphasis on confidentiality. It is stated that the party to the settlement shall keep the subject of the negotiation and the information and documents it reached within the scope of this negotiation confidential, until the final decision. If it is determined that the party has violated its confidentiality obligation after the final settlement decision, a new investigation can be launched concerning such party. Moreover, violation of the confidentiality agreement may be deemed as an aggravating factor when calculating the amount of the administrative fine.

A good example of the Settlement Regulation in action is the settlement with a number of companies active in the market for electrical and electronic household goods, including Türk Philips, Dünya Dış Ticaret, Melisa Elektrikli ve Elektronik Ev Eşyaları, Nit-Set Ev Aletleri, and GİPA Dayanıklı Tüketim Mamülleri, reached on 9 August 2021. As a result of it the TCA decided to terminate its antitrust investigation.

With the introduction of the settlement procedure into the Turkish Competition Law, another step has been taken towards harmonization of the Competition Law with the European Union legislation. Additionally, with the settlement procedure, investigations conducted by the TCA can benefit more from procedural economy. Following the amendments made to the Turkish Competition Law, the enactment of a secondary legislation in order to guide undertakings and associations of undertakings in a more detailed and precise manner may undoubtedly lead more undertakings to resort to this path.

TCA Terminates Investigation due to Sufficient Commitments (Association of Insurance Companies case)

*On 2 August 2021 the TCA published its reasoned decision regarding the assessment of the revised commitments submitted by the Association of Insurance, Reinsurance, and Pension Companies of Turkey (Türkiye Sigorta, Reasürans ve Emeklilik Şirketleri Birliği) ("**TSB**") and OSEM Sertifikasyon A.Ş. ("**OSEM**"). After finding the revised commitments sufficient to remedy competition concerns, the TCA decided to terminate the investigation.*

On 29 August 2019, the TCA initiated an investigation concerning TSB and OSEM on the grounds that since OSEM was a 100% subsidiary of TSB and had senior executives of the insurance companies, as a result of the accreditation of OSEM from the Turkish Accreditation Agency (TÜRKAK), the activities of other undertakings that issue equivalent parts certification in the market could become more difficult, and that competitors could be excluded from the market corresponding the various activities of this undertaking, which is neither impartial nor independent.

The TCA received a revised commitment form from OSEM on 23 December 2020, thereafter, not finding Articles 2 and 3 of the initial commitment forms submitted by OSEM sufficient to resolve the competition concerns. After assessing the revised commitments, the TCA found them proportionate to remedy the competition issues.

Article 2 of the initial commitment form, which included commitment related to the sharing of data on repair parts in vehicle insurances kept by SBM, was not found suitable for eliminating competition problems nor effectively applicable in a short time due to the fact that the minimum certainty for data sharing had not been provided.

Article 3 of the initial commitment included a statement that no matter to which buyer the OSEM was transferred, there would be at most one employee/employees or manager/managers of each insurance company among the members of the board of directors. The TCA assessed this commitment and decided that it could create an obstacle for OSEM, which was legally beyond the control of the TSB, to continue to operate as a *de facto* association of undertakings with a board of directors with representatives from more than one insurance company and if there were managers from different insurance companies at the management level of OSEM as well, the problems arising from OSEM's being under the control of the association could persist.

In its turn, Article 2 of the revised commitments states that (i) the Protocol signed between OSEM and SBM will be terminated, (ii) no other similar Protocol will be signed afterwards, and (iii) if the information on vehicle repair parts is shared between SBM and OSEM, attempts will be made to provide access to this information by other undertakings. The scope of Article 3 of the revised commitments was extended to cover senior managers as well. Therefore, it is stated that no matter which buyer OSEM is transferred to, there will be at most one employee of the insurance company among the board of directors' members and senior managers. Accordingly, the revised versions of the commitments were deemed appropriate by the TCA and the investigation was concluded.

TRY 1.3m Administrative Fine Imposed on an Undertaking Operating in the Ro-Ro Transportation Market is Annulled by the Court

*On 16 July 2021 the Ankara 16th Administrative Court ("**Court of First Instance**") annulled[1] the Turkish Competition Authority's decision No. 19-16/229-101 dated 18 April 2019 ("**TCA's decision**") which imposed a TRY 1,347,056.44 administrative fine on Istanbullines Denizcilik Yatırım A.Ş. (currently Ziyad Denizcilik Yatırım Anonim Şirketi; "**LINES**").*

The TCA's decision sanctions the undertakings operating in the Ro-Ro transportation market on the Ambarlı-Bandırma line, including LINES, for collectively determining the transportation prices applied to the transporters and thus violating Article 4 of the Turkish Competition Law. LINES appealed before the Court of First Instance for the annulment of the TCA's decision.

The Court of First Instance determined that within the scope of the documents obtained during the investigation:

- there is no communication evidence indicating that LINES is a party to the price agreement between Tramola Gemi İşletmeciliği ve Ticaret A.Ş. ("**TRAMOLA**") and Kale Nakliyat Seyahat ve Turizm A.Ş. ("**KALE**");
- the communication evidence between TRAMOLA and KALE, only by itself, cannot meet the standard of proof required for LINES to be regarded as a cartel participant;
- evidence of communication between TRAMOLA and KALE needs to be supported by more detailed economic evidence belonging to LINES, especially with regards to the exact dates of the price increases of the investigated undertakings; and
- the line of causality between the beginning of the alleged violation and the actions alleged to has led to the violation have not been proven with clear, solid, or convincing evidence.

On these grounds, the TCA's decision, which imposed a TRY 1,347,056.44 administrative fine on LINES, was annulled by the Court of First Instance.

1 Decision dated 15 April 2021 and numbered E. 2020/431, K. 2021/873.

General Court Upholds EC's Findings in Altice Gun jumping Case

*The General Court ("**GC**") dismissed Altice Europe's action against the European Commission ("**EC**") decision imposing in 2018 two fines on the company totaling EUR 124.5 million in connection with the acquisition of PT Portugal and violation of the core principles of the concentration control – standstill and notification obligations.*

The GC clarifies the definition of the gun jumping in its ruling, emphasizing that the key element of it is the early implementation of any action that confers control, or in other words, provides with ability to exercise decisive influence. This was exactly the Altice case with its pre-closing clauses of the Share Purchase Agreement, which enabled Altice to exercise decisive influence over PT Portugal even before closing of the transaction and even before its notification to the EC. For instance, Altice was involved in appointment and dismissal of PT's senior management, modifications to PT's pricing policies, and renegotiation of contracts (its consent was required for that), as well as exchange of commercially sensitive information.

The GC confirmed that closing of the transaction before notifying it to the EC and closing before obtaining the approval of the competition authority constitute two separate infringements with two different fines. Even though the GC ruled that the fine was lawful and proportionate, nevertheless it reduced the one for the violation of the notification obligation by 10% due to the fact that Altice did inform the EC of the transaction and even sent a case-team allocation request on its own initiative and prior to the signing of the SPA.

The case is a good reminder for all of us that compliance with the standstill and notification obligations is important. Due care should be taken with regards to the pre-closing clauses to make sure those are not conferring any (*de facto*) control/influence of the buyer over the target companies.

Google Faces Fine of EUR 500 million for Non-compliance with Interim Measures in France

*On 13 July 2021 the Autorité de la concurrence ("**Autorité**") issued a fine of EUR 500 million against Google for non-compliance with the interim measures issued against it in April 2020. Moreover, it ordered Google to comply with the relevant measures on all points issued by its initial decision, under the threat of periodic penalty payment.*

On 9 April 2020, the Autorité decided that Google's unilateral decision to no longer display extracts from articles, photographs, and videos within its various services unless the editors give it permission free of charge constituted an abuse of dominant position and that it caused serious and immediate harm to the press sector. Accordingly, it issued seven measures against Google.

Following the reference by several press publishers and agencies to the Autorité of practices of non-compliance with the relevant measures, the Autorité considered that Google has disregarded, in several respects, several measures of the decision and in particular, interim measure No. 1, the most important one, relating to the obligation to negotiate in good faith and according to objective, transparent, and non-discriminatory criteria.

In addition, interim measure No. 2 required Google to disclose to press publishers and agencies the information required for a transparent assessment of the remuneration due for related rights and its allocation. The Autorité held that Google's provision of relevant information was partial, late, and insufficient.

Consequently, the Autorité imposed a fine of EUR 500 million on Google and further ordered it:

- to propose a remuneration, offer for the execution of interim measure No. 1, meeting the requirements of its interim decision; and
- to supplement this offer, in accordance with the French Intellectual Property Code in relation of interim measure No. 2.

Finally, to ensure the effective execution of the above interim measures, the Authorité has attached a fine of EUR 300,000 per day of delay at the end of the two-month period starting from the date of the formal request to reopen negotiations made, if necessary, by each of the complainants. Google also will have to justify compliance with the Autorité's decision by means of monthly monitoring reports.

Fines Totaling over GBP 260 million for Drug Companies for Unfair Prices

*As a result of its investigation into the conduct of several pharmaceutical firms, on 15 July 2021 the Competition and Markets Authority ("**CMA**") has imposed fines totaling over GBP 260 million for competition law breaches in relation to the supply of hydrocortisone tablets at unfair prices.*

The CMA's investigation set forth that Auden McKenzie and Actavis UK (now known as Accord-UK) charged the National Health Service ("**NHS**") excessively high prices for hydrocortisone tablets for almost a decade. Hydrocortisone tablets are used to treat adrenal insufficiency, which includes life-threatening conditions such as Addison's disease.

Auden McKenzie and Actavis UK were found to have increased the prices of 10mg and 20mg hydrocortisone tablets by over 10,000% compared to the original branded version of the drug, sold by the drug's previous owner prior to April 2008. Accordingly, Accord-UK - and, for their ownership periods, its parent companies Intas and Accord and its former parent firm Allergan - have been fined GBP 155 million for charging the NHS excessive and unfair prices for hydrocortisone tablets from 2008 to 2018.

In addition to excessive and unfair pricing, it is established that Auden McKenzie paid pharmaceutical companies Waymade and AMCo (now known as Advanz Pharma) not to enter the market with their own generic versions of hydrocortisone tablets. The relevant agreement was in place for approximately four years and as a result, Advanz - and its former parent Cinven - and Waymade were fined a total of GBP 43 million and GBP 2.5 million, respectively.

Mastercard Facing UK's Biggest Class-Action Suit for Damages

Walter Merricks, a former financial ombudsman, brought a lawsuit against Mastercard on behalf of 46 million consumers, on the grounds that Mastercard's interchange fees are reflected on consumers as higher prices. This makes the case the UKs biggest class-action suit for damages over the payment fees after the court approved a GBP 10 billion lawsuit.

In December 2020, the UK Supreme Court overturned the decision of the Competition Appeal Tribunal ("**CAT**") to throw out Merricks' case in 2017 and sent it back for reconsideration.

Followed by this, the CAT allowed the claim to move forward. It ruled that Merricks' lawsuit cannot include a claim for compound interest and cannot include claims from the estates of consumers who died between 1992 and 2008.[1] This ruling enabled Merrick to bring the lawsuit on behalf of people who were over age 16 and had purchased goods and services from businesses accepting Mastercard between 1992 and 2008, thus involving Mastercard in the biggest class-action suit in UK history.

The Mastercard case stems from the 2007 infringement decision of the European Commission finding that the interchange fees were in breach of the EU competition law.

1 ft.com/content/9125338a-e298-4cc1-8482-8bd178d42bb8.

Highlights of the Evaluation of the Market Definition Notice in the EU

*On 12 July 2021 the EC published a Staff Working Document in relation to the main findings of the evaluation of the Market Definition Notice 1997 ("**Notice**") in the EU. The evaluation, launched in March 2020, aimed at assessing the functioning of the Notice and deciding whether it needed revision. The evaluation focused on four specific aspects of market definition: (i) digitalization, (ii) innovation, (iii) geographic market definition, and (iv) quantitative techniques.*

The Notice aids in the process of the competitive analysis of the relevant market and establishing its boundaries. Market definition is an important initial step of the assessment in antitrust and concentration control cases. The evaluation showed that the Notice provided clarity and transparency on how to define market(s). Those principles of the market definition remain relevant.

At the same time, the Notice does not fully reflect the recent developments in market definition practices, particularly those related to digitalization. To be more precise, the following may require updating: (i) the use and purpose of the SSNIP (Small Significant Non-Transitory Increase in Price) test in defining relevant markets; (ii) digital markets, in particular with respect to products or services marketed at zero monetary price and to digital 'ecosystems'; (iii) the assessment of geographic markets in conditions of globalization and import competition; (iv) quantitative techniques; (v) the calculation of market shares; and (vi) non-price competition (including innovation).

Therefore, these are issues to be addressed/revised in the near future.

Exports of Clinkers and Certain Types of Fertilisers Subject to Registration

On 4 September 2021, through Communiqué No. 2021/7 Amending Communiqué No. 2006/7 on Products Whose Exportation is Subject to Registration, exports of clinkers[1] and certain types of fertilizers[2] became subjected to registration.

With a press release dated 4 September, the Ministry stated that due to the COVID-19 pandemic, production processes had been disrupted in all sectors and serious deterioration had taken place in the global supply chains of raw materials and semi-finished products as well as logistics processes, which in turn had caused significant increases in cement and fertiliser prices. The Ministry noted that the exportation of cement already was subject to registration, yet as the current circumstances hindered the construction of buildings, decided that the exports of clinkers also would be subject to registration to monitor clinker exports. The Ministry also emphasized that to ensure the continuous supply in the agriculture sector in Turkey, exports of fertilisers also needed to be supervised.

Accordingly, before exporting clinkers and certain fertilisers, exporters are now required to register their customs declarations to the General Secretariat of the relevant Exporters' Associations. As a rule, customs declarations registered by

the General Secretariat of Exporters' Association must be submitted to the customs authorities within 30 days from the date of the Exporters' Association's approval.

1 Classified under CN Code 2523.10.00.00.00.

2 Fertiliser types whose exportation is subject to registration are as follows: (i) diammonium hydrogen orthophosphate (DAP) classified under CN Code 3105.30.00.00.00, (ii) NP (20-20-0) classified under the CN Code 3105.59.00.00.11, and (iii) NPK (15-15-15) classified under CN Code 3105.59.00.00.11.

Anti-Dumping Measures Concerning Imports of Welded Stainless-Steel Tubes, Pipes, and Profiles Originating in Vietnam

*On 10 July 2021, through Communiqué No. 2021/38 on the Prevention of Unfair Competition in Imports, the Ministry concluded its dumping investigation concerning the imports of "welded stainless steel tubes, pipes, and profiles"[1] ("**concerned products**") originating in Vietnam.*

The Ministry observed that the imports of the concerned products originating in Vietnam (**i**) had increased in both absolute and relative terms and (**ii**) caused price undercutting as well as price depression to the prices of the domestic industry. Additionally, the Ministry found that Vietnamese laws on land, price formation, and energy prices, and the state's intervention in steel production prevented market economy conditions from prevailing and thus, the Ministry constructed the normal value based on the cost of production in Turkey for the like product, plus sales, general and administrative costs, and a reasonable amount for profits. Considering the deterioration in economic indicators such as production, domestic sales amount, commercial cost, unit product profitability from domestic and total sales, and capacity utilization ratio in 2019 compared to 2017, it was evaluated that there has been material injury to the economic indicators of the domestic industry. The Ministry noted that there is a causal link between the dumped imports and the material injury suffered by the domestic industry.

Consequently, the Ministry decided to impose anti-dumping duties ranging between 19.64% and 25% on the imports of welded stainless-steel tubes, pipes, and profiles originating in Vietnam.

1 Classified under HS Codes 7306.40.20.90.00, 7306.40.80.90.00, and 7306.61.10.00.00.

Expiry Review Investigations into the Imports of PVC-S and Ballpoint Pens Resulted in a Continuation of Anti-Dumping Duties

*On 14 and 15 July 2021, the Ministry promulgated two communiqués regarding the prevention of unfair competition in imports wherein the Ministry has concluded the expiry review investigations concerning the imports of (**i**) "only suspension type of polyvinyl chloride"[1] ("**PVC-S**") originating in the United States of America ("**USA**") and Germany, and (**ii**) "ballpoint pens"[2] originating in China.*

The expiry review investigation concerning the imports of PVC-S originating in the USA and Germany was concluded on 14 July 2021 through Communiqué No. 2021/29. Within the scope of the expiry review investigation, the Ministry did not calculate a new dumping margin; rather, the Ministry noted that the dumping margins established during the original investigation (concluded in 2003) were indicative of the exporters'/producers' behaviors in the absence of the anti-dumping measures. The Ministry observed that while the imports of PVC-S originating in the USA have decreased in both absolute and relative terms, imports originating in Germany have increased in absolute and relative terms. Additionally, it has been seen that the imports originating in the USA have not resulted in any price depression or price suppression whereas the imports originating in Germany has resulted in price depression and price undercutting of the domestic prices of the domestic industry (Petkim Petrokimya Holding A.Ş.).

In terms of the domestic industry's economic indicators, although the Ministry noted that some indicators such as end-of-period stocks and stock conversion speed demonstrated a positive trend, other economic indicators such as profitability, domestic sales in terms of quantity and value as well as investment deteriorated during the 2017-2019 period. When all economic indicators as well as the import trends were evaluated holistically, the Ministry established that the expiry of the concerned measures likely would result in a continuation or recurrence of dumping and injury. Consequently, the Ministry decided that the application of the anti-dumping measure of 7.93% of the CIF value of the product shall continue for another five years.

The expiry review investigation concerning the imports of ballpoint pens originating in China was concluded on 15 June 2021 through Communiqué No. 2021/37. It should be noted that none of the producers/exporters located in China cooperated with the Ministry within the scope of the expiry review. Similar to the afore-mentioned expiry review, the Ministry did not calculate a new dumping margin for the expiry review and relied on the dumping margins (ranging between 232% and 633%) established during the original investigation (concluded in 2004). The Ministry observed that the imports of point pens originating in China demonstrated a fluctuating trend during 2017-2019. However, it has been seen that the imports did not cause price depression or price undercutting. On the other hand, when the domestic industry's economic indicators were examined, the Ministry noted that the overall state of the domestic industry reflected a positive trend due to the anti-dumping measures. However, given that China is the leading ballpoint pen producer in the world with production and export capability, and Chinese producers have knowledge of the Turkish market, and they do not face any obstacles regarding market access, the Ministry established that the expiry of the concerned measures likely would result in a continuation or recurrence of dumping and injury. Eventually, the anti-dumping duty of 0.066 USD/piece was imposed on the imports of ballpoint pens originating in China.

1 Classified under the HS Code 3904.10.00.00.19.

2 Classified under HS Codes 9608.10.10.10.00 and 9608.50.00.10.00.

Overview of the Anti-Dumping Duties to Expire in the First Half of 2022

*Through Communiqué No. 2021/39 on the Prevention of Unfair Competition in Imports ("**Communiqué**"), the Ministry announced the anti-dumping duties that expired in the first half of 2021 and those that will expire in the first half of 2022.*

According to the Communiqué, the following anti-dumping duties expired as the domestic producers of the concerned products did not submit a request to the Ministry for the initiation of a review investigation:

- *"polystyrene"* classified under HS Code 3903.19.00.00.00 originating in Egypt;
- "*Cotton, neither carded nor combed*" classified under the HS Code 52.01 originating in the USA; and
- "*Flat products of iron or non-alloy steel, hot-rolled or cold-rolled painted, varnished or coated with plastics*" classified under HS Codes 7210.70.80.90.11 and 7210.70.80.90.10 originating in China.

The relevant anti-dumping duties listed in the Communiqué that will expire in the first half of 2022 unless the domestic producers of the concerned products request an expiry review investigation are as follows:

- *"Cored wire of base metal"* classified under HS Code 8311.20.00.00.00 originating in China;
- *"Phthalic anhydride"* classified under HS Code 2917.35.00.00.00 originating in Korea;
- *"Solar panels"* classified under HS Code 8541.40.90.00.14 originating in China;
- *"Unbleached kraft liner paper"* classified under HS Codes 4804.11.11.10.00, 4804.11.15.10.00, 4804.11.90.10.11, and 4804.11.90.10.12 originating in the USA; and
- "*Pentaerythritol (pentaerythrityl)*" classified under HS Code 2905.42.00.00.00 originating in China.

Exports of Personal Protective Equipment and Masks No Longer Subject to Authorization

Within the scope of the measures taken to ensure the supply chain of the products necessary to protect healthcare workers as well as the public during the COVID-19 pandemic, Turkey imposed control measures on the exports of certain products in the first half of 2020. As the pandemic seems to be under control, the Ministry has repealed some of the restrictive measures on trade.

The first case of infection from COVID-19 in Turkey was detected on 11 March 2020. A week earlier, on 4 March 2020, the Ministry subjected, through Communiqué No. 2020/4 Amending the Communiqué No. 96/31 on Products Whose Exportation is Prohibited and Subject to Prior Authorization, the exportation of personal protective equipment to the Pharmaceuticals and Medical Devices Administration of Turkey's authorization. The following products were thus subject to export control: (**i**) protective masks with gas, dust, and radioactive dust filters, (**ii**) tubus (protective work clothing), (**iii**) liquid-proof aprons (aprons used to protect from chemicals), (**iv**) protective glasses, (**v**) medical masks, and (**vi**) medical and surgical gloves.

On 6 August 2021, through the Communiqué No. 2021/6 Amending the Communiqué No. 96/31 on Products Whose Exportation is Prohibited and Subject to Prior Authorization (Exportation: 2021/6), the authorization requirement for the exportation of the aforementioned products was repealed.

Turkey to Publish an Action Plan for the Green Deal

*On 16 July 2021, through Presidential Decree No. 2021/15 ("**Presidential Decree**"), Turkey took its first concrete step to implement the Green Deal.*

The "2030 Agenda for Sustainable Development," which entered into force with the unanimous votes of 193 member states of the United Nations, including Turkey, aims to bring poverty to an end and to increase welfare, as well as to make the global fight against climate change an integral part of an economically and socially inclusive development model. In this regard, while policies to combat climate change gain speed all across the globe, the goal of achieving sustainable economic growth also has brought climate change to the center of international economic and trade policies.

The European Union ("**EU**") announced on 11 December 2019 that it would adopt a new growth strategy that would transform its economy with the European Green Deal, and in the following process, it was seen that other leading actors of the international economy set their targets for the green transformation of their economies.

Consequently, as per the Presidential Decree, the "Action Plan for the Green Deal" will be issued by the Ministry of Trade on the official website of the Ministry in order to contribute to Turkey's transition to a sustainable and

green economy and to ensure that Turkey adapts to the changes envisaged by the European Green Deal in a way that will preserve and further the integration provided within the scope of the Turkey-EU Customs Union.

In this respect, the Presidential Decree highlights that in line with the changes envisaged in the European Green Deal and the EU policies, the transformation in international trade and economy, and Turkey's 2023 and development goals, maintaining and improving Turkey's competitiveness in its exports are of great importance in terms of strengthening Turkey's integration into the global economy and supply chains with the advanced economic integration established within the scope of the Turkey-EU Customs Union.

DPA Guidelines on the Critical Issues to be Considered When Processing Biometric Data

*The Turkish Personal Data Protection Authority ("**Authority**" or "**DPA**") published "Guidelines on Issues That Need to Be Considered While Processing Biometric Data" ("**Biometric Data Guidelines**"). The Biometric Data Guidelines define biometric data and introduce their processing conditions and principles in accordance with Law No. 6698 on the Protection of Personal Data ("**KVKK**").*

The Biometric Data Guidelines start with emphasizing that the definition of biometric data is not provided for comprehensively in any legislative text. Therefore, the long-awaited need with regards to the scope of the biometric data is better satisfied with the explanations of the Biometric Data Guidelines.

In the section "Biometric Data Processing Principles," the principles that need to be followed in the processing of biometric data are detailed with reference to the decisions of the Turkish Constitutional Court and the Personal Data Protection Board ("**Board**") and examples.

In this regard, the Guidelines stipulates that the data controller will be able to process biometric data only pursuant to the general principles set forth in Article 4, the conditions set forth in Article 6 of the KVKK, and in accordance with the principles set forth below:

- The data processing activity should not prejudice the essence of fundamental rights and freedoms.
- The method used should be suitable for achieving the purpose of processing and the data processing activity should be suitable for the purpose to be achieved.
- The biometric data processing method should be necessary for the purpose to be achieved.
- There should be proportionality between the method and the purpose to be achieved by data processing.
- Personal data should be kept only for as long as necessary and after the necessity ceases, the respective data should be destroyed without delay.
- Data controllers must fulfil their obligation to inform in accordance with Article 10 of KVKK, limited to the purpose of processing.
- In case explicit consent is required, the explicit consent of the data subjects must be obtained in accordance with KVKK.

In the last section titled "Biometric Data Security" the document states that the data controller should take the necessary technical and administrative measures in line with the Board's decision numbered 2018/10 to ensure biometric data security. In this section, numerous technical and administrative measures are set forth as a reference.

EU Digital COVID Certificate System: Turkey, North Macedonia, and Ukraine Join the "Club"

The EC adopted equivalence decisions for North Macedonia, Turkey, and Ukraine connecting the countries to the EU's system. This means that COVID certificates issued by North Macedonia, Turkey, and Ukraine are accepted in the EU, as of 20 August 2021, under the same conditions as the EU Digital COVID Certificate.

At the same time, the three countries agreed to accept the EU Digital COVID Certificate for travel from the EU to their countries facilitating safe travel to and from the EU.

The list of the countries implementing the EU Digital COVID Certificate system is growing and the countries are opening up safely together.

The Protection of Personal Data and Artificial Intelligence: Recommendations to Developers, Manufacturers, Service Providers, and Decision Makers

*The Authority published its guidelines, "Recommendations on the Protection of Personal Data in the Field of Artificial Intelligence" ("**Artificial Intelligence Guidelines**"). Therein, the Board introduced, in keeping with European examples, its recommendations for the protection of personal data in artificial intelligence applications for developers, manufacturers, service providers, and decision makers operating in the field of artificial intelligence.*

Within this context, the Guidelines first refer to the necessity of managing the techniques and applications of artificial intelligence properly as they have started to have direct effects in many areas of life and set forth that artificial intelligence studies and applications based on personal data processing should comply with KVKK and its secondary legislation.

The Guidelines continue with general recommendations and concludes with recommendations on the protection of personal data in artificial intelligence applications conducted by developers, manufacturers, service providers, and decision makers operating in the field of AI. This broad range of recommendations even includes the protection of the freedom of individuals not to trust the outcome of the suggestions offered by artificial intelligence applications and are of particular importance since they reflect the Authority's perspective.

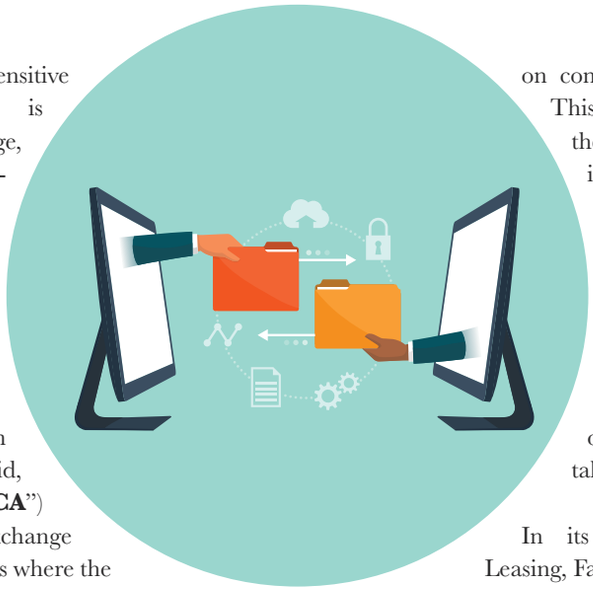
The respective guidelines indicate that if a high risk is foreseen in terms of data protection in artificial intelligence applications based on processing personal data, a privacy impact assessment should be applied. It also states that in artificial intelligence applications that process special categories of personal data, measures should be taken in accordance with special category data protection rules.

Within the scope of the recommendations for developers, manufacturers, service providers, and decision makers, it is stated that the rights of the data subjects regarding personal data arising from national and international legislation should be protected. It is further noted that the quality, qualification, quantity, category, and content of the data used should be evaluated and minimum data usage should be performed.

The accuracy of the developed artificial intelligence model should be followed. Lastly for the decision makers, the Artificial Intelligence Guidelines emphasizes that (**i**) the principle of accountability must be observed, (**ii**) the role of human intervention in the decision-making processes of artificial intelligence should be determined, and (**iii**) users should be given the chance to distrust suggestions made by artificial intelligence.

TCA's Tough Stance towards Information Exchanges through Associations of Undertakings

by Caner K. Çeşit, Ulya Zeynep Tan and Bahadır Aslan



The sharing of commercially sensitive information amongst competitors is categorized as information exchange, which may affect their decision-making processes and ultimately affect competition. Professional societies are considered associations of undertakings and information exchange through an association of undertakings is usually subject to Article 4 of Law No. 4054 on the Protection of Competition ("**Competition Law**"). That being said, the Turkish Competition Authority ("**TCA**") may exempt this kind of information exchange from the application of Article 4 in cases where the conditions set out in Article 5 of the Competition Law are satisfied.

Recently, the TCA's approach to information exchange through associations of undertakings has become stricter as to the sharing of commercially sensitive information due to competitive concerns. Within this article, we aim to reflect on the issue of information exchange through associations of undertakings as handled by the TCA in three of its recent decisions. The Turkish Ceramic Federation (*Türkiye Seramik Federasyonu*, "**SERFED**"), the Construction Equipment Distributors and Manufacturers Association of Turkey (*Türkiye İş Makineleri Distribütörleri ve İmalatçıları Birliği*, "**İMDER**"), and the Forklift Distributors and Manufacturers Association (*İstif Makinaları Distribütörleri ve İmalatçıları Derneği*, "**İSDER**") were the associations of undertakings subject to the relevant decisions whose applications for negative clearance and/or individual exemption were rejected because of competitive concerns.[1]

General Framework on the Information Exchange through Associations of Undertakings

The TCA analyses the potential effects of information exchange on competition on a case-by-case basis. This assessment is done by comparing the existing and likely effects of the information exchange with the competitive conditions that would prevail in the absence of that information exchange. When assessing the restrictive effects of information exchange on competition, the characteristics of the relevant market and the nature of the information exchange are taken into consideration.

In its the Association of Financial Leasing, Factoring, and Financing Companies Decision,[2] the TCA summarized its approach regarding the criteria of information exchange that affect competition in the table below:

Within the scope of the TCA's decisional practice, assessments of the information exchange through associations of undertakings can be categorized as pro-competitive and anti-competitive depending on the specifics of each case.

Pro-competitive Arguments

- Information exchange can contribute to the elimination of information asymmetry between the parties. With the ability to compare themselves with their competitors, undertakings are more likely to benefit from increased efficiency.
- When the exchanged information is aggregated, the risk of competitors colluding is considerably lowered in comparison with individualized information.
- Data such as sales unit, capacity, or input/component cost can be in favor of the suppliers and customers as it would shed light on the economic state of the sector, so long as the data is gathered by a professional society or survey company and published in an aggregated form.

Criterion	Degree	Possible Negative Effect on Competition
Transparency	If high	High
Concentration	If high	High
Complexity of the market	If high	Low
Stability of the market	If high	High
Similarity of firms	If high	High
Strategic information	If high	High
Market coverage	If high	High
Individualized data	If high	High
Aggregated data	If high	Low
Age of data	If high	High
Frequency of the information exchange	If high	High
Public information	If high	Low

Anti-competitive Arguments

- Information exchange may cause the restriction of competition, notably in cases where the undertakings learn about their competitors' market strategies. Such exchanges minimize uncertainties and increase the foreseeability of the market, thereby resulting in coordination between undertakings. Furthermore, competitors may rely on the exchanged information to control each other's practices.
- According to the TCA, the less transparent a market is, the greater effect information exchange has on the restriction of competition. Therefore, the degree of transparency in the market before and after the information exchange takes place and how this exchange may alter the said degree is a distinctive factor when calculating the possibility of restriction of the competition.
- Another consideration in terms of market structure is the degree of concentration. That said, as far as tight oligopolies are concerned, cooperation is likelier as the collusion of fewer undertakings and diversions from the agreements are easily observable. In return, information exchange is more likely to cause restrictive effects on competition in tight oligopolies than other oligopolies.

Considering the abovementioned criteria, there also have been many occasions where the TCA has granted either negative clearance or individual exemption to the information exchange through associations of undertakings when the exchanged information has been aggregated. Even more, in 2019, the exchange of individualized container handling data within the Port Operators Association of Turkey (*Türkiye Liman İşletmecileri Derneği*, "**TÜRKLİM**") was granted an individual exemption, considering the structure of the relevant market, for the period of five years.[3]

How the TCA Changed Its Approach?

The SERFED Decision

In the SERFED decision, the members of the association applied for information exchange, aiming to share information with regards to employee numbers, capacity, production, sales, energy (natural gas), electrical energy, total energy, and carbon emission. Within this scope, the information gathered had been planned to be exchanged with members of the association and with the public on the SERFED's website.

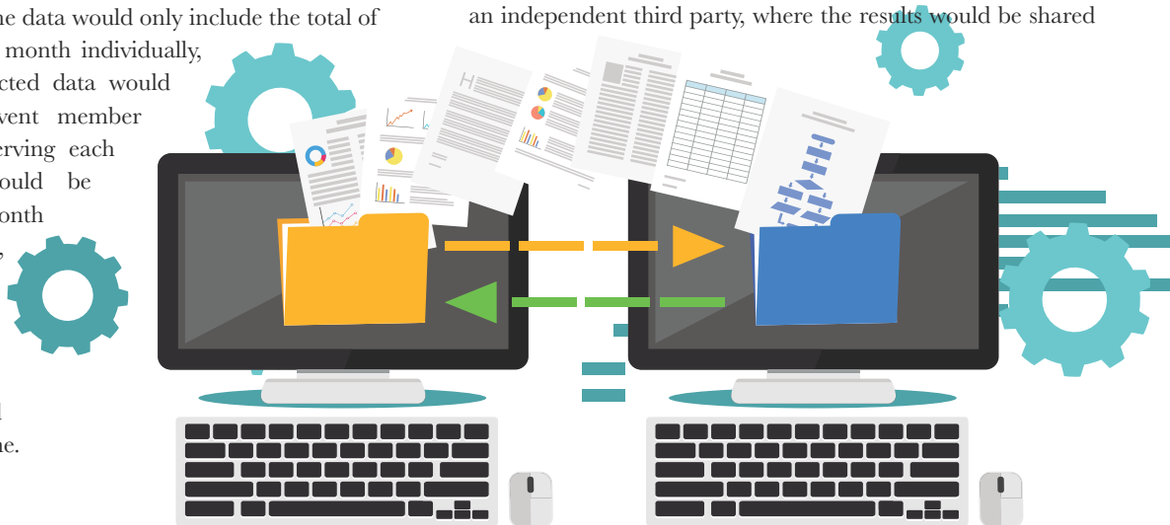
The purpose of the relevant information exchange was to provide foreseeability and necessary information to the public authorities in the relevant sectors. It also was stated that the data would be collected by an independent third-party consultancy firm every three months, and the information would be collected only if it were given by the members voluntarily. It was further stated that the data would only include the total of three months, not each month individually, meaning that the collected data would be aggregated to prevent member undertakings from observing each other's data, and would be published with a two-month history. In other words, January-March data would be aggregated and, after the two-month retardation period, would be shared with the members in June.

Finally, if there were no more than five members voluntarily participating in the data collection for every single subcategory, the data would not be compiled and shared.

The TCA evaluated the application for negative clearance within the framework of Article 4 of the Competition Law. As such, the relevant market was found to be available for coordination among competitors. Even though competitively sensitive information would be exchanged only between at least five undertakings, considering the market shares of the undertakings, and based on a symmetrical market, the results possibly could be used to predict which of the undertakings acted against an anticompetitive agreement or to determine and track their compliance with the agreement. Furthermore, the data also could be used as an indicator for the rest of the market and lead to coordination amongst the competitors within the market and the coordination on the supply amount itself may lead to an increase in the prices of goods. In this regard, the TCA found that upon assessment of the structure of the market, the extent of the gathering and the age of the data was not sufficient to prevent the restriction of competition. With this, the TCA unanimously decided that SERFED's practice could not be granted negative clearance.

However, interestingly, with regards to the individual exemption application of SERFED, the TCA rejected this with a majority, with one member expressing his dissenting opinion. First, the TCA opined that the information subject to the exchange had not been sufficiently aggregated and historicized, which would restrict the competition by enabling the control over the costs and amounts of the sales and purchases. Furthermore, the information exchange on whether additional capacity would be needed by the undertakings might likely lead to the determination and restriction of the capacity and the amount of supply. Secondly, the TCA evaluated the possibility of the coordination on the determination of the supply amount and stated that this might cause price increases to the detriment of the consumers. Third, although the exchange seemed to concern only the top five undertakings in the relevant market, it was concluded that 50% of the market would be affected by such an exchange. Lastly, as the exchange at hand was found to be more restrictive than necessary to achieve the goals of consumer benefit and efficiency gains, the individual exemption application was not granted by the TCA.

The dissenting vote expressed that SERFED took every possible measure to prevent any anti-competitive effects arising from this information exchange, and even further, unlike other decisions where individual exemption had been granted, SERFED would be conducting the data collection only via an independent third party, where the results would be shared



with the public. In light of this, the dissenting vote stated that individual exemption could have been granted.

The İMDER Decision

In the İMDER decision, a platform named *Imderonline* was assessed in terms of information exchange. The case concerned an association of undertakings whose aim was to enhance foreseeability and provide the public authorities with the necessary information by exchanging information on the sale and rental amounts of construction machinery among İMDER members on *Imderonline*.

Upon the TCA's assessment of the application in detail, İMDER's application for a negative clearance and individual exemption was rejected. Within the scope of the negative clearance assessment, the TCA evaluated that some of the reports would include individualized data on a regional basis, while others would involve sales amount information on a provincial basis. Moreover, the data subject to information exchange were found to be more detailed than had been asserted, since its scope would not be limited to the period of the three-month and six-month reports.

Within the scope of the individual exemption assessment, the reports contemplated by İMDER were deemed to prevent resource waste with regards to undertakings as market research was lacking in the market of construction machinery. In addition, the undertakings were expected to make more rational decisions on production and exportation. The latter would contribute to the reduction in the costs, therefore in the prices, which would enable consumers to enjoy lower prices.

On the other hand, the practice would entail individualized data and would be shared only with İMDER members. Also, the data subject to exchange would be relatively current and was planned to be shared on a monthly basis. The TCA concluded that for the individualized information exchange to be allowed, it should be made available to the public. In addition, as the shared data would not be of historical quality, it was considered likely to that it would cause coordination between competitors and restrict the competition more than necessary.

All in all, the TCA, like the İSDER decision discussed below, found that the contemplated reports restricted competition more than necessary to achieve efficiency gains and consumer benefit.

The İSDER Decision

Within İSDER's application for a negative clearance or an individual exemption decision on its practices to share reports with its members, the information collected by İSDER from its members was stated to encompass sales quantities and market shares and would be shared with member undertakings periodically. The data collection process would be conducted by İSDER members, and the members would be sharing this information voluntarily. İSDER emphasized that data sharing was in fact not mandatory and that they would not impose any kind of sanction to the undertakings if they were to opt-out of sharing. While these reports would have been only shared with İSDER members, they also would have been shared with public authorities upon request.

The TCA stated that the elements subject to the information exchange should be differentiated, as monthly sales quantity data based on individual undertakings constituted more of a risk in terms of competition, compared to the lower risk of periodical reports and six-month historic data reports. Moreover, the TCA also indicated that İSDER members constituted 80% of the market, and for this reason, it was not possible to agree with İSDER's claim that the market for forklifts did not display a stable structure and that the market was not suitable to give rise to coordinated effects. For this reason, the TCA rejected İSDER's negative clearance application.

Furthermore, upon the TCA's individual exemption analysis, it was found that the contemplated reports restricted competition more than necessary since the collected data were not processed by an independent research company, whereas in its previous decisions, this condition had been sought. Thereon, the TCA stated that even though the information exchange was done on a voluntary basis, this would not be publicly available. For this reason, non-İSDER members were unable to exert competitive pressure considering their size and position within the market; and as there had not been any new members for the past three years, that the membership conditions were not reasonable.

The TCA rejected İSDER's individual exemption application as the reports were found to restrict competition more than necessary to achieve the goals of (**i**) ensuring new developments or improvements or economic or technical improvement in the production or distribution of goods and in the provision of services, and (**ii**) consumer benefit.

Conclusion

Recently, the TCA seems to be steering in a different direction within its decisions regarding third party information exchange, as also discussed above when drawing a comparison between the TCA's previous decisions. Previous information exchange decisions seem to have been more lenient, such as granting individual exemption even though the information was not gathered by an independent third party, whereas within the above-mentioned decisions, the fact that association employees were to gather information, even if it was aggregated, has been deemed sufficient grounds for rejection. In the earlier decisions of the TCA, aggregated and historic data were more likely to be considered pro-competitive relative to individualized and future data, in particular the data relating to prices and trade strategies.

Considering this stricter approach of the TCA, it is safe to say that the TCA is adopting a much more conservative approach with regards to third party information exchange. Undertakings operating in the same product market should proceed with caution when it comes to information exchange through an association of undertakings. The TCA may deem just about any type of information or data exchange as anti-competitive, especially within sectors where undertakings have high market coverage.

[1] Please see the TCA's SERFED Decision, 20 August 2020, No. 20-38/526-234; the İMDER Decision, 19 November 2020, No. 20-50/688-302; and the İSDER Decision, 19 November 2020. No. 20-50/687-301.

[2] The TCA's Association of Financial Leasing, Factoring and Financing Companies Decision, 15 February 2018, No. 18-05/79-43.

[3] The TCA's TÜRKLİM Decision, 14 November 2019, No. 19-40/655-280.

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