

**Qualcomm's Predation
Turns into €242 million Fine**

**USA Denounces
Turkey's Status as
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**Vodafone, TT Mobil and
Turkcell Cooperation
Agreement Individually
Exempted**

**Data Protection
Concerns in Sending
Multiple SMS's**

Canon's "Jumping the Gun"



**Welcoming a New Book
"Merger Control in the EU and Turkey:
A Comparative Guide"**

We are pleased to present our book
“Merger Control in the EU and Turkey: A Comparative Guide”.
This book provides, for the first time, a description and analysis
of the relationship between the EU and Turkish
merger control law and practice.



Although not being a full member, Turkey has been following EU principles in establishing and improving its merger control regime, as well as overall competition law, keeping pace with changes in relevant EU legislation and case law.

Since 2003, ACTECON has been showing a landmark presence in competition law practice in Turkey. Especially in the area of merger control, transactions that require multi-jurisdictional filing along with Turkey, have been delicately handled by ACTECON and resolved with sometimes swift clearance decisions and sometimes lengthy negotiations with the Turkish Competition Authority in harmony with the parties' counsels and parties' responsible ones together. This book is a reflection of all those efforts. It compares substantive, procedural and jurisdictional issues and draws parallels on their regulation in the two jurisdictions. Each

chapter provides an overview of the respective issues in the EU and Turkey, projecting a clear understanding of the main similarities and differences in the two regimes. A notable feature is an in-depth analysis of applicable case law concerning each issue, with most of the Turkish decisions available in English for the first time.

The book will certainly guide any practitioner in understanding in a comparative manner merger control in Turkey with strong reference to the EU practice. It will be of immeasurable value for lawyers and their business clients dealing with multijurisdictional merger cases. Interested academics and policymakers will also find much here to attract their attention.

It is our pride to present this piece of work to the academic world as well as to the practitioners.



*Fevzi Toksoy, PhD
Managing Partner*



*Bahadır Balki, LL.M.
Managing Partner*

We are delighted to introduce the next issue of ACTECON's quarterly bulletin "The Output" containing highlights of the main competition, international trade and data protection related news of the third quarter of 2019 that deserve attention in Turkey and the EU.

The Turkish Competition Authority has reviewed and approved several concentration transactions, launched investigation into the activities of the pharmacists' union, a leading ice-cream producer and a ticketing company in Turkey, in addition to numerous hearings it has been conducting as part of the ongoing investigations into undertakings active in the telecommunication, cement, mail and cargo carriers, and household appliances industry.

In parallel, the European Commission has closed a procedural case in relation to a railway operator and conditionally approved a concentration between the energy companies to ensure that electricity and gas are available to customers at competitive prices. It has also been busy with imposing million Euro fines for abuse of dominance by the US chipmaker and partial implementation of merger between Japanese companies without its approval. It also launched an investigation into Amazon's use of competitively sensitive data. This is in line with the the EU Commissioner M. Vestager's statement at the CCBE Standing Committee in Copenhagen in September 2019 in relation to security and trust in a digital world that competition authorities need to keep "a close eye on the way that digital platforms deal with data" and "be prepared to take action" if control of data by such platforms undermines competition in order to ensure that society gets "the most out of digitisation." For the same reason, the EC continues working on an action plan to solve the problem of below-threshold acquisition of tech start-ups/big data companies.

On the trade side, in addition to the antidumping investigations initiated by the Turkish Ministry of Trade, Turkey's status as a Generalized System of Preferences beneficiary has been denounced by the USA on the grounds that Turkey no longer satisfies the conditions to be a beneficiary to the program since it is sufficiently economically developed.

The Data Protection Authority of Turkey has been dealing with several interesting issues such as abuse of right by sending multiple SMS's on the same subject and the use of hand-palm reading systems by the gyms as a processing of personal data.

The third quarter of 2019 is especially notable for ACTECON due to successful completion of our book "Merger Control in the EU and Turkey: A Comparative Guide" published by Wolters Kluwer as part of the International Law Series.

Finally, as part of the fifth promotion of the Ethics Academy nested within Ethics&Reputation Society, ACTECON partners were again active as instructors of competition law courses, drawing attention on the link between corporate compliance and competition issues. We also acted as moderators at a Grand Panel on Update on Competition Law Issues for Turkey and the European Union at the Turkey & Middle East 6th Annual International Arbitration and Regulatory Global Summit held on 26th of September in İstanbul. ACTECON was proud to be one of the sponsors of this important event.

We invite you to check the details of the above inside The Output®.

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Vodafone, TT Mobil and Turkcell Cooperation Agreement Individually Exempted



On 9 September 2019, the Turkish Competition Authority (“TCA”) published its reasoned decision in which it granted individual exemption to the Facility Consolidation Cooperation Agreement signed between Vodafone, TT Mobil and Turkcell (“Agreement”), the only three mobile operators in Turkey (as of the third quarter of 2018, Turkcell, Vodafone and TT Mobil had 43.3%, 30.9%, 25.8% market shares respectively in terms of number of subscribers). The evaluations of the TCA both with respect to the efficiency gains and the anti-competitive effects should be taken into consideration when designing similar cooperation agreements.

As the Agreement is made between competitors, in order to be deemed as lawful, it must satisfy the conditions set forth in the Article 5 of the Law of Turkey No 4054 on Protection of Competition (“Turkish Competition Law”) regarding individual exemption:

1. The expected efficiency gains from the Agreement: the TCA held that passive network sharing provides significant efficiency gains in terms of both actual and planned cost savings.
2. Consumer welfare from the expected efficiency gains: the TCA expressed that the Agreement would contribute to the consumer welfare to an appreciable extent due to enhancement of the signal quality and strength, reduction of imports, saving on energy expenditures and increase in the quality of service.
3. The potential restrictive effects of the Agreement:

the TCA particularly focused on the (i) possibility of exchange of sensitive information between the operators, (ii) cost similarities and (iii) the right of first refusal stipulated in the Agreement. The first two concerns were eliminated as there was a specific provision in the Agreement that aimed to prevent any exchange of sensitive information, and the TCA concluded that there were material differences between the cost structures of the operators. As for the right of first refusal in the Agreement, the parties stated that such a provision was necessary to ensure that the other party is able to maintain its activities by paying the facility fee, in case one party decides to leave the facility. The parties stressed that this was crucial for the protection of the consumers since it guarantees that the subscribers of the mobile operator that would be able to maintain its activity in a given facility won’t encounter any degradation in the service quality.

In the light of the above, the TCA concluded that the conditions required for an individual exemption were cumulatively satisfied in the case at hand. The TCA’s decision will serve as an important guide as to the future assessments for determining when the expected efficiency gains could be deemed sufficient to outweigh the potential anti-competitive effects of such agreements.

COMPETITION

Celgene/BMS Concentration Approved in Turkey



Upon the permission request with regard to the acquisition of the sole control of US-based biopharmaceutical company Celgene Corporation (Celgene) by another US-based global biopharmaceutical company Bristol-Myers Squibb Company (BMS), on 9 September 2019 the TCA decided to approve the transaction.

After the full-fledged examination regarding the products of both parties, it was determined that a horizontal overlap between the products named Taxol and Abraxane produced by the parties exists. Following BMS's announcement that as of January 2019 BMS's Taxol sales



stopped in Turkey and the license decertification process for this product began, it was clarified that there would be no horizontal overlap between the activities of the parties in the current situation.

Following the examination of the effects of the proposed transaction in the market, the TCA stated that within the frame of the respective transaction subject to the notification there would be no creation or strengthening of dominant position as a result of which the competition would be impeded significantly.

The TCA Investigates the Turkish Pharmacists' Association



On 21 August 2019 the TCA concluded its preliminary inquiry conducted in response to the claim that the Turkish Pharmacists' Association violated Turkish Competition Law by means of determining purchasing conditions outside the market. Article 4 of the Turkish Competition Law prohibits anticompetitive agreements and practices between undertakings (equivalent of Article 101 of the Treaty on the Functioning of the EU).

After discussing the information and documents acquired and observations, the TCA concluded that the findings were significant and sufficient, and decided to initiate an investigation.

It should be noted that in July 2010 (TCA decision No. 10-49/912-321 dated 8 July 2010), the TCA investigated and imposed a fine on the Turkish Pharmacists' Association for the same reason, namely, violation of Article 4 of the Turkish Competition Law by means of determining purchasing conditions of pharmacies outside the market.

Sale of Competing Ice Cream Products under the TCA's Scrutiny

On 15 August 2019 the TCA concluded its preliminary inquiry conducted in response to the claim that Unilever Sanayi ve Ticaret Türk A.Ş. ("Unilever") violated Articles 4 (anticompetitive agreements) and 6 (abuse of dominance) of the Turkish Competition Law by means of actual exclusivity via preventing the sale of competing ice cream products at final sales points.

After discussing the information and documents acquired and observations, the TCA concluded that the findings were significant and sufficient enough, and decided to initiate an investigation into whether Unilever violated Articles 4 and 6 of the Turkish Competition Law.

The activities of Unilever were investigated by the TCA previously in 2015 (TCA decision No. 15-38/631-214, dated 16 October 2015) to determine whether Unilever had violated the Turkish Competition Law by means of obstructing activities of competitors; no fine was imposed on Unilever as a result of the investigation at that time



Obstructed Inspection Case of the Railway Company in the EU

On 25 July 2019, following a careful assessment of the evidence, i.e., the Slovak rail company ZSSK's reply to the Statement of Objections and the oral hearing, the European Commission ("EC") decided to close the procedural case against the company. It was initiated by the EC following the ZSSK's obstruction of an inspection conducted in June 2016 by giving incorrect information and deleting data from a laptop.

Under the EU competition rules, companies are obliged to cooperate with the EC during an inspection and to provide correct information and access to all documents relevant to an investigation. Failure to do so can lead to the imposition of fines of up to 1% of their annual total turnover.

ZSSK provides both passenger and freight transport services. The inspections at the company's premises were conducted by the EC as part of the preliminary inquiry upon suspicion



that ZSSK may have been in anti-competitive agreements with other undertakings aimed at driving rival companies from the market. The investigation is still on-going

European Commission Approves E.ON/ Innogy Concentration

On 17 September 2019, the EC, following an in-depth investigation approved the acquisition by E.ON of Innogy's distribution and consumer solutions business as well as certain of its electricity generation assets subject to a commitments package offered by E.ON. Both are energy companies based in Germany.

The two companies are engaged in a complex asset swap. Following this asset swap, E.ON will focus on the distribution and retail supply of electricity and gas, whereas RWE will be primarily active in upstream electricity generation and wholesale markets.



Following its investigation, the EC voiced concerns that the transaction, as initially notified, would have significantly reduced competition in: (i) the German market for the supply of electricity for heating purposes and electric vehicle charging stations on motorways; (ii) the Czech market for the retail supply of gas (to all customers) and electricity (to households and small businesses), and (iii) the Hungarian market for the retail supply of electricity to unregulated businesses.

To address the Commission's competition concerns, E.ON offered:

- To divest most of E.ON's customers supplied with heating electricity in Germany;
- To discontinue the operation of 34 electric charging stations located on German motorways;
- To divest E.ON's business in the retail supply of electricity to unregulated customers in Hungary, including all assets and staff;
- To divest Innogy's entire business in the retail supply of electricity and gas in Czechia, including all assets and staff.

The EC's clearance decision is conditional upon the full compliance with the commitments.

Investigating Ticketing Company in Turkey

On 22 July 2019 the TCA concluded the preliminary inquiry conducted in response to a claim that the ticketing company Biletix violated Turkish Competition Law by means of adding extra costs to tickets under the guise of service, transaction, and cargo costs and via exclusive agreements it signed with organizers.

After discussing the information and documents acquired and observations made in the preliminary inquiry, the TCA concluded that the findings were

significant and sufficient, and decided to initiate an investigation into whether Biletix violated the Turkish Competition Law.

It should be noted that the activities of Biletix have been investigated by the TCA before to decide whether Biletix had violated the Turkish Competition Law; however, no fine was imposed on Biletix as a result of the preliminary inquiries and investigation at that time.

Export Bans by Big Pharma Cleared by the TCA

The TCA recently issued its reasoned decision¹ concerning its investigation against Novartis Sağlık Gıda ve Tarım Ürünleri San. ve Tic. A.Ş. (“Novartis”), as a result of which the TCA held that the two undertakings did not violate the Turkish Competition Law.

The investigation was initiated based on the complaint issued by Çınar Eczacı Deposu ve Dış Tic. A.Ş. (“Çınar”) (a pharmaceutical warehouse) concerning Novartis’s alleged violations of the Competition Law by way of preventing competition in the wholesale level of pharmaceutical industry via prohibiting pharmaceutical warehouses, which act as distributors of Novartis, from selling Novartis products to other warehouses and refusing to supply its products to Çınar.

As per Çınar’s allegations, after Novartis terminated its General Sales Agreement with Çınar, Çınar was not able to sell Novartis and Alcon Laboratuvarları Ticaret A.Ş. (which is a subsidiary of Novartis active in the eyecare market) products and this significantly impeded its ability to compete with other pharmaceutical warehouses and led to loss of customers.

In its investigation, the TCA examined Novartis’s practice under articles 4 and 6 of the Competition Law

that prohibit anti-competitive agreements and abuse of dominance, respectively.

The Relevant Market

When dealing with the definition of relevant product market in the investigation, the TCA referred to the precedents of the European Commission and stipulated that the Commission bases its market definitions on the ATC classification constituted by the European Pharmaceutical Marketing Association (EphMRA). The TCA further noted that in general the relevant market is defined in accordance with the ATC-3 classification whilst adding that the active ingredient or the ATC-4 classification may also be taken into consideration to narrow down the scope of the market if required during the course of the examination.

For the case at hand, the TCA stated that while the relevant market may be defined based on the active ingredient or the ATC-3 classification, it ultimately left the market definition open as the definition of the relevant market would not have any material impact on the substantive assessments. The relevant geographical market was defined as Turkey because the regions where Novartis and Çınar engaged in sales and distribution activities did not differentiate significantly.



Assessment regarding the Abuse of Dominance

Allegations

Refusal to Supply

Pursuant to paragraph 43 of Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings (“**Guidelines**”), refusal to supply may be deemed as anti-competitive if the following conditions are satisfied in a cumulative manner: (i) the refusal should relate to a product or service that is indispensable to be able to compete in a downstream market, (ii) the refusal should be likely to lead to the elimination of effective competition in the downstream market and (iii) the refusal should be likely to lead to consumer harm.

Regarding the first condition, the TCA provided comprehensive explanations on the “essential facilities doctrine” and set forth that the good or service provided by the dominant undertaking must constitute an “input”, which is used for the creation of a new and competitive output, adding value to the initial input. From that point of view, the TCA made it clear that in case the good or service provided by the dominant undertaking is being requested with the sole purpose of reselling, it would not be possible to talk about an added value or a competitive contribution worthy of protection and thus that the conditions of the essential facilities doctrine may not be satisfied.

Returning to the case at hand, the TCA underscored that Çınar was merely a reseller and it did not create any added value for the relevant medication. Accordingly, and by referring to a number of precedents, the TCA expressed the products in question may not be deemed as indispensable for Çınar.

In addition to the foregoing, the TCA pointed out that pharmaceutical warehouses do not purchase products only from one supplier and when the ratio of Novartis products within the total sales of Çınar is examined, it was seen that this ratio had been declining since 2015. The TCA stated that this further supported its conclusion that Novartis’s products are not indispensable for Çınar. While examining whether the refusal is likely to lead to the elimination of effective competition in the downstream market or not, the TCA considered Çınar’s share in the distribution of pharmaceutical products and stated that even the elimination of Çınar from the market would not lead to the elimination of the effective competition in the relevant market.

In respect of the third condition, the TCA referred to the paragraph 25 of the Guidelines, which holds that the harm to consumers may occur in the form of increased prices, decreased product quality and level of innovation, and reduced variety of goods and services and stated that the disqualification of a small pharmaceutical warehouse like Çınar from selling Novartis products would not affect the overall price and service level in the market, rendering any plausible theory of consumers harm impossible.

After clarifying that the conditions for anti-competitive refusal to supply are not satisfied in the case at hand, the TCA moved on to evaluate whether Novartis had any reasonable justifications for terminating its ongoing business relation with Çınar. In light of the available

information, the TCA stipulated that Novartis terminated Çınar’s contract due to the fact that a drug named “Galvus” was found in Iraq and Çınar was unable to provide as to why this had been the case.

The TCA referred to its precedents whereby export bans (direct and indirect) in the pharma sector were assessed from the perspective of competition law and concluded once again that these restrictions may not be deemed anti-competitive. According to the TCA, since such restrictions were not-anticompetitive, Novartis’s termination of the agreement with Çınar based on the violation of these restrictions did not constitute an exclusionary conduct. The TCA also noted that Novartis’s termination on the said grounds was justified since preventing exports was necessary for ensuring product safety and protecting the brand image.

Prevention of Trade between Pharmaceutical Warehouses

In addition to its claims regarding anti-competitive refusal to supply, Çınar further argued that Novartis imposed anti-competitive conditions on pharmaceutical warehouses by prohibiting them from trading with each other. Çınar based its allegations on the written documents received from Denge Eczacı Deposu Ticaret A.Ş. (“**Denge**”) and Galenos Eczacı Deposu Tic. ve San. A.Ş. (“**Galenos**”), which were other pharmaceutical warehouses that distributed Novartis products whereby it was stated that they may not engage in trade with Çınar due to the provisions of the agreement concluded between them and Novartis.

As a result of further examinations, the TCA concluded that these agreements did not prohibit trade between pharmaceutical warehouses unless it is known or suspected that the recipient will sell the products abroad. As Çınar’s agreement was terminated because of its breach of the export ban, the TCA expressed that it is reasonable for Denge and Galenos to regard Çınar as a third person who is suspected to sell products abroad if supplied. Accordingly, the TCA held that the contractual obligation imposed on Denge and Galenos is not a per se ban on trade between pharmaceutical warehouses but rather a provision that supplements the export ban, which is deemed as lawful.

Conclusion

Novartis Investigation is the latest decision of the TCA which adds another link to the chain of precedents whereby the TCA takes into consideration the specific characteristics of the pharma sector when determining how certain abstract concepts in competition law should be implemented to a concrete case. This decision should come as a relief to the manufacturers as it confirms once again that their monopoly positions in various upstream markets, which generally stem from patents, do not automatically oblige them to provide their products to any wholesaler that desires to engage in the resale of the said products and that both direct and indirect export bans in the pharma sector are deemed to be lawful by the TCA.

Footnote

1. TCA’s decision dated 11.04.2019 and numbered 19-15/215-95

COMPETITION

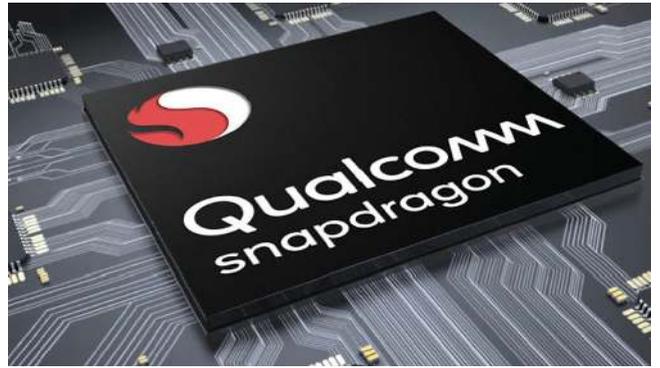
Qualcomm's Predation Turns into €242 million Fine

On 18 July 2019 the EC fined Qualcomm €242 million for abuse of dominance in the market for 3G baseband chipsets, key components that enable users to connect mobile devices to the Internet. Qualcomm via predatory pricing aimed at forcing its competitor, Icera, out of the market. Previously, in January 2018, the EC had fined Qualcomm €997 million for abusing its market dominance in LTE baseband chipsets by making significant payments to a key customer on condition that it would not buy from rivals.

The EC concluded that Qualcomm was a dominant undertaking in the global market for the baseband chipset between 2009-2011 (considering approx. 60% market share and high entry barriers to this market due to significant initial investments in R&D and Qualcomm's intellectual property rights).

Qualcomm was found to be abusing its dominance via predatory pricing, selling certain quantities of its chipsets below cost to Huawei and ZTE, thus aiming to eliminate its main competitor, Icera. The EC's conclusion finding a violation is based on:

- a price-cost test for the three Qualcomm chipsets concerned, and
- a broad range of qualitative evidence demonstrating the anti-competitive rationale behind Qualcomm's



conduct, intended to prevent Icera from expanding and building a market presence.

No evidence that Qualcomm's conduct created any efficiency that would justify its practice was found. Qualcomm's practices prevented Icera from competing in the market, suppressed innovation, and reduced consumer choice (eventually Icera was acquired by US tech company Nvidia, which decided to wind down its baseband chipset business line in 2015). The fine in this case of €242 042 000 takes account of the duration and gravity of the infringement and represents 1.27% of Qualcomm's turnover in 2018.

Closer Look at the Use of Competitively Sensitive Data by Amazon

As of 17 July 2019, the EC has been investigating whether Amazon's use of sensitive information obtained from the retailers who sell on Amazon's marketplace is in breach of EU competition law. Amazon's practices under investigation (if proven), may be in breach of Article 101 of the TFEU on anticompetitive agreements and/or Article 102 of the TFEU on the abuse of a dominant position.

Amazon's business practices include (i) selling its products on its website as a retailer, and (ii) providing a marketplace for independent sellers to sell their products to consumers. Particularly, the

EC is concerned with the latter role. When providing a marketplace, Amazon collects information about the marketplace sellers, their products, and transactions on the marketplace.

The standard agreements between Amazon and the marketplace sellers, as well as the role of the data in the selection of the winners of the "Buy Box" will be examined carefully. The focus will be on how and whether the use of the marketplace seller data by Amazon as a retailer affects competition in the market.



Canon's "Jumping the Gun"



On 27 June 2019 the EC fined Canon (Japan) €28 million for partial implementation of its acquisition of Toshiba Medical Systems Corporation (TMSC) before notification to and approval by the EC. In other words, Canon was punished for violation of the notification requirement and standstill obligation that are both envisaged by the EU concentration control rules.

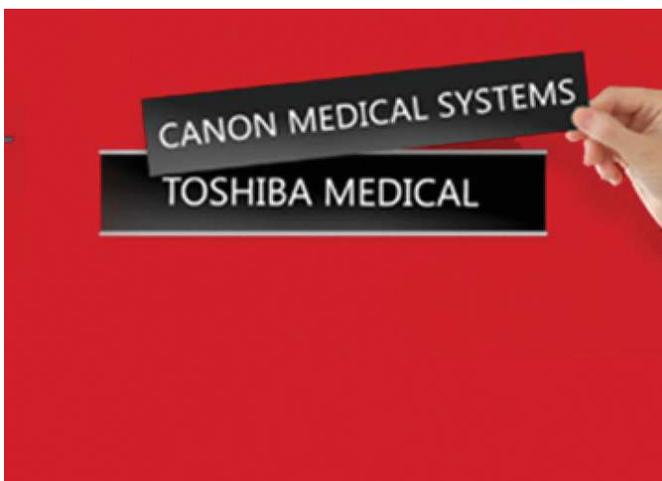
EU concentration control rules require that undertakings notify planned transactions of the EU dimension for review by the EC prior to their implementation (“the notification requirement”) and do not implement them until notified to and cleared by the EC (“the standstill obligation”).

Canon notified the EC about the acquisition of TMSC and the transaction was cleared unconditionally. However, following

the analysis of the two-step transaction structure put in place for the acquisition of TMSC it was revealed that, in fact, the actual control had been exercised by Canon before the notification of the EC (which was submitted at the second step of the transaction). The first and second steps together formed a single notifiable transaction, and, in fact, the first step contributed to the acquisition of final control over TMSC, which occurred with the second step. Thus, Canon breached both the notification requirement and the standstill obligation.

Canon’s breach of procedural obligations was, at least, negligent since in the EC’s view Canon had been aware of its obligations under the EU Merger Regulation. The fact that the transaction had been cleared unconditionally was also considered for the gravity of the infringements.

The case adds more to the evidence that procedural breach of merger reviews are taken seriously by the EC. In April 2019, the EC imposed a €52 million fine on General Electric for initially providing incorrect information during the investigation of its planned acquisition of LM Wind. In April 2018, the EC imposed a €124.5 million fine on Altice for implementing its acquisition of the Portuguese telecommunications operator PT Portugal before notification of or approval by the EC. In May 2017, the EC fined Facebook €110 million for providing incorrect or misleading information during the EC’s 2014 investigation of its acquisition of WhatsApp.



Anti-dumping Investigation into Indonesian Yarn

In June 2019 the Turkish Ministry of Trade (“**Ministry**”) initiated an anti-dumping investigation concerning imports of yarn of man-made staple fibers by certain firms from Indonesia with Communiqué No. 2019/21 on the Prevention of Unfair Competition in Imports (“**Initiating Communiqué**”). The investigation can be considered as an extension of the existing anti-dumping measure imposed on the concerned products originating from PRC, India, and Indonesia by Communiqué No. 2009/1 on the Prevention of Unfair Competition in Imports (“**Imposing Communiqué**”) dated 12 January 2009. The Ministry decided to initiate an anti-dumping investigation into the firms excluded from the measures introduced by the Imposing Communiqué.

The Ministry has imposed anti-dumping measures on yarn of man-made staple fibers originating from Indonesia with the Imposing Communiqué since 2009. Said measures have varied between 0.23 USD and 0.40 USD per kg. While imposing the mentioned anti-dumping measure, the Ministry decided to leave two firms out of the scope, namely PT Elegant Textile Industries and PT Sunrise Bumi Textiles, since it could not determine a dumping margin higher than the negligible level for them.

Following the Imposing Communiqué in 2009, the Ministry conducted an expiry review investigation in 2015 and is conducting one this year. The Ministry ruled on the continuation of the imposition of the measure in the inspection conducted in 2015 and is inspecting the imports of concerned products originating from the PRC, Indonesia, the Republic of India, Malaysia, the Islamic Republic of Pakistan, the Kingdom of Thailand, and the Socialist Republic of Vietnam in the current investigation.

With respect to the concerned two firms, the Ministry decided not to include them into expiry review



investigation, but initiated a separate anti-dumping investigation. The Ministry justified its decision by stating that there is enough information, documentation, and proof to initiate an investigation.

The Ministry used the information, documents, and proofs presented in the context of the ongoing expiry review investigation. Said information demonstrated that (i) the imports from the two concerned firms (PT Elegant Textile Industries and PT Sunrise Bumi Textiles) followed a fluctuating trend between 2016-2018 in absolute terms while increasing in 2016; (ii) the market share of PT Elegant Textile Industries followed the changes in the Turkish markets; (iii) the market share of PT Sunrise Bumi Textiles has followed an upward trend, increasing its share even in the year 2017 during which the Turkish market contracted; and (iv) the domestic industry’s prices were undercut and suppressed by the imports of the concerned firms.

Considering the above, the Ministry ruled on the initiation of an anti-dumping investigation against imports of yarn of man-made staple fibers by PT Elegant Textile Industries and PT Sunrise Bumi Textiles, both of which were based in Indonesia.

USA denounces Turkey's Status as GSP Beneficiary

*Turkey's status as a Generalized System of Preferences (“**GSP**”) beneficiary has been denounced by the USA on the grounds that Turkey no longer satisfies the conditions to be a beneficiary to the program since it is sufficiently economically developed. An official statement regarding the USA's intention to exclude Turkey from the GSP program was made by the U.S. Trade Representative's Office (“**US Trade Office**”) in March 2019, following which in May 2019, Turkey was officially excluded from the GSP program.*

The GSP is a preferential tariff system. Members of the World Trade Organization (“**WTO**”) can exclude the developing countries from their tariffs and other duties through the program. The GSP program provides an exemption from general WTO rules, especially the Most Favored Nation (“**MFN**”) rule. Without the GSP program, any tariff or duty should be imposed on all WTO members without exemption. Therefore, such programs are to the benefit of developing countries since they can realize exports without duties.

With respect to the process of defining the scope of the GSP program, the WTO has no legislation. Each member country retains its sovereignty regarding whom they decide to include in their GSP program.

Turkey was included in the GSP program of the USA starting in 1975. Under the favor of USA's GSP program, in 2017 alone Turkey realized 1.66 billion USD worth of export to that country. However, an eligibility review which resulted in the exclusion of Turkey from the GSP program was initiated by the US Trade Office upon Turkey's imposition of additional duties on imports from the USA within the context of “Trade Wars.”

As a result of the eligibility review, Turkey's status as a GSP beneficiary has been denounced on the grounds Turkey no longer satisfies the conditions to be a beneficiary to the program since it is sufficiently economically developed.

Data Protection Concerns in Sending Multiple SMS's

The Data Protection Authority (“DPA”) decided that sending SMSs to a data subject on different dates and multiple times on the same subject constitutes an “abuse of the right of the data controller” and imposed an administrative fine on the concerned data controller (see decision 2019/159 dated 31.05.2019).

A data subject, who received many SMSs without his explicit consent from an asset management company reminding him about the payment of his debts, first applied to the concerned company and then brought his case before the DPA. Upon the examination, the DPA

- decided that in cases of transfer and assignment of receivable, the personal data of the debtor was processed by the new creditor in accordance with the applicable law and with the purpose of (i) preventing the debtor from paying his/her debt to the previous creditors and (ii) informing the debtor about the conveniences offered for the payment as well as the legal risks in cases of non-performance, and
- determined that the data controller company relied on one of the data processing conditions stated in the DP Law for its operations subject to the complaint, which is “when data processing is mandatory for the establishment, exercise or protection of a right” and, therefore, it was not necessary for the company to obtain the explicit consent of the data subject for the concerned sending.



In this scope, it has been decided that the asset management company had the right to process the personal data of the debtors. However, the DPA determined that sending SMSs with the same content on multiple times on different dates constitutes an abuse of right and decided to impose an administrative fine of TRY 20,000 on the concerned data controller. Thus, the DPA recalled that the obligations of the data controllers do not end with processing personal data by relying on one of the data processing conditions and that all data processing activities should be carried out in accordance with the purpose of processing and *bona fide* rules.

Unlawful Commercial Electronic Messages

An administrative fine of TRY 50,000 TL was imposed on the data controller who was carrying out SMS advertising activities without relying on any of the data processing conditions (see decision No 2019/162 dated 31.05.2019).

A data subject who has been receiving SMS advertisements, submitted a complaint to the DPA after not being able to receive a response from the company regarding his/her requests as to his/her personal data. As a result of

the investigation, the DPA determined that the company carried out the activities subject to the complaint without relying on any of the data processing conditions mentioned in Articles 5 and 6 of the DP Law.

In this context, it was decided to impose an administrative fine of 50,000 TL on the data controller who acted in contradiction to its obligation “to prevent the unlawful processing of personal data”.

Hand-Palm Reading Systems vs Data Protection

As a result of various complaints submitted to the DPA, it was determined that some of the gyms have been using hand-palm reading system to control the entrance/exit of their members, which was regarded as processing of special categories of personal data including biometric data (see decision No 2019/81 dated 25.03.2019 and decision No 2019/165 dated 31.05.2019).

Upon the notices and complaints filed, the DPA examined the practices of two data controller companies providing gym services, which are controlling the entrances/exits of their members with the hand-palm reading system and showing its members' personal data on a TV screen during such entrances/exits. The DPA considers that

- the personal data obtained through the hand-palm reading system is “biometric data” and therefore the activity carried out by
- the data controller should be evaluated within the scope of the processing of special categories of personal data;
- making “hand and fingerprint reading system” used by the gyms compulsory does not comply with the principle

of proportionality; and

- even though the explicit consent of the data subjects was obtained for such application, this falls under the concept of “obtaining explicit consent as a precondition of a service” and people who do not want to give explicit consent are not admitted to membership.

In light of above, it was decided that (i) the explicit consent obtained from the members constitutes a violation of the DP Law since it does not comply with the principle of proportionality and does not comply with the requirements of the DP Law, (ii) adequate technical and administrative measures were not taken, (iii) the gym must find an alternative way to this practice and immediately stop processing biometric data, (iv) the data obtained so far containing hand, finger and palm print must be destroyed in accordance with the legislation and (v) the third parties, to whom such personal data was transferred, must be notified of the destruction and an administrative fine was imposed on the respective gyms.

FROM ACTECON

EVENTS

Ethics & Reputation Society Training Program



ACTECON's Managing Partners, Fevzi Toksoy and Bahadır Balkı acted as instructors of competition law courses at the fifth Ethics Academy nested within



Ethics & Reputation Society, drawing attention on the link between corporate compliance and competition issues.

Turkey & Middle East 6th Annual International Arbitration and Regulatory Global Summit

ACTECON was proud to be one of the sponsors to 6th Annual International Arbitration & Regulatory Global Summit organized by LEGALPLUS and supported by Wolters Kluwer. Our Senior Associate Mr. Barış Yüksel gave a presentation on “Anti-Competitive Agreements and Abuse of Dominance in Turkey in Light of the Recent Case Law”. He also acted as one of the moderators at a Grand Panel on Update on Competition Law Issues for Turkey and the European Union.



RECOGNITIONS



Who's Who Legal – World's Leading Competition Lawyers

ACTECON's Managing Partner, Bahadır Balkı, selected by Who's Who Legal as one of the world's leading competition lawyers in 2019. WWL says, "*Bahadır Balkı has a great reputation in the market, thanks to his first-class handling of high-profile cartel and dominance investigations*".

Who's Who Legal – World's Leading Economists and Anti-Dumping Consultants

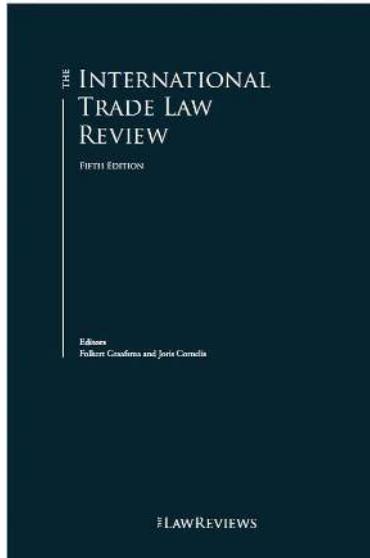
ACTECON's Managing Partner, Fevzi Toksoy, selected by Who's Who Legal as one of the world's leading economists and anti-dumping consultants in 2019. WWL says, "*Fevzi Toksoy is a distinguished economist and comes recommended by peers across Europe. His practice encompasses a range of customs union issues, including parallel trade and antidumping matters.*"

PUBLICATIONS

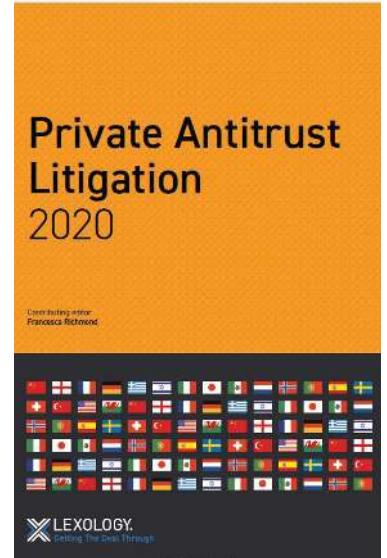
Merger Control in the EU and Turkey: A Comparative Guide - Wolters Kluwer 2019 **irus.wolterskluwer.com**



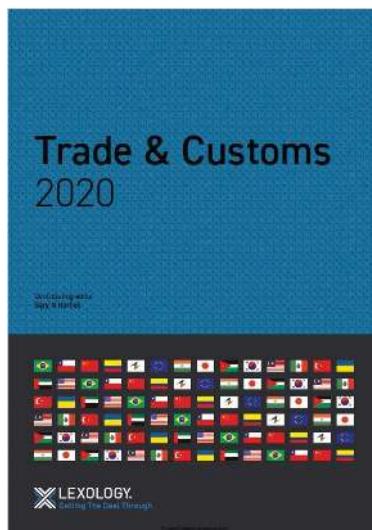
International Trade Law Review, 5th edition, 2019, Turkey Chapter **actecon.com/en/publications**



Private Antitrust Litigation 2020 - Turkey Chapter – Getting the Deal Through **actecon.com/en/publications**



Trade & Customs 2020 – Turkey Getting the Deal Through **actecon.com/en/publications**



Abuse of Dominance Cases in the Electricity Sector in Turkey **competitionlawblog.kluwercompetitionlaw.com**



Recent Developments in Personal Data Protection in Turkey (April – May 2019): Microsoft’s Data Breach, Facebook’s Violation, and More **mondaq.com**



Individual Exemption By The Turkish Competition Authority To The Leading Mobile Telecommunications Companies **mondaq.com**



Turkish Competition Authority’s Latest Decision Concerning “Refusal To Supply” And “Export Bans” In The Pharma Sector (Novartis Investigation) **mondaq.com**



The Spanish Competition Authority Initiates Second-Phase Examination in Connection with an Acquisition of a White Cement Production Base (ÇİMSA / CEMEX) **actecon.com/en/news-articles**



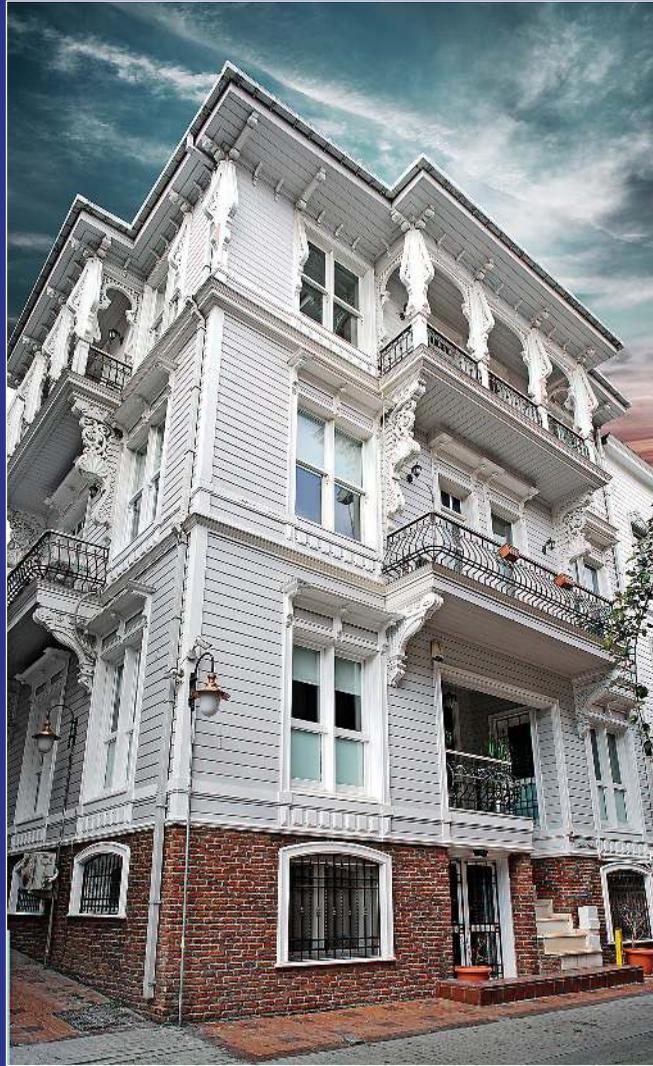


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