

 Balcioğlu Selçuk Akman Keki

# Antitrust Review 2018 Turkey



## Your Law Firm in Turkey

Balcıoğlu Selçuk Akman Keki Attorney Partnership ("BASEAK") is an Istanbul-based full service law firm led by experienced professionals. Drawing on broad experience gained at Turkish and global law firms and international organizations, each BASEAK is well equipped to provide creative and diligent transaction counseling and cutting edge litigation services.

BASEAK has been providing legal solutions since 2007. We understand the complexities you face around expansion and doing business domestically, and we can be depended on for providing solid, cost-effective solutions. BASEAK has gained an outstanding reputation and valued clientele by responding to the needs of a broad spectrum of clients of all sizes – individuals; entrepreneurs; small businesses and start-ups; government agencies; and mid-sized and larger private and public corporations, including international and global businesses. Now clients benefit from a team of 75-plus lawyers and economists who are committed to offering creative business and legal solutions. With exceptional practices in competition, M&A, banking and finance, capital markets, real estate, energy and litigation, BASEAK provides access to top tier legal talent with experience in 17 sectors and 20 practices.

## Your Competition and Regulation Team in Turkey

Our lawyers and economists experienced in competition rules are competent in representing clients before the Turkish Competition Authority on matters ranging from on the spot inspections to investigations. Additionally our team notifies negative clearance/exemption and M&A applications to the Turkish Competition Authority and represents in all phases of litigation in relation to Board's decisions. We provide regular advice to companies on compliance of agreements and practices which govern daily commercial activities, support drafting or amendments to various laws and carry out competition compliance programs tailored to anticipated risks.

The Competition and Regulation team has the advantage of assessing both legal and commercial perspective. Indeed our team is acclaimed for being the only team consisting of lawyers, academicians, regulatory specialists and economists. This structure allows the team to provide solutions with quantitative financial analyses and determine holistic strategies with legal/commercial perspective. The team, which regularly monitors international developments and engages in academic activities, takes the front row in academic studies. Our market specific experience-stemming from regulatory consultancy provided to companies operating in the regulated markets-benefits from the use of technology in streamlining of information to you and to the relevant institutions on your behalf. With the participation of economist academicians and practitioners from regulatory institutions and the support of lawyers and economists, a versatile approach is when providing advice in relation to competition and regulation rules.

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# Welcome

**Evolving public policies are of particular concern for many companies operating in the local and global market. Legislation, government policies, new and amended regulations - all play an integral role in the effective operation of all economies and industries. Companies face increasing and rigid competition law practice, more so in the years following the global economic crisis of 2008.**

Managing this challenge requires keeping up with the developments – with support of experienced lawyers and industrial economists who not only understand the issues but also have the background to create innovative solutions for your business that steer clear of competition law related problems.

We are pleased to deliver this report covering the competition law developments over 2018. We hope you find it insightful!

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# **Competition Advocacy**





### **Reflection of the new Presidential System on the appointment process of Turkish Competition Board members**

The Turkish Administration has undergone a substantial change following the general elections in June 2018. Powers of the Council of Ministers were transferred to the President with Statutory Decree No. 698. As the Turkish Government adapted to the new presidential system, Statutory Decree No. 703, amending some articles of the Act No. 4054 on the Protection of Competition (Competition Act) was published, followed by the first three Presidential Decrees under the new Presidential System.

The second statutory decree and the following presidential decrees set forth principles and organization of the Presidential post and significantly modified the structure of regulatory institutions and organizations. Accordingly, terms of duty and appointment procedures of members of these institutions and organizations, including the Turkish Competition Authority (TCA) were amended. Important changes to the appointment of members of the Turkish Competition Board are as follows:

- The President of the Turkish Republic will directly appoint the President, Vice President and members of the Turkish Competition Board, which were formerly selected among candidates appointed by certain ministries and public institutions.
- Candidate members are required to have five years of experience regardless of the field of occupation rather than ten-years of experience in an area related to competition policies. Candidates are no longer required to display adequate knowledge and experience in competition proceedings.
- The members term of duty, which was six years, is reduced to four years.
- The President will decide on matters such as salaries and other financial benefits, retirement and board members' terms of service.

Accordingly, two new members, Ahmet Algan and Hüseyin Ünlü, were appointed as board members in late July 2018. Additionally, Şükran Kodalak, who has already served for four years as a board member, was appointed again, since the term of duty was reduced to four years within the scope of the new Presidential System.



### **The TCA examines commissions implemented by meal voucher companies**

Regulation of commissions applied by meal voucher companies have been one of the main concerns of the TCA in 2018. In 2010, the TCA conducted a preliminary examination in order to determine whether undertakings operating in the market for meal vouchers violated the Competition Act through anti-competitive agreements regarding commissions applied to restaurants. Although the TCA decided not to launch an investigation, the Council of State ultimately annulled this decision in 2016. Accordingly, the TCA decided to launch an investigation to determine whether six undertakings operating in the relevant market engaged in anti-competitive practices to acquire higher commissions.

As the investigation continued, in 2017, the Istanbul Chamber of Commerce (Chamber) adopted an occupational decision taking into consideration concerns raised by its members, which are mainly undertakings operating in the food and beverages sector. The decision provided that meal voucher companies, who are members of the Chamber, shall not offer discounts to businesses, which provide these vouchers to their employees and pay some amount of commission for this service to the meal voucher companies. In addition, according to the decision of the Chamber, businesses, who are also

members of the Chamber, shall not request such discount as these are usually reflected in member restaurants as high commissions.

Following the publication of the Chamber's decision, the TCA initiated an ex officio preliminary inquiry regarding the foregoing and concluded its preliminary inquiry in January 2018. The TCA determined that commissions and discounts are the main variables of competition between meal voucher companies as they correspond to prices and costs respectively. The TCA decided that an opinion to be sent to the Chamber to withdraw its decision, which was in violation of the Competition Act, and informed its members accordingly.

On the other hand, the TCA, who has been closely monitoring practices of meal voucher companies, concluded its investigation in November 2018, which was started after the annulment decision of the Council of State and decided to impose an administrative fine on three of the investigated undertakings in violation of the Competition Act.

Finally, commissions applied by meal voucher companies were ultimately governed by the Ministry of Trade who amended the Regulation on Principles and Rules Applicable to Retail Trade (Regulation on Retail Trade). According to the amended Regulation on Retail Trade, meal voucher companies shall not offer





discounts to member businesses in the same way that these businesses shall not request such discounts. Additionally, the aforementioned regulation provides that commissions applied by meal voucher companies shall be limited to 6 percent, regardless of the costs incurred by these companies.

### **The TCA amends the Guidelines on Vertical Agreements**

As the number of cases involving the implementation of most favored customer (MFC) clauses and online sales both in Europe and in Turkey, the TCA started amending its Guidelines on Vertical Agreements (Guidelines). The TCA opened the draft Guidelines to public discussion in 2017 and the updated Guidelines came into force in March 2018. Accordingly, the new Guidelines contain amendments relating to (i) online passive sales restrictions, (ii) MFC clauses and (iii) selective distribution systems.

**Restriction of online sales:** Following the approach of the European Commission in its Guidelines on Vertical Restraints (EU Guidelines), the Guidelines recognize online sales as passive sales and therefore prohibit restriction of the foregoing. The Guidelines introduce new hardcore restrictions in line with the EU Guidelines including placing automatic routing to the manufacturer's or the exclusive distributor's website, terminating consumer transactions based

on address information revealing that it falls within another distributor's territory, limiting the proportion of online sales vis-à-vis the offline sales and charging distributors higher prices for products to be sold online.

However, the new Guidelines recognize that the supplier may impose additional obligations/conditions provided that such conditions do not have the object to restrict, directly or indirectly, distributors' internet sales. In that case, there must be an objective, substantial and acceptable reasoning behind these obligations/conditions imposed by the supplier.

It should also be noted that the TCA did not include a certain provision, which was highly debated both in Turkey and across the EU since the Coty Decision of the European Court of Justice in its new Guidelines. The EU Guidelines on Vertical Agreements provide that *"where the distributor's website is hosted by a third-party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third-party platform."* Accordingly, the ECJ decided in its Coty Decision that online sales of luxury products may be restricted in case such restriction improves the distribution system, provides efficiency gains and guarantees consumer welfare. As certain undertakings and associations of undertaking opposed to this provision, the TCA did not include such provision allowing the restriction of online

sales. The TCA rather explicitly regulated that online sales shall not be restricted via online platforms as well as distributors.

**MFC Clauses:** The TCA regulated MFC practices for the first time with the amended Guidelines. Such clauses requiring that the seller offers more favorable prices or terms to the beneficiary of the clause are often classified under three types as narrow MFC, wide MFC and MFC +. The Guidelines, without making a distinction, provided that MFC practices may be regarded as anti-competitive in case:

- The foregoing practices are retrospective practices which ensure the entity imposing the MFC practice to benefit at all times or increase the cost of the contracted seller to provide further discounts or favorable conditions to entities competing with the contracted entity.
- The contracted parties of an MFC practice have a considerably higher market share and power when compared to other players in the market.
- The concentration level in the relevant market subject to MFC practices is rather high. In parallel with the European practice, the Guidelines recognize that MFC practices might facilitate resale price maintenance. Accordingly, implementation of MFC clauses as an incentive to reduce buyer's motivation to lower the resale price is prohibited, as it will increase the likelihood of direct or indirect price fixing. On the other hand, supporting practices reinforcing efficiency of MFC and resale price setting shall not be considered as behaviors amounting to a violation within context of resale price maintenance.

**Selective distribution systems:** Taking into consideration the definition of online sales as passive sales, the Guidelines provide that online sales of system-members shall not be restricted. The Guidelines further clarify that a new website created by a system-member for online sales is not to be interpreted as opening a new sales point.

### **The TCA closely monitors utilization of Big Data**

Taking into consideration the latest technological developments and examinations conducted by other competition authorities, in 2018 the TCA closely monitored issues relating to big data and its implications with respect to competition. Accordingly, the TCA organized the Symposium on Recent

Developments in Competition Law and the Seminar on Big Data, Online Platforms and Competition Law in April 2018 to discuss further the effects of digitalization on competition.

The TCA determined that big data originating from digitalization has significant effects on examinations, dawn raids conducted by the TCA as well as its decision-making process. The TCA attributes great caution to anti-competitive practices facilitated by big data as it believes that algorithms developed for processing such data can be used for cooperation between undertakings and ultimately for the establishment of cartels.

The TCA therefore is planning to introduce certain solutions to mitigate anti-competitive concerns triggered by digitalization in a timely manner before consumers are affected:

- **Competition Act Amendment:** The TCA discussed that the "de minimis principle" adopted in the EU practice might be regulated in the Competition Act so as to prevent the launch of investigations where the subject matter does not have considerable effect on the competition in the market.
- **Effective implementation of commitments:** The TCA notes that an effective commitment mechanism will increase institutional capacity, as the TCA will not need to launch an investigation or conclude ongoing investigations as soon as commitments are accepted.
- **Settlement in investigations:** The TCA recognizes settlement as an effective way of concluding investigations in a shorter period of time to increase capacity. It is important to note that settlement requires for the undertaking, agreeing to an anti-competitive practice, cooperating with the TCA and facilitating the investigation's prompt conclusion.

The TCA, who has been monitoring closely the developing implementation of big data in 2018, is motivated to make necessary changes in the upcoming years to prevent undertakings from engaging in anti-competitive practices.



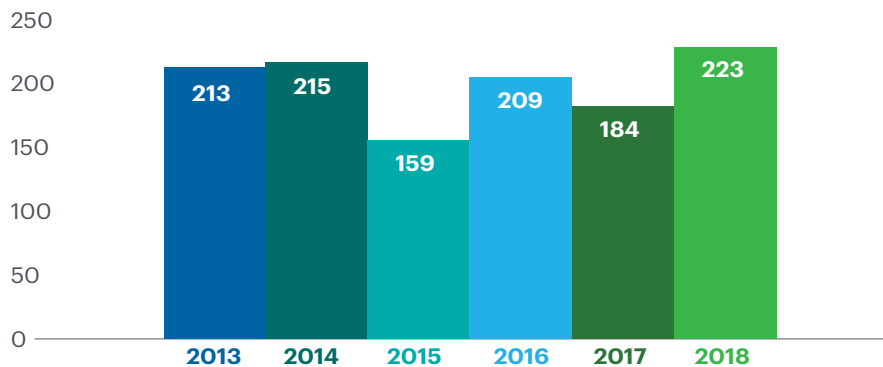




# Merger Control

## Overall statistics and trends

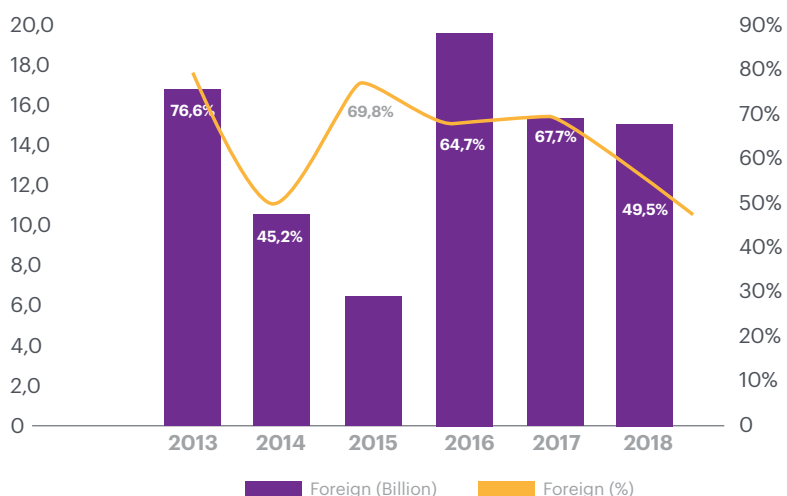
Merger and acquisition (M&A) transactions examined by TCA increased by 39 in 2018, setting a new record for both the highest number and value of transactions examined.



Source: TCA's 2018 M&A Insight Report, p.7. / Examined Transactions

## Let's start with transaction numbers ...

The majority of the M&As (119) notified in 2018 concerned transactions undertaken between foreign undertakings with effects in Turkish markets. M&As concerning Turkish entities were lower in number (85). Having said that, foreign investment to Turkish entities decreased from 68% to 49.5%; whereas transactions between Turkish entities increased by 101% since 2017.



Source: TCA's 2018 M&A Insight Report, p.13. / Foreign Investment

In 2018, foreign investors invested into 36 Turkish entities in total, and foreign investment to Turkish entities shifted from Dutch and Japanese entities to Italian entities.

Overall, the TCA concluded that 19 of the notified M&A transactions did not require TCA's prior authorization. Yet, the TCA further reviewed four M&A transactions under Phase II Investigation.

Moreover, the TCA concluded 13 decisions on privatization matters, mainly in relation to the hot topic on Turkish sugar companies' privatization. Indeed, sugar factories in Erzincan, Erzurum, Muş, Elbistan, Burdur, Afyon, Alpullu, Kastamonu, Ilgın, Turhal, Çorum, Yozgat, Kırşehir and Bor owned by Türkiye Şeker Fabrikaları were auctioned in 2018 and the TCA examined each bidder's position in the sugar beet, sugar production and sale markets for privatization.



87	45	87	211
48	269	376	332
0	23	31	38
383	482	407	2854
74	857	945	789
87	867	970	970
573	3023	3028	
31		317	



## Moving on to transaction values ...

In 2018, the total value of transactions undertaken solely between Turkish entities was recorded as approx. US\$2.2 billion; whereas the total value of transactions undertaken between Turkish and foreign entities was recorded as approx. US\$3.9 billion. In relation to transactions undertaken solely between foreign entities with only effects in the Turkish market, the total value of the notified transactions were recorded as approx. US\$578.2 billion.

## Global sectoral trends vs. trends in Turkey

Sectors heavily invested globally in 2018 included the following:

- Basic chemical substances, chemical fertilizer and nitrogen compounds, production of primary plastic and synthetic rubbers
- Production of precious metal ores and other metals except iron
- Production of chemicals and chemical products

In Turkey, the sector with the highest value of investment concerned the “support activities for transportation” whereas the sector in which highest number of transactions took place related to “production and distribution of electric, gas, steam and ventilation systems.”

Overall, the highest Turkish-entity related transaction volumes were recorded in the storage, transportation, e-commerce, organized industry, broadcasting & publishing and the telecommunications sectors.

## Increasing significance of gun-jumping awareness

2018 marked increased awareness in relation to gun-jumping risks associated with M&A transactions – especially post European Commissions’ Altice Decision, which provided guidance in relation to gun-jumping constituting practices.

Let’s rewind to the beginning: What is gun jumping and how is it construed under competition rules?

Practices concerning failure to notify transactions subject to notification and implementation of notified transactions prior to competition authorities’ clearance are defined as gun-jumping practices. Overall, such practices are considered to have the potential to facilitate various competition law infringements ranging from formation or

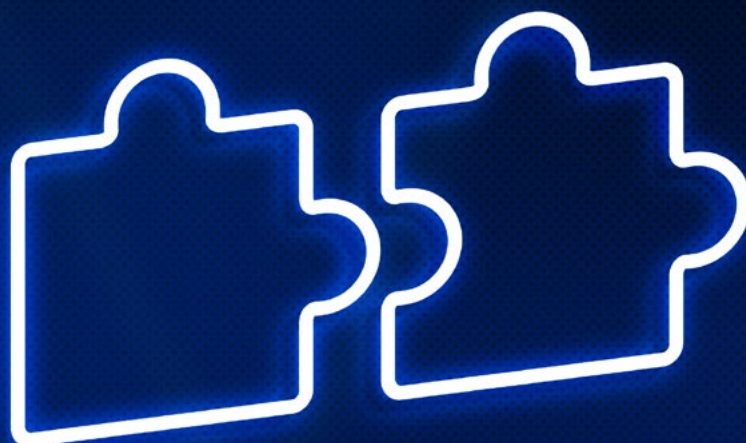
strengthening of dominant position to exchange of commercially sensitive information and coordination.

In M&As, it is essential for the acquirer to examine information beyond publicly available information in order to assess the value of the company invested. In certain circumstances, such investors requiring access to confidential information may be competitors. However, exchange of commercially sensitive information, especially between competitors, may be considered risky. Moreover, it is also essential for the acquirer to enter into arrangements for the interim period prior to closing in order to maintain the value of the investment in an effective manner. Having said that, some engagements may facilitate control over the target prior to closing (and thus, clearance) of a transaction. It is important to strike a balance between the legitimate interests of the potential investors and competition law concerns.

Turkish competition law does not have explicit rules in relation to gun-jumping, however the TCA may regard negligence of competition law related concerns and exchange of commercially sensitive information between competitors as gun-jumping practices and impose administrative fines on the M&A parties. Overall, gun-jumping stands out as a more developed concept under EU and US competition law. However, boundaries of practices that constitute implementation of notified transactions prior to competition authorities’ clearance remain grey.

Having said that, the recent Altice Decision sheds light on relevant risky practices. Accordingly, acquirer’s practices on matters such as appointment of managers and key executives, investments with low thresholds, involvement with business decisions and day-to-day management prior to a clearance are regarded as constituting gun-jumping practices.

Against this background, it is observed that entities are beginning to recognize the significance of placing attention on the entire M&A process from a competition law point of view, and they are starting to conduct the entire process—from due diligence to negotiation, consummation of the transaction to practices adopted post-closing—with great care given to competition rules.



### **A significant procedure-related take away: Always provide correct information**

In 2018, entities were also reminded of the significance of providing correct information at all times – even in M&As!

In early 2018, the TCA rendered a decision concerning the submission of incorrect information provided by one of the parties to an M&A transaction, GIC. The transaction concerning acquisition of joint control of Rothesayby Blackstone, Cambourne and Massmutual was notified to the TCA and, during the course of the analysis, the TCA case handlers who reviewed previous TCA submissions of the relevant parties detected that the parties provided inconsistent and thus incorrect information in relation to shareholding and the control structure of certain entities.

Indeed, in the RAC and Railpool notifications, GIC stated that it does not have controlling rights with 50 percent shareholding over certain companies. However, footnotes of statements and other information in the subsequent notifications revealed that GIC indeed had control over the relevant entities with 50 percent shareholding.

Even though it was possible to deduct correct information from the relevant notification, the TCA concluded that information submitted by the parties to a transaction should not require any further examination or verification and reflect the


exact situation. The TCA also noted that good faith and intention of an undertaking is irrelevant for determining incorrect information and imposed an administrative fine on GIC. The decision highlighted that failure to provide correct information may come back to bite one day.

### **Top merger control hits in Turkey**

#### **Second phase II resolved: way forward with the Lesaffre-Dosu Maya transaction**

During the course of a cartel investigation concerning the yeast market, Lesaffre et Compagnie received the TCA's conditional clearance in relation to the transaction concerning acquisition of sole control of its competitor in Turkey, Dosu Maya. Lesaffre, which operated in the yeast sector in Turkey via its subsidiary Özmaya merged its businesses with Dosu Maya under Lesaffre Turquie subsequent to the TCA's Phase II investigation which resulted in a clearance, subject to the implementation of certain commitments.

Post clearance, Lesaffre Turquie implemented the commitments it proposed, which consisted of one structural commitment (relevant to the downstream distribution market) and four behavioral commitments (concerning pricing of products, exclusivity provisions and applying a regular competition compliance checks) for three years. However, in the midst of monitoring, reporting and compliance with relevant commitments, an action



was brought for annulment of the TCA decision clearing the Lesaffre-Dosu Maya transaction, and the Administrative Court of Ankara's decision annulling the TCA's decision came out of the blue on January 2017. On the administrative front, the Regional Administrative Court and the Council of State approved the administrative courts' annulment decision during 2018.

Yet, on the other hand, the TCA launched a second Phase II Investigation in order to examine further the Lesaffre-Dosu Maya transaction. New commitments—mainly elongating the duration of those previously proposed and currently implemented—were proposed by the parties in the second Phase II Investigation, and the TCA decided to clear the transaction for the second time subject to relevant commitments in 2018. The M&A stood out as a precedent setting one in relation to judicial review of matured transactions which have been cleared subsequent intricate analysis by the TCA.

#### **Reflection of DG comp review to TCA analysis: Bayer's Acquisition of Monsanto**

The TCA examined the acquisition of Monsanto by Bayer under Phase II Investigation. In the transaction, where the TCA detected both horizontal and vertical overlaps, the commitments proposed to and accepted by the European Commission eased the TCA's concerns in relation to the transaction. The TCA

cleared the Bayer – Monsanto Transaction subject to commitments proposed globally.

Overall, Monsanto's and Bayer's operations were observed to overlap horizontally in the vegetable seeds, cottonseeds and herbicide markets. The TCA concluded that the transaction would create a competitive concern in relation to the vegetable and cottonseeds markets and give rise to dominant position. In relation to herbicides, the TCA concluded that the acquisition would not create a competitive concern in the market, since the combined market share of undertakings is lower than 20 percent.

Within this scope, the TCA evaluated commitments proposed by Bayer to the European Commission in relation to transfer of operations in the vegetable and cotton seeds market to an undertaking which would have a competitive power. Indeed, the vegetable and cotton seed operations of Bayer were acquired by BASF SE, which does not have any substantial activity in the relevant markets.

The TCA's concerns in relation to vertical overlap concerned the relationship between operations of Monsanto in the corn seeds market and Bayer's operations in the insecticide in the corn seeds market. Considering the need for application of insecticide to corns prior to its sale to end users, it was evaluated that any change in the insecticide market may directly affect the seed market.





Accordingly, Bayer committed to transfer its top corn seed insecticide product, Poncho, to a third party in order to eliminate any competition concerns arising in relation to the relevant market.

### **Assessment of horizontal and vertical overlaps in the port and port-related activities through the Arkas - Mardaş Decision**

Another M&A subject to Phase II Investigation concerned the acquisition of the Mardaş Port by Arkas. By way of background information on the parties to the transaction, Mardaş Port stands out as one of the main container terminals in the Ambarlı Port Facility Area located in the European side of İstanbul with two other container terminals, Kumport and Marport; whereas Arkas is considered to be one of the leading port operators in Turkey.

Arkas already had joint control over one of the three container terminals in Ambarlı, Marport. Accordingly, the TCA examined the competitive concerns arising from the joint control, mainly in relation to information exchange and coordination.

Moreover, the TCA analyzed the vertically integrated structure that will be created post transaction based on Arkas' existing activities in the relevant port and Arkas' other port-related activities related to marine transportation. The TCA also evaluated Marport's and Arkas's relationship with other ports in the relevant region (such as Asyaport) and certain intermediaries (such as the MSC - as the ship agency and partner of Marport). In its analysis, the TCA raised concerns related to potential discrimination and input restrictions that may arise as a result of the vertically integrated structure and coordination.

In order to remedy the TCA's concerns, three sets of commitments/remedies were proposed within the scope of the Arkas-Mardaş Transaction.

The first set of commitments proposed related to "Operational Unbundling of Marport and Mardaş" and concerned determination of separate Board of Directors and senior executives, separation of buildings as well as crucial departments (i.e. legal and finance), adopting separated decision-making processes and utilizing separate tools and equipment. Moreover, in order to restrict potential coordination between Arkas and Mardaş, "Unbundling of Information Security" was proposed, and, accordingly, the parties agreed that they would separate the crucial departments (i.e. finance,

commercial, sales and marketing), tools and equipment, limit information exchange and arrange their information security in a competition sensitive matter. Moving on, in order to eliminate competition concerns related to vertically integrated structure that will be created post-transaction, the parties proposed not to amend the tariff applied to customers and the port management tariff for a certain time period and continue offering berth/landing, port usage and operational services at the same standards.

Overall, the Arkas-Mardaş Transaction led the TCA to evaluate the current port and port-related activities in a rather in-depth manner, especially in the Marmara Region. Moreover, the decision laid out the TCA's attitude towards the evaluation of remedies in relation to vertically integrated ownership structure in the container terminals/ports.

Having said that, in early January 2019, the Administrative Court suspended execution of TCA's clearance decision, reasoning that the proposed commitments were behavioral rather than structural and that behavioral commitments did not clear competition concerns related to the vertically integrated structure and did not enable effective examination. Would the Administrative Court decision hint resolution of problems concerning unscrambling the egg? – We are yet to see!

### **Fresh Look at the newly published Luxottica - Essilor Decision**

Just in time for the Insight, the TCA's reasoned decision clearing formation of a joint venture, namely EssilorLuxottica, by merger of Luxottica controlled by Delfin and Essilor was published on the website.

The Luxottica-Essilor transaction concerning highly complementary businesses related to ophthalmic lenses (Essilor) and sunglasses as well as optical frames (Luxottica) was subject to merger control reviews in 20 jurisdictions, including Brazil, Chile, China, Colombia, Mexico, Singapore, the US and the EU.

In Turkey, the TCA analyzed that the transaction created horizontal overlap in relation to the sunglasses/frames markets and created conglomerated effects in relation to complementary markets. In its analysis, the TCA stressed that the merger gave rise to the creation of a dominant position and an increase in the brand portfolio of the relevant entities, especially in relation to the sunglasses and optical frames markets. Accordingly, the parties proposed to divest

one of its main subsidiaries, namely Merve Optik, and end its distribution relationship with one of the significant glass brands, namely Marcolin, in order to remedy TCA's concerns in relation to increased market share and enhanced portfolio. Moreover, the parties proposed certain behavioral remedies in order to remedy concerns linked to conglomerated effects of the transaction. Indeed, the parties proposed to refrain from tying its products (i.e. ophthalmic lenses, sunglasses, optical frames) and imposing exclusivity or non-compete to opticians for a period of three years.

The TCA cleared the transaction subject to proposed commitments whilst foreseeing further restrictions in relation to the tying practices and deciding to review the effects of the commitments in the end of the three-year period.

### **Phase II investigation expectation disappears: plot twist in market definition in the Demirören – Doğan Medya Decision**

The TCA unconditionally cleared the acquisition of sole control over media sector assets of Doğan Medya by Demirören Medya. The TCA detected horizontal and vertical overlaps between the operations of relevant undertakings. In this context, operations of parties to the transaction overlapped horizontally in the printed and online publications market. Moreover, vertical overlaps were observed in the markets concerning agency services, distribution of newspapers and magazines services and the sale of online advertisement areas. Majority expected the decision to be examined under Phase II Investigation due to substantial horizontal and vertical overlaps in crucial markets, however the relevant market assessment came out with a plot twist.

Indeed, the Demirören - Doğan Medya decision set precedent for examination of substitutability between the online and digital publications and printed publications. A detailed analysis was carried out in relation to the online and printed publications, and overall the TCA opined that demand, supply and the view of advertisers differed between the two markets. The TCA noted that the quality of journalism, revenues of advertisements and the frequency of news between the printed and online – digital publications varied greatly. Accordingly, the TCA refrained from making an explicit market definition; however, it highlighted that online and printed publications may not be considered as a substitute for one another, and the parties did not gain high

market shares in the relevant markets as a result of the transaction.

The TCA also examined the vertical effects of the M&A mainly based on agency services, distribution of newspapers and magazines services and the sale of online advertisement areas. Overall, it evaluated that the transaction did not give rise to competitive concerns in relation to the relevant markets and cleared the acquisition.

### **BONUS: The TCA blocks UN-Ro Ro merger in 2017, reasons reveal in 2018**

The TCA blocked acquisition of shares of seven Ulusoy entities by UN Ro – Ro in 2017. The reasons for TCA's decision did not reveal until 2018 awaiting publishing of the reasoned decision.

The TCA examined the effects of the transaction on shipping agency service and Ro – Ro transportation between Turkey and Europe including Istanbul, Izmir and Mersin departing lines as well as port management services related to Ro – Ro ships. The key point in TCA's decision was considering different Ro – Ro lines such as Izmir and Mersin in the same geographical market based on their hinterlands rather than separate geographical markets. The TCA based its evaluation on the substitutability of the lines since the pricing policy of a line cannot be determined by disregarding other lines' prices.

By identifying market in a broad manner, the TCA concluded that transaction would create a dominant position in the Ro – Ro transportation market since there were only three undertakings operating in the market and Un Ro – Ro was the market leader. In accordance with the Ro – Ro transportation market, TCA stated that port management services are inseparable from Ro – Ro transportation. Therefore, the analysis on Ro- Ro transportation market was applicable to port management services. Accordingly, the TCA concluded that transaction would also constitute a dominant position in the port management services. Moreover, the TCA stated transactions shipping agency services side does not constitute any violation since there were not entry barriers to market contrary to Ro – Ro transportation and port management services markets.

Overall, certain behavioral remedies proposed by the M&A parties were regarded to not remedy the above explained competition concerns and thus, the TCA refrained from clearing the transaction.





# Unilateral Conduct



## **The TCA scrutinizes the electricity sector through three investigations**

We have seen that after the liberalization policies in the electricity market, the TCA has closely examined undertakings in the related sector and has adapted a more active policy through preliminary inquiries, market studies and lastly through investigations. After preliminary inquiries against undertakings operated in the electricity market in 2015, the TCA started a series of investigations in the electricity sector in 2016 on allegations in relation to abuse of dominant position, which were ended up in 2018.

The TCA initiated a first investigation in the electricity sector in August 2016 against CK Enerji, at which the TCA imposed an administrative fine of €6.7 million. A second investigation initiated in January 2017 against Enerjisa where the TCA imposed €25.2 million of administrative fine. The third investigation of the TCA in the electricity market was started in March 2017 against Bereket Enerji at which the TCA imposed an administrative fine of €7.9 million.

During the investigations of the TCA, activities of CK Enerji, Enerjisa and Bereket Enerji in the electricity retail sales and distribution markets were examined. Distribution regions of those three energy groups are among the largest of 21 distribution regions of Turkey and reach more than 30 million users (approximately one third of total Turkish population). Also, group companies investigated in relation to their retail sales operations reached around 14 million users in 19 provinces of Turkey.

The relevant market definition became a crucial point during the investigations. For the distribution of electricity, there was no conflict between the TCA and energy groups under investigation in a sense that it was agreed on the regional distribution market definition. However, there occurred a conflict between the TCA and energy groups regarding the retail sales of electricity market. Although the TCA defined the relevant product as residential, commercial and industrial consumers by mainly focusing on the regulations of Energy Market Regulatory Authority and regulated tariff prices, energy groups, of which Enerjisa and Bereket were represented by BASEAK, argued for relevant market definition based on consumption levels for commercial and industrial consumers. Energy groups further argued that the relevant geographical market should be defined nation-wide, in opposition to the

view adopted in the investigation.

The TCA mainly examined allegations of (i) anticompetitive information exchange and coordination between the distribution company and the retail supplier, (ii) foreclosure of the market to the competitors of retail sales companies of energy groups through different conducts, (iii) complication of customer switches to competing retailers via concluding legally deficient contracts and IA-02 Forms, (iv) competition in the market is restricted due to the implementation of different conducts and (v) customer switches were prevented via agreements including commitments and automatic renewal clauses.

After ending up those investigations against CK Enerji, Enerjisa and Bereket Enerji and although a short time passed through the 2015 Electricity Report of the TCA, the TCA announced a new sector inquiry at the end of December 2018 to identify the structural problems in the market and to discuss and propose solutions with market players.

Lastly, the claims of Meram Elektrik, which were closed during the preliminary inquiry in 2016, were cancelled with a court decision and brought one of the first investigations of 2019. We can say that the electricity market has continued to be on the agenda of the TCA this year.

## **Game-changer decision of the TCA on innovative markets: Sahibinden Decision**

In the last couple of years Sahibinden, which is a leading online platform in Turkey that provides goods and services to its customers in ten different categories has been under the spotlight of the TCA especially in terms of its pricing strategy. In May 2017, the TCA initiated an investigation on allegations of excessive pricing practices and abuse of dominant position towards online real estate ads market. In September 2017, the TCA decided to launch an additional investigation on the same allegations towards online automobile ads market. The two cases were combined and the case handlers prepared a joint investigation report in relation to allegations in two different markets.

The investigation against Sahibinden raised two significant and difficult topics from a competition law perspective – excessive pricing and relevant market definition regarding online/innovative markets. Firstly, the issue of excessive pricing, which can be defined as a pricing higher than the competitive level arising





from significant market power, is interesting for competition analysis. Indeed, considering a price as excessive conduct requires to determine an “appropriate” and “non-excessive pricing” which becomes delicate in an open, free and capitalist oriented market. In accordance with these debates in the US, by contrast to the European Union or Turkey, excessive pricing does not constitute a violation of anti-trust laws. Secondly, the definition of the relevant market for online platforms or innovative markets is a debatable issue in competition law analysis. Recently for the Sahibinden case, it became crucial once again to define the relevant market and hence the limits of allegations. In this decision, the TCA defined the relevant product markets as “online platform services for selling/rental of automobiles and real estates.” The TCA focused on the online markets and for this case did not accept offline markets as a substitute for online markets.

After more than a year of investigation, the TCA declared its final decision on October 2, 2018. The TCA concluded that Sahibinden was in a dominant position in online platform services for real estate sales/rental and online platform services for vehicle sales in Turkey. The TCA considered Sahibinden applied excessive pricing in these markets, and for these reasons, imposed Sahibinden to administrative monetary fine amounting €1,8 million.

It is also important to note that Sahibinden case was an exceptional situation that the members of the Competition Board reached out a conclusion that differentiated from the conclusion of the case handlers, of which stated that the pricing strategy of Sahibinden did not constitute excessive pricing and violate the Competition Act in their report.

### **Google continues to be on the agenda of competition authorities: Google Decisions of the TCA in 2018**

In 2018, the TCA and the European Commission investigated Google for abusing its dominant position in different relevant markets with different allegations.

On February 2017, an investigation was initiated against Google on allegations of abuse practices concerning the supply of its mobile operating system and mobile applications/services and the agreements made between Google and OEMs. The allegations of the TCA are similarly to those penalized by the European Commission. As a result of the investigation, the TCA applied a fine against Google amounting to €1.4 million.

According to the decision of the TCA, Google was in a dominant position in the “licensed mobile operating systems” market. The agreements signed between Google and mobile device manufacturers for mobile operation systems contained a provision, which



obliged manufacturers to add Google WebView component as the default and only component for search function. The agreements signed between Google and mobile operation systems contained a provision, which obliged device manufacturers to add Google Search on the home screen and other designated screens by default. Income Sharing Agreements signed between Google and mobile device manufacturers contained a provision where Google search was placed by default. At the end of the decision, the TCA obliged Google to remove these provisions from the agreements.

Afterwards in January 2019, the TCA decided to initiate two new investigations to determine whether Google violated the article related to abuse of dominant position of Competition Law. In the first investigation, the TCA alleged that Google complicate the activities of other undertakings with the new updating algorithm for general research services. In the second investigation, the TCA alleged that Google abused its dominant position towards AdWords advertisements. Google will continue to be in the radar of the TCA.

### **The TCA investigates TTNNet's New Year's bundling**

In January 2017, an investigation has been launched against TTNNet, which is the largest internet service

provider in Turkey operating under Türk Telekom, to determine whether TTNNet violated the article concerning the abuse of dominant position though allegations in relation to offering packages including internet and pay TV services with fixed broadband internet services market. The Competition Board rendered its decision in August 2018.

The TCA examined the dominant position of TTNNet in retail fixed broadband internet access and also investigated the Tivibu New Year packet, which claimed to propose a combination of internet and pay TV at a reduced price.

Firstly, the TCA considered that TTNNet was in a dominant position in packages including pay TV services with fixed broadband internet service market. However, the TCA concluded that TTNNet did not violate the article of Competition Law on abuse of dominant position and it was not necessary to impose an administrative fine. According to the decision of the Competition Board, it was decided to send an opinion to the Information Technologies and Communication Authority regarding the implementation of the principles of multicast tariff access obligation introduced by Türk Telekom. It aims to provide economic and technical repeatability of multi-game services and to provide a structural solution to competitive problems in the sector.

It is also important to figure out that although the case handlers were of the opinion that TTNNet violated the Competition Law, the Competition Board decided not to impose an administrative fine in relation to the conducts of TTNNet.

### **Recently concluded investigations of the TCA in relation to unilateral conduct**

#### **Celebi Bandirma Port Decision**

In May 2017, an investigation was launched against Çelebi Bandırma Limanı. It is examined that whether Celebi Bandırma Port implemented excessive pricing in relation to the port services that were offered to undertakings operating in ro-ro transportation services at the Bandırma Port.

The investigation was finished in June 2018, and the Competition Board concluded that Celebi Bandırma Port is in a dominant position in the “port services market for ro-ro lines between Northern Marmara and South Marmara” in Ege, South Marmara and western parts of Central Anatolia. However, the Board decided not to impose any administrative fines on Celebi Bandırma Port by determining that the port had not abused its dominant position.

This decision of the TCA on Celebi Bandırma Port became the second investigation of the TCA in 2018 on excessive pricing after the decision on Sahibinden.

#### **Mercedes Benz Decision**

In March 2017, the TCA initiated an investigation in order to determine whether Mercedes-Benz Turkey violated Article 6 of the Competition Law concerning the abuse of dominant position by distorting competition in the market for concrete pumps and trucks mounted with concrete pumps.

In August 2018, the final decision concluded that Mercedes-Benz did not abuse the dominant position through the agreements it made with the concrete pump producers and the discount systems it applied to these producers. The TCA did not impose any administrative fine against Mercedes Benz.

#### **D&R Decision**

In July 2017, the TCA launched an investigation against D&R, which is the investment of Doğan Holding in the retail sector and offers service in the field of hobby and culture retailing. The TCA examined allegations against D&R based on the

claims that the entity prevented new entries into the market through exclusivity agreements.

In August 2018, the TCA decided that D&R did not abuse its dominant position in the relevant market and hence, did not impose any administrative fine.

#### **Microsoft Decision**

In 2011, the TCA concluded that Microsoft did not abuse its dominant position after a preliminary investigation initiated against Microsoft concerning the “3+ project” which aimed to license unlicensed software and secured the use of computers in internet cafes. As a result of an appeal, the 13th Chamber of the Council of State cancelled the abovementioned decision of the TCA. Accordingly, the TCA carried out a second investigation in April 2017 to determine whether Microsoft violated the Competition Law with the in “3+ project” prepared for internet cafes or not.

In April 2018, the TCA rendered its final decision. The TCA re-examined tying/bundling practices adapted by Microsoft concerning the “3+ project” and concluded that Microsoft did not cause any anti-competitive effect in the relevant market. Therefore, the TCA concluded that although Microsoft was in a dominant position in the relevant market, it did not abuse its dominant position through its 3+ project.





# **Cartels/Horizontal Agreements**

Unlike previous years, 2018 was a stagnant year for the horizontal violations of the Competition Law in Turkey. However, the TCA published several reasoned decisions within the first quarter of the year which constitutes significant precedents for Article 4 (equivalent of Article 101 of TFEU) enforcement of the TCA.

### **Insurance companies absolved of concerted practice allegations**

At the beginning of the last year, TCA published its reasoned decision on the investigation regarding the vehicle insurance market on the grounds that alleged anticompetitive agreements or concerted practices arose through jointly allocating the market and increasing prices. Thirty-two insurance companies and the Insurance Association in Turkey were under investigation. At the end of the proceeding, the TCA concluded that the Competition Law was not violated.

In its decision, the TCA observed that full freedom to determine the premium rates motivated insurance companies to increase their market share in 2014. Therefore, the premium rates decreased unusually within 2014. This dramatic decrease was the main reason why the ratios show a significant uptrend in 2015. On the other hand, by considering that it is a quite homogeneous market in terms of the services provided by insurance companies, the TCA stated that it is feasible to encounter similar premium rates among the competitors in the vehicle insurance market. Thus, the TCA concluded that there is no agreement or concerted action amongst the undertakings to fix the price on the market.

As for the economic analysis of the market, the TCA also stated that insurance companies consider several factors in determining their premium rates, such as variable costs, data repository, risk analysis and statistical information. In this respect, it is emphasized that there was no evidence to indicate that insurance companies have an agreement or concerted action to share the market illegally.

In conclusion, the TCA decided that there is no evidence to show anticompetitive practice among insurance companies, and the fluctuation in premium rates is reasonable in light of the economic analysis. Thus, no administrative fine was imposed on the companies.

### **TCA finally published the reasoned decision for syndication loans investigation**

One of the interesting antitrust cases in 2017 was the investigation of the TCA concerning 13 international

banks, for their conducts in syndicated loan markets. Even though the TCA gave its decision at the end of 2017, the reasoned decision was published in the second quarter of 2018.

In April 2016, the TCA started an investigation about 13 international banks for their certain conducts in corporate loan markets. Among those 13 international companies, BASEAK represents ING Bank., Merrill Lynch Bank and RBS Bank.

The authority initiated the investigation with respect to Article 4 of the Competition Act based on a leniency application made by one of the undertakings under scrutiny; MUFG Bank. The TCA claimed that the mentioned banks, which supply loans to corporations, have been regularly exchanging some sensitive information—including information on prices and other related conditions—in order to restrict the competition.

Among other undertakings subject to investigation, two international banks are found to be the parties of an anti-competitive “agreement/concerted practice” with MUFG separately, on the grounds that they have carried out distinct yet similar behaviors. The TCA concluded that the agreement/concerted practice between MUFG and those banks has enabled them to exchange information concerning prices, amount, maturity or participation.

As a result, TCA decided to impose administrative fines on those three banks. However, MUFG, which have applied to the leniency program, was fully exempted from the imposed fine.

The decision should be elaborated under several grounds. First of all, when the reasoned decision is assessed, one may argue that most of the corporate loans supplied by the investigated banks are multilateral loans, which are generally referred to as syndicated loans. In fact, “syndicated loan” points out to a general concept that label multilateral loans in which two or more lenders jointly agree to provide a loan to a borrower. In that sense, not only competition but also cooperation and information sharing are required to formalize efficient syndication. This renders the investigation more complex than a regular investigation for bilateral loan transactions.

Perhaps one of the most interesting parts of the TCA's decision is that the TCA assessed that the market definition is not crucial for an investigation subject to Article 4. It is surprising that the TCA does not



consider the relevant market definition as necessary to evaluate the conducts of the banks as the market definition is the initial and indispensable part of competition analysis, especially for the information exchange cases. Contrary to TCA's decision, market definition is required to make a proper assessment regarding the nature of information exchange as per the Guidelines on Horizontal Cooperation Agreements. In the Guidelines the TCA states that market definition is a crucial element to determine whether information exchange is anti-competitive or not.

In addition, for the first time, the TCA has granted immunity without a proper cartel decision. Since the existence of a cartel agreement between the undertakings is the main condition to be deemed immune from an administrative fine, TCA concludes that the investigated parties have infringed the competition law through an "agreement/concerted practice". In doing so, the TCA solves the shortcoming stemming from the secondary legislation, since cartel definition made in the mentioned legislation includes agreements and concerted practices, but not information exchange. Through this approach, the TCA opens the door to anti-competitive information exchanges, which may also provide a basis for the leniency program.

In the reasoned decision, TCA also adopted an interesting interpretation of the effects principle. TCA assessed that if an undertaking in Turkey has a subsidiary in another country, any infringement claim related with this subsidiary has an effect in Turkey through the main undertaking. This is interesting because TCA—without looking at effect—automatically grants authorization itself to investigate the claims all over the world through the undertakings established in Turkey.

Moreover, the TCA mentioned that the Competition Act gives enough authorization to the TCA to use phone (voice) records. The TCA argued that voice recording is a common application in the banking industry and thus the employees who are involved in the alleged conduct had consent for their conversation to be recorded. As a result, the TCA concluded that the element of consent deems the usage of voice records lawful, and it is legally convenient to use them as a means of proof regarding the conduct at stake, which was deemed as a violation of the Competition Act in the wake of the investigation.

## **TCA finally concluded the long-lasting investigation on meal ticket/card sector**

The TCA concluded its investigation on meal ticket/card sector companies in line with the concerted practices allegations. In the end, three of the six companies were found to be in anticompetitive concerted practices.

When the process is examined in detail, the preliminary investigation was initiated against the six companies in 2010. At the end of the preliminary investigation, the TCA determined that there is no need to open a full-fledged investigation. Pursuant to the appeal, the 13th Chamber of Council of State annulled the TCA's decision and TCA decided to re-open the investigation.

At this point, it is quite interesting that the TCA also included Multinet, who is represented by BASEAK, into the investigation even though Multinet was the applicant of the appeal made to the Council of State. In other words, the investigation was initiated upon complaint of Multinet, however Multinet remained to be party to the investigation. This is a rather rare situation in competition law practice in Turkey.

At the end of the investigation, the TCA determined violation of Article 4 of the Competition Act by means of concerted practices and imposed administrative fines on Sodexo in the amount of approx. €5.5 million, Ederned in the amount of approx. €6 million and finally Network, which is the joint venture of the abovementioned companies, in the amount of approx. €1 million.

## **Recently Initiated Investigations**

### **Investigation on particle board and MDF market**

TCA concluded its preliminary examination and determined to initiate a full-fledged investigation on MDF (medium-density fiberboard) and Particle Board Industrialists Association and 12 undertakings in particle board and MDF market.

Within the last two years several allegations were made towards the undertakings in particle board and MDF market, the TCA concluded not to open an investigation on two occasions respectively in 2016 and 2017. However, this time, the TCA determined that the findings were significant and sufficient and investigate whether the undertakings in question violated Article 4 of the Competition Act.

### **Another investigation on the insurance market**

As mentioned above, the TCA recently concluded its full-fledged investigation and decided that there is no evidence to demonstrate anti-competitive practice among the undertakings in the insurance market.

However, in the third quarter of 2018, the TCA determined to initiate another investigation on eight undertakings operating in the insurance market in order to assess whether they violated Article 4 of the Competition Law. In its preliminary investigation decision, the TCA concluded that the findings were sufficient to make further investigation in the insurance market in respect of voluntary insurance for big projects with high-risk capacity (including project financing)

### **Cement procedures are again subject to investigation**

The cement market has been subjected to TCA's investigations for many years. In the second quarter of 2018, the TCA initiated another investigation in the cement market and concluded that the findings were sufficient to further examine Göltaş Çimento and As Çimento operating in Isparta province.

The allegations in the investigation mainly rely on the violation of Article 4 through fixing cement prices and allocating customers by pressuring ready-mixed cement producers.

### **Investigation on mail-freight transportation market**

The TCA initiated an investigation into the mail-freight transportation market in order to determine whether the undertakings in the market violate Article 4 by customer allocation practices.

Several undertakings were added to the investigation, and, finally, the number of the undertakings which are under investigation reached to 35.

### **Investigation concerning Arçelik and Vestel**

The TCA initiated an investigation on Arçelik and Vestel which operate in white appliances market. The allegations mainly based on the claim that the parties exchanged sensitive information which may cause the violation of Article 4 of the Competition Act.

### **Preliminary investigation about retail prices of potatoes and onions**

As the recent news in the media indicated that the prices of potatoes and onions are quite high compared to recent years, and retail prices show significant differences between markets, the TCA initiated a preliminary investigation to conduct research in the sector.

At the end of the preliminary investigation, the TCA concluded that there is no evidence to indicate anti-competitive collaborations among the undertakings which engage in the potato and onion business.

### **Preliminary investigation on LPG market**

In the first quarter of 2018, the TCA initiated a preliminary investigation on undertaking operating in LPG Market in order to determine whether the parties decrease the prices through a collusion.

In its decision, the TCA considered that a significant level of competition exists regarding the price and the quality of the product/service in the LPG market. In this respect, in addition to the fact that there are several documents which may point out the collusion intent of the undertakings, the TCA concluded that the intention of the collusion has not been realized in practice. On the contrary, the TCA assessed that there is a significant level of competition among the undertakings in the LPG market. In this respect, the TCA concluded that a full-fledged investigation is not required in the LPG market.

# Vertical Relations



2018 has been a very active year for the TCA with regard to vertical agreement enforcement.

### **Recently Initiated Investigations**

#### **Red Bull is on the radar for alleged vertical violations**

The first investigation into the vertical relations was launched against Red Bull's Turkish subsidiary for resale price maintenance allegations.

The TCA announced that the investigation that was launched in July 2018 also focuses on whether Red Bull Turkey is imposing de facto exclusivity to its distributors.

#### **Distribution agreements of Baymak is under scrutiny**

In September 2018, an investigation against Baymak, a heating and cooling systems producer, for its suspected violation of competition laws in its relations with distributors was launched. Although the TCA mentions "other practices" in its announcement, whether the scope of investigation is limited to vertical relations remains to be seen.

#### **Vertical restriction allegations in fuel distribution**

The final investigation launched in 2018 was into the petroleum market. The vertical relations of the four prominent market players with their dealers are now being scrutinized.

All of these investigations are pending before the TCA, and they signal that vertical restrictions will be on TCA's radar in 2019 as well.

#### **Recently concluded investigations of the TCA in relation to unilateral conduct**

2018 was also a significant year for the investigations concluded by the TCA. This year the TCA concluded two vertical investigations by absolving Karsan, a local commercial vehicles manufacturer, and Roche, the Turkish subsidiary of the global pharmaceuticals company, from vertical restriction allegations. Karsan was being accused of resale price maintenance and territory allocation, and similarly Roche was on the hook for limiting exports from its distributors.

#### **Never ending story: resale price maintenance**

But 2018 was not so smooth for the Turkish subsidiaries of Sony, the consumer and professional electronics giant, and Henkel, the multinational

chemicals and consumer goods company. They were sentenced to administrative monetary fines of €0.6 million and €1 million, respectively, for resale price maintenance. Competition law circles are waiting for the reasoned decisions of these cases to see whether there has been a paradigm shift in the test applicable to resale price maintenance from rule of reason to per se.

Apart from these headliner developments, the TCA has also issued cornerstone precedents in 2018. We are providing insights to the most important ones below.

#### **Retail minus tariff methodology is recognized by the TCA**

It is a well-known fact that the infrastructure and transaction costs are quite high for the undertakings who operates in the broadband internet access services market. Thus, it is crystal clear that the recent regulations of the Information and Communication Technologies Authority do not help to change this fact by imposing heavy legislative burden to the market players.

Approximately one year ago, Vodafone applied to the TCA to request an exemption for the agreement which stipulates network sharing on the wholesale fiber data stream access and support services with Superonline. After a yearlong examination, the TCA decided to grant the individual exemption to the agreement. But most importantly, the retail minus method is recognized by the TCA for the first time.

It should be noted that the parties of the agreement are competitors both in the wholesale and retail market. Both sides have their own fiber infrastructure, and both of them offer fixed broadband internet services to end users. More specifically, Superonline, who is the affiliate company of Turkcell—the largest mobile operator in Turkey—has the second largest fiber network. On the other hand, Vodafone is more active in the mobile network; however, its network infrastructure is not widespread.

Therefore, the cooperation should be assessed taking into account the horizontal relation between the parties.

In addition, as the agreement stipulates the sharing of the infrastructure which is an essential facility for the activities in the retail market, vertical implications come into question as well.

As the incumbent, Türk Telekom, has the largest fiber

network in Turkey with 79 percent of the market share in fiber infrastructure prevalence. Therefore, the parties of the agreement need access to the infrastructure of Türk Telekom in order to enlarge their fiber network. In this regard, the main purpose of the agreement is to enhance the service network of the parties by sharing their fiber infrastructure and cooperation in the new infrastructure construction.

TCA concluded that the cooperation will allow the parties to achieve higher capacity utilization rates. Therefore, infrastructure sharing between Vodafone and Superonline will strengthen the parties against Türk Telekom. Furthermore, according to the TCA, the fact that the parties will be entitled to a premium at the rates correlated to the number of subscribers and the number of households will foster the motivation of the parties to invest in the infrastructure.

On the other hand, the TCA emphasized that the cooperation in the support services will contribute the quality standard of the services offered to consumers in Turkey. Thus, it will allow the consumers to choose between different service providers when they are not satisfied with the received services.

Despite these efficiencies, the TCA highlighted that the cooperation has the potential to increase the prices at the retail level. To remedy this Vodafone referred to the so-called “retail minus method” which is about the margin available to a potential competitor created by the subtraction of specific cost components. For example, if the final product price is \$100, and the incumbent avoids a cost of \$30 by not supplying the customer itself, then the access charge should be \$70. Therefore, entrance will be efficient if the costs are less than \$30.

Considering all of the above, the TCA granted an individual exemption to the agreement.

### **A new round in MFC clauses? Individual exemption granted to Migros**

BNR Teknoloji is a developer of a consumer application, Hopi, that offers personalized shopping experience to customers in various sectors such as fashion, technology, travel and car rental. This application allows consumers to collect bonus points from their transactions. Migros, one of the largest wholesalers in Turkey, has signed an agreement with BNR, for customers to be able to collect bonus points from purchases made in Migros stores and similarly spend the bonus points already collected through the application.

The contract had an MFC clause through which Migros agreed to apply the same commercial conditions to Hopi that it applies to Hopi’s competitors. In its Booking.com and Yemeksepeti decisions the TCA ruled that MFC clauses can have anticompetitive effects and thus imposed administrative monetary fines. However, the TCA ruled that the MFC clause of Migros allowed consumers to collect more bonus points and in this regard created consumer welfare. Therefore, the TCA granted individual exemption to the MFC clauses of Migros.

### **Green-light for a 10-year exclusivity: Passolig Decision**

The e-ticketing application for football games had previously been granted individual exemption for three years (until the end of the 2016-2017 season) in 2014. The agreement had exclusivity clauses through which the Football Association was subcontracting the establishment of necessary IT infrastructure and physical infrastructure in the stadiums exclusively to a consortium. The TCA had based its previous decision on the fact that the market for e-ticketing was not established then, and there needs to be long lasting exclusivities to be able to invest in infrastructure properly.

Following up its previous decision, the TCA reviewed the exclusivity clauses in the agreements and continued with its previous stand and granted individual exemption to exclusivity clauses until 2023.

### **Refrigerators are still the medium of competition in beer market ...**

Considering the competitive edge created through being able to serve cold beverages, the TCA previously ruled that “refrigerator exclusivity” is anti-competitive in the beer market. In this regard, Efes, the dominant player in the Turkish beer market, had to allow its nearest competitor, Tuborg, to use a certain portion of its refrigerators.

In 2018 Efes applied to the TCA for it to allow going back to “refrigerator exclusivity” era. After a thorough review, the TCA ruled that if it allows Efes to prevent Tuborg from entering into its refrigerators, it would lead to de facto exclusivity which would be anticompetitive. Therefore, the TCA refused Efes’s request and continued with the so-called refrigerator rule.





# **Agency effectiveness**

## Enlarged scope of the leniency

The Regulation on Active Cooperation for Detecting Cartels (Leniency Regulation) explicitly stipulates the conditions for being granted immunity from fines or reduction of the fines for the companies involved in a cartel. This is considered as a bottleneck for entities to go cold feet on leniency applications, since other types of competition infringements (especially information exchanges) are not to be considered in the scope of leniency.

The TCA took a major step towards this obstacle in its Syndicated Loan Decision by adopting an approach on consideration of anti-competitive information exchanges within the scope of a leniency application, which could be defined as liberal.

We would like to remind that the investigation launched, following the leniency application of the Bank of Tokyo - Mitsubishi UFJ Turkey A.Ş. (BTMU). TCA decided that with the two other banks, BTMU has also infringed the competition law, but, because of its active role of disclosure of the infringement, TCA granted full immunity to BTMU.

The TCA needed to solve the problem of the Leniency Regulation left hanging, by investigating the parties in the scope of "agreement/concerted practice," since anticompetitive agreements and concerted practices are within the scope of the cartel, while information exchanges are not.

## Consistent approach to the single continuous infringement concept

Single continuous infringement (SCI), a concept recognized by both the European Commission and the TCA, allows competition authorities to evaluate a series of infringements under one single conduct. The primary importance determining an SCI is with regard to the calculation of the base fine as per the Regulation on Fines. The foregoing regulation states that the base fine shall be calculated separately for each behavior in case the TCA determines that there is more than one individual behavior. Accordingly, the TCA needs to consider the (i) relevant market, (ii) the nature and (iii) the chronological order of behaviors in establishing the presence of multiple infringements.

SCI also affects the manner in which the burden of proof is perceived. The TCA is generally under the obligation to present proof separately for each infringement in case more than one infringement is

determined. However, the TCA is no longer obliged to present proof of each separate behavior, but rather of one single conduct, in case it rules on the presence of SCI.

Having evaluated the presence of SCI in a few precedents, the TCA tackles the same concept in Syndicated Loan Decision. In late 2017, the TCA concluded its investigation initiated to determine whether banks providing syndicated loans to corporate customers in Turkey violated article 4 of the Competition Act by exchanging competitively sensitive information for current loan agreements, including information related to credit terms such as interest rates and credit periods, as well as information related to other financial transactions.

TCA, who determined that exchange of information between two banks extends over a period of two years, decided these multiple behaviors shall be considered as one single continuous infringement. Similar to precedents of the TCA, not allowing a clear understanding of TCA's approach to the concept, the latest syndicated loan decision does not expressly discuss why multiple conduct by investigated banks shall constitute SCI. Instead, the TCA echoes a few of its precedents by also recognizing the decisions of the European Commission (Commission) and the European Court of Justice (ECJ) while underlining factors to be considered in establishing SCI.

## What happened to the attorney client privilege in competition practice?

The TCA, at the end of 2016, announced the initiation of a preliminary investigation against a retail electricity provider to determine whether the undertaking abused its dominant position through exclusionary behavior. During the course of the preliminary inquiry, the TCA dawn raided offices of investigated parties so as to gather information necessary to build a case. During the dawn raid, case handlers discovered a report prepared by lawyers of an independent law firm within the scope of a competition compliance program. Despite objections that said documents are protected under attorney-client privilege and therefore shall be returned, case handlers obtained a copy of the document in a sealed envelope. The TCA later evaluated our objections and the content of these documents and resolved that they shall not enjoy the protection provided by attorney-client privilege. Accordingly, these privileged documents were used by the case handlers in drafting the Investigation

Report. This decision of the TCA, which was later appealed, naturally caused great concern with regard to the protection of privileged documents in competition proceedings.

This example materializes the basis of the concerns regarding attorney-client privilege, which is an internationally recognized concept, being not explicitly regulated under the Competition Act. Despite the absence of provisions regulating attorney-client privilege in the Competition Act, it is evident that such privilege is recognized for competition proceedings both by the European Court of Justice and by the TCA under the following conditions:

- The exchanges between the attorney and the client shall be connected to the client's right to defense;
- The exchanges shall emanate from an independent lawyer.

Therefore, naturally, documents and information advising/outlining how to circumvent competition rules are not protected by the attorney-client privilege. Likewise, documents and information emanating from a lawyer bound to the client by a relationship of employment, such as an in-house counsel, are not privileged.

The second requirement of being an independent lawyer is rather easy to determine. Whereas, determining the scope of client's right to defence is left with the discretion of competition authorities, and it can often be abused. The TCA in this case resolved that the scope of a client's right to defence extends only to documents produced by an independent lawyer during an investigation.

Such narrow interpretation is criticized by many, including the Administrative Court, which annulled the TCA's decision on this basis. The Administrative Court indisputably recognized the applicability of the attorney-client privilege during competition proceedings, conceded that the privilege extends to legal advice given before the initiation of an investigation and acknowledged that reports prepared within the scope of a competition compliance program do not aim to provide guidance for avoiding competition rules but are rather closely relate with the client's right to defence.

The TCA appealed the decision of the Administrative Court before the 8th Chamber of the Ankara Regional Administrative Court (Regional Court). The Regional

Court overruled the decision of the Administrative Court by upholding the TCA's narrow interpretation by stating the document prepared by independent lawyers does not correspond with the investigated parties' right of defence. Such narrow interpretation of the Regional Court is criticized since it clouds the importance of preventive legal support. The last word on the subject belongs to the Council of State, which will evaluate the appeal filed against the Regional Court's decision.

### **Investigating the complainant**

In 2010, Multinet, which is a meal card entity, filed a complaint before the TCA alleging that two of its competitors are in violation of the Competition Act. The Multinet was not the only one who is complaining to the TCA about the acts of those meal card entities. The TCA initiated a preliminary investigation regarding the complaints, and found that the meal card entities in question were not in violation of the Competition Act, therefore decided not to initiate a fully-fledged investigation.

The TCA's decision is brought before the Council of State by Multinet arguing that the TCA shall initiate a fully-fledged investigation examining the two complainees' actions. The Council of State annulled the decision of the TCA, by pointing the existence of enough evidence to start an in-depth investigation. Following the decision of the Council of State, the TCA decided to initiate a fully-fledged investigation, but this time it included the complainant Multinet among the those investigated.

The decision of the TCA initiating a fully-fledged investigation against the meal card entities including Multinet is brought before the administrative court, which ruled in favor of the TCA by stating "the decision to initiate an investigation" is not subject to judicial review since it lacks the elements of being final and executable in the eyes of the Administrative Jurisdiction Procedures Act. The Regional Court upheld the decision of the Administrative Court, and the case is moved to the desk of the Council of State.

The Council of State annulled the decision of the TCA initiating a fully-fledged investigation. The decision of the Council of State is revolutionary since it changed the general opinion excluding the TCA's decisions to initiate an investigation from a judicial review with the argument of these being not final and not executable. At the end of the day, the TCA concluded its investigation by clearing Multinet and fining three of its competitors.





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