

COMPETITION QUARTERLY

News and Updates on Competition Law Cases and Developments in Turkey



Aktay Legal Consulting

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Welcome

Welcome to the inaugural issue of Turkey Competition Quarterly Newsletter published in partnership by Aktay Legal and Deal Economic Consulting. With these quarterly newsletters, we will attempt to provide our readers with regular updates on regulatory developments such as launch of new investigations or publication of new communiqués or regulations by the Turkish Competition Authority. We will also consider the background that informs these developments and attempt to deliver a more thorough understanding.

Turkish Competition Board has been active in the first quarter of 2017, releasing new communiqués, launching and concluding investigations. This first issue includes details of these developments and articles authored by Eren Gunay, PhD and Faruk Aktay, LL.M., Esq. with detailed coverage of the new communiqués.

If you have any questions in relation to competition law cases and developments in Turkey, please email us at faktay@aktay.av.tr and eren.gunay@dealecon.com

Recent Investigations

Investigation Against Mercedes Benz

Turkish Competition Authority ("TCA") has concluded its preliminary inquiry launched against Mercedes-Benz Turk AS and determined that their findings yielded "sufficient" and "serious" evidence that merited a formal investigation.



The preliminary inquiry was initiated based on a third party complaint that claimed that Mercedes-Benz Turk AS abused its dominant position in the market for trucks to distort competition in the markets for standalone and truck-mounted concrete pumps, through agreements with manufacturer of concrete pumps, as well as discount plans offered for those manufacturers.

The investigation will attempt to determine whether the company has violated Article 6 of Act No. 4054 on the Protection of Competition, which prohibits abuses of dominant position in the market. Within the context of TCA's previous rulings, this decision hints at a more fine-grained definition of markets and may signal future regulatory stances.

Significant Investments in Turkey

Mercedes-Benz Turk AS has been producing trucks in Aksaray Turkey since 1986 and has been investing in production capacity, commencing exports in 2001 which currently account for a third of its output.

In the domestic market, it has been the market leader for the past 15 years in the medium (6-16 ton) and heavy (16 ton and above) truck markets, ending the years 2015 and 2016 with 50.6% and 41.3% market share, respectively. Mercedes-Benz Turk is 67% owned by Daimler AG.

Investigation Against Google

In response to Ankara District Administrative Court ruling, TCA revisited the complaint previously filed by Google's main competitor in Turkey, Yandex, and decided to launch an investigation into Google's practices and exclusive agreements in Turkey. Yandex's previous complaint alleged that Google (which includes the economic entity comprised of Google Inc, Google International LLC and Google Reklamcılık ve Pazarlama Ltd. Şti.) violated Articles 4 and 6 of Act No. 4054 with its restrictive practices in the mobile operation systems and mobile applications and services markets and the exclusive agreements concluded with original equipment manufacturers.

In the previous preliminary inquiry into the aforementioned complaint, Google's activities in Turkey were examined and the Board ruled that a further investigation was not necessary given that consumers are not prevented from downloading other applications of choice from application stores.



Yandex then filed a lawsuit and upon the appeal of the lawsuit rejecting Yandex's claims concerning the Board decision, Regional (Ankara District) Administrative Court issued its decision dated 9 September 2016, suspending the execution Board's decision not to investigate Google's practices further.

After discussing the information and documents included in the file, the Board issued the decision launching an investigation against Google under Article 41 of Law No. 4054, in order to further investigate as to whether Articles 4 and 6 of Act No. 4054 were violated and Google engaged in anti-competitive agreements and concerted practices between undertakings or abused of dominant position (if any).

Investigation Against Two Electricity Distribution Companies

TCA has determined that in their concluded preliminary investigation, their findings yielded "sufficient" and "serious" evidence meriting a formal investigation against electricity transmission companies ADM Elektrik Dağıtım A.Ş. and GDZ Elektrik Dağıtım A.Ş. and the affiliated, but legally independent electricity suppliers Aydem Elektrik Perakende Satış A.Ş. and Gediz Elektrik Perakende Satış A.Ş.



The preliminary inquiry was launched based on third party complaints alleging obstruction of the operation of electricity suppliers through various conduct and behavior, preventing the exercise of customers' right to choose their supplier. The companies named in the complaint are the incumbent players following the privatization of electricity production, transmission and supply markets, operating in the western Aegean region of Turkey. Beyond their high populations, economic activities in these provinces also represent significant shares of tourism and industrial output in Turkey.

A Bit of Hindsight

TCA had previously launched a preliminary investigation against these companies in 2014, but had determined that a formal investigation was not warranted based on evidence gathered. Complaints against the companies included providing incomplete lists of "free consumers" to competitors, claiming long-term contracts to be mandatory to consumers and signing ineligible consumers as "free consumers" based on premises of meeting consumption targets in the future and employees of the transmission company conveying marketing messages on behalf of the supply company or casting doubt on reliability of competing suppliers.

TTNET Investigation

In its January 19 meeting, the Competition Board decided that the preliminary investigation launched against Türk Telekomünikasyon A.Ş. ("TT") and TTNET A.Ş. yielded "sufficient" and "serious" evidence and launched a full scope investigation to establish whether the company had violated Article 6 of Act No. 4054, prohibiting abuses of dominant position. The preliminary investigation was initiated in response to third party complaints that the two companies operating as a single economic entity abused their dominant position through bundling of fixed broadband and subscription television services.

As former state-owned monopoly, TT owns and operates 71% of backbone and 89% of local loop infrastructure. As of 2016 Q4, TT has 63.6% share of the fixed-broadband market by number of subscribers. In the subscription television services market, TT has acquired approximately a quarter share of the market by number of subscribers since its reentry into the market in 2010 with an IPTV offering. During the privatization of TT, its cable television services and satellite operations were left in public ownership, operating as Türksat.

Revisiting Exemption

TTNET A.Ş. had in 2014 sought an exemption from TCA regarding the bundling of its subscription TV services with broadband access and voice services. In its February 2015 decision, the board had recognized that TTNET was attempting to leverage its market share in the broadband access market to gain a strong entry into the subscription TV services market, but argued that TTNET was already discriminated against by Türk Telekom's wholesale pricing schedule for access to infrastructure and that the proposed price points for the bundles would not price squeeze an efficient competitor out of the market. TCA pointed out that the decision hinged on whether the bundles would be loss leaders, but recognized that it had to decide at an ex-ante stage where proof would not be available. Ultimately, the board unanimously decided to grant the exemption, conditional on ex-post analysis demonstrating that the bundles cover their costs.

Luxottica Turkey Fined

Turkish Competition Board concluded the investigation on as to whether Luxottica Gözlük Endüstri ve Ticaret A.Ş. (Luxottica Turkey) violated Article 6 of Law No. 4054 by its sales policies and other practices.



The investigation was initiated on 1 September 2015. In the Competition Board meeting of 23 February 2017, it was decided that Luxottica Turkey has a dominant position in the sun glasses whole-sale market. Upon review and evaluation of all evidences, information, documents, expert reports, written responses of the parties and conclusion of oral hearings, the Competition Board, by majority vote of its members, ruled that Luxottica Turkey abused its dominant position by way of hindering the activities of its competitors in the relevant market thus violated Article 6 of the Act no 4054. Consequently, the Board, based on Luxottica Turkey's 2015 revenues, imposed an administrative fine, in the amount of try 1.67 million equivalent to 0.75 per cent of its 2015 revenues per Article 16 of the same Act.

The company has the right to appeal the fine before Ankara District Administrative Courts within 60 days following the service of the Board decision.

Market Leader Across the Board

Luxottica Group is the global market leader in the design, production and distribution of fashion, luxury and sport sunglasses. The group, in its portfolio of sunglasses, owns Ray-Ban, Oakley, Vogue Eyewear, Persol, Oliver Peoples and Alain Mikli brands and the licensed products of Giorgio Armani, Burberry, Bulgari, Chanel and many more.

Luxottica also owns every major retail outlet that sells eyewear chains LensCrafters, Pearl Vision and Sunglasses Hut, which do not operate in Turkey.

Diageo's Turkey Unit Mey İcki Fined

The investigation to find out whether Mey İçki San. ve Tic. A.Ş. violated Articles 4 and 6 of Law No. 4054 by means of preventing the sale of competing products through creating pressure on points of sale, practicing exclusivity in favor of its own products and hindering its competitors' activities in the raki market was concluded.

The investigation was initiated as a result of the preliminary inquiry conducted upon a complaint. As a result of the discussion of the contents of the file by the Competition Board on 12 June 2014, it was decided that Mey İçki San. ve Tic. A.Ş. held dominant position the raki market and violated Article 6 of Law No. 4054 by means of abusing its dominant position through activities which had as their object or effect complicating its competitors' activities in the raki market.



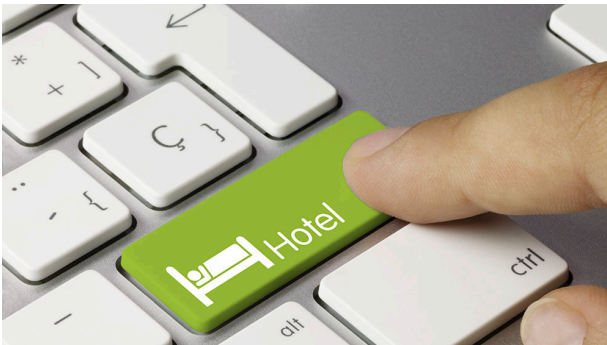
Moreover, considering the facts that Mey İçki San. ve Tic. A.Ş. was dominant and its activities that constitute a violation were the result of unilateral conduct by the said undertaking, it was concluded that it was not necessary to impose administrative fines within the scope of article 4.

Troubles Are Not Over Yet

In 2011, Diageo acquired Mey İcki, Turkey's foremost producer of raki, the milky aniseed spirit which many Turks consider their national drink, for USD 2.1 billion. Two years after the deal, Turkey's government enforced a law forbidding advertisements and restricting sales of alcohol. In June 2014, the Competition Board also imposed a fine of USD 14.9 million for breaching competition rules.

Booking.com Fined, then Banned

The Competition Board has announced the conclusion of its formal investigation on whether Booking.com B.V. and its Turkish representative Bookingdotcom Destek Hizmetleri Limited Şirketi were in violation of Articles 4 and 6 of Law No. 4054 with 2.5 million TL (around USD 675.000) fine imposed on Booking.com B.V. by majority vote.



Price and allocation conditions in agreements entered into by Booking.com and the company's best price guarantee were found to be in violation of Article 4. Booking.com could not benefit from the Block Exemption Communiqué on Vertical Agreements (Communiqué No: 2002/2), due to its market share above the threshold set therein. TCA also decided that the company could not be granted exemption based on Article 5 of Law No. 4054, which allows exemption for new economic or technical improvements or developments which benefit consumers while not eliminating competition in a significant part of the market and not limiting competition beyond what is necessary.

In a further development, on March 29, the Association of Turkish Travel Agencies (TÜRSAB) obtained from the Istanbul Fifth Commercial Court of First Instance an injunction against Booking.com B.V., suspending reservations in Turkey for customers located in Turkey. The court will deliberate whether the company requires a license to resume its operations in Turkey. TÜRSAB intends to proceed with actions against similar service providers, naming Trivago and Tripadvisor as future targets.

However, this injunction was met with protest from hoteliers, whose association, TÜROB, in turn filed to lift the injunction. Following foreign relations crises, especially with Russia, hoteliers have increasingly counted on domestic travelers. Platforms like Booking.com are understood to be important sources of reservations for smaller establishments.

Compliance a Puzzle to be Solved

In the past few years, local presence of international web companies have been under the spotlight, with debates on how they should be taxed or where their servers and data storage should physically be located. Compliance with local rules and regulations is becoming a more important challenge as local governments and stakeholders recognize the missed tax opportunities and disruptive influence, respectively, caused by the entry of web services providers into the local market.

Legal Updates & Articles

Turkish Competition authority has announced two important communiqués with implications on M&A notifications and block exemption rules in relation to motor vehicles sector. You may find more detailed coverage in our articles below.

Our New Articles

I - Amendments to Communiqué on Mergers and Acquisitions Calling for Authorization of the Competition Board (Communiqué No.2010/4)

Turkish Competition Authority (the “TCA”) introduced amendments to Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board on 24 February 2017.

With the amendments introduced under the new Communiqué No. 2017/2,

- Article 7(2) of the Communiqué regarding the biannual review of notification thresholds has been repealed;
- Article 8(5) of the Communiqué regarding the definition of the scope of “single transactions” has been amended; and
- A new provision concerning share purchases made in the stock exchange through serial transactions has been included as Article 10(6) in the Communiqué

TCA's Review of Notification Threshold

Initially, the first limb of amendment repealed the mandatory biannual review of the notification thresholds by TCA. As known by the competition practitioners, Turkish Competition Law regime opted for a pre-merger mandatory notification system. In this system, a transaction that meets certain criteria has to be reported to the competition authority before it is consummated and a transaction falling below the criteria will be considered *de minimis* and thus will not be subject to merger filing. In practice, TCA have reviewed but not revised the notification thresholds regularly in every two years. The last time TCA revised notification thresholds

was the end of 2012 with the Communiqué No. 2012/3. The main reason behind this is that TCA prefers the “catching net” created by the notification threshold to be rather wide in order to avoid that a transaction with a potential anti-competitive impact might escape notification thus scrutiny by TCA. Once a merger has received a clearance from TCA, it has almost no authority to review it unlike that of the U.S. Federal Trade Commission (“U.S. FTC”) under Section 7 of the Clayton Act, which allows the U.S. agencies to revisit mergers with no limitation in time if they can demonstrate that the transaction may have substantially lessened the competition. So the thresholds set forth in Article 7 of the Communiqué No.2010/4 remained as follows:

- Total turnovers of the transaction parties in Turkey exceed 100 million TL, and turnovers of at least two of the transaction parties in Turkey each exceed 30 million TL, or
- Global turnover of one of the transaction parties exceeds 500 million TL, and at least one of the remaining transaction parties has turnover in Turkey exceeding 30 million TL

Given that the turnover thresholds have not been revised by TCA over the last four years, it makes sense to strike it out of this Communiqué. As per our conversation with the experts of TCA, the turnover thresholds are not expected to change at least for the rest of this year.

Serial Transactions Rule Expanded

Secondly, TCA revised the provision in relation to “creeping acquisitions” or “serial transactions”. Rules on serial transactions aim to avoid that by structuring a large transaction in smaller deals companies may circumvent merger review. TCA expanded the scope of “serial transactions” for the calculation of notification thresholds. Previously, two or more transactions carried out between the same persons or parties within a period of two years were considered as a single transaction. With the amendment introduced, the time period for calculation has been expanded from two to three years and the same persons or parties has been

replaced with “the same persons or parties or by the same undertaking in the same relevant product market”. Previously, two year time period was similar to the one adopted under Section 27(6) of the UK’s 2002 Enterprise Act. Theoretically speaking the introduction of three year time period will allow TCA to subsequently review more of transactions, which have already been consummated. However, in practice its impact on the workload of TCA would be deemed negligible. We are of the opinion that instead of tweaking this “aggregation model” already adopted, introduction of “sectorial model” where serial transactions are used to acquire market power in certain industries e.g. electricity generation market, would be better to combat against anti-competitive creeping acquisitions.

Acquisition of Control of Listed Companies

Lastly, TCA inserted an additional provision concerning the acquisition of control for stock exchange transactions. Accordingly, the new provision reads that “in case control is acquired as a result of security purchases made from different seller in the stock exchange through serial transactions, the transaction may be notified to the Board after its execution, provided the following conditions are met:

- a) The transaction should be notified to the Board without delay,
- b) Voting rights connected to the acquired securities are not exercised, or are only exercised based on an exception to be granted by a Board decision in order to ensure the preservation of the full value of the investments

TCA also reserved the right to introduce terms and obligations on the parties to the transaction in its exception decision in order to ensure effective competition conditions. This provision is similar to the one introduced under Section 801.13 Hart-Scott-Rodino Act of 1976 (“HSR Act”) in the US. However, instead of adopting the “size of transaction” and “size of persons” tests under the HSR Act, the TCA put forth a simpler change of control criteria for the implementation of this new rule. Please also note that TCA did not introduce any notification or waiting period requirements for its implementation.

II - TCA Revises Terms of Block Exemption for Motor Vehicle Sector

Turkish Competition Authority (TCA) has published a new Block Exemption Communiqué (Communiqué No. 2017/3) for the Vertical Agreements in the Motor Vehicle Sector (“New Communiqué”) on 24 February 2017, updating terms of the block exemption on specified vertical arrangements. With this New Communiqué, the Competition Authority has instituted some changes in policy, in line with the 2011 sector study that they have conducted. This regulatory update follows a similar update by the European Commission, whose Regulation No. 461/2010 necessitated changes to some of the provisions of its Regulation No. 1400/2002.

The New Communiqué, replaces Communiqué No. 2005/4 which was in force since January 1, 2006. The Competition Authority has instituted a grace period of two years to achieve compliance with new provisions stipulated in the new communiqué.

In their study, TCA deemed that market concentrations in the sales market were in line with competitive markets and observed that prices have not increased in real terms since 2005, despite increased demand. TCA concluded that there was no evidence of a sufficient degree of market failure necessitating stricter measures on the sales market. On the other hand, in the after sales market, referring to spare parts and repair and maintenance services, the study has identified market distortions, including high profit margins and high market concentration of authorized dealers in the after sales market for more recent vehicles.

Conditions to Qualify for the Block Exemption Have Been Removed

In Communiqué No. 2005/4, block exemption was subject to meeting some restrictions on vertical arrangements which are no longer conditions in the New Communiqué.

Previously, vertical contracts could not restrict dealers or after-sales service providers from transferring their rights and obligations arising from

the vertical arrangement to another dealer or service provider within the authorized network. Further, both parties to the vertical contract were obligated to specify their reasons to terminate a contract with proper notice. Since provisions of the Turkish Commercial Code (Law No. 6102) and the Turkish Code of Obligations (Law No. 6098) allow the intended results of these provisions, such provisions were deemed no longer necessary in the new communiqué. Likewise, the provision of the right to arbitration to settle disputes was removed due to conflict with Article 413 of Law No. 6100 on Civil Procedure.

Marketshare Thresholds Have Been Simplified

Companies will benefit from this block exemption as long as their market share remains below the threshold set at 30%. This threshold will apply equally to the sales and after-sales markets and to exclusive distribution and quantitative selective distribution systems alike. This implies a lowering of the threshold set at 40% for quantitative selective distribution networks under the guidelines of the previous communiqué, while maintaining the other thresholds. As before, no threshold has been set for qualitative selective distribution networks.

Sector studies conducted by TCA have indicated that differentiated thresholds have not contributed to efficiency, but market participants have found compliance challenging. Specifically, shares of participants in the sales market have remained below the threshold and therefore they have chosen to implement quantitative selective distribution systems, whereas participants in the after sales market have chosen quantitative or qualitative selective distribution systems based on whether their market shares have remained below or exceeded the threshold, according to their own estimation of market shares. However, such estimations of market share cannot be corroborated by the Competition Authority and create legal indeterminacy. Following these, the thresholds have been homogenized to create a simpler policy.

TCA has also argued that high profit margins incentivize market entry when qualitative-selective

distribution systems are implemented, however the determination of whether qualitative conditions have been met by a service provider to become authorized should be left to the court system and regulation should not be introduced.

Single-Branding Obligations (Non-Compete Clauses)

Under the new regulation, any direct or indirect obligation by a supplier to limit the buyer's purchases from other (non-designated) suppliers to below 20% of the buyer's total purchases for some class of goods or services constitutes a single-branding obligation. In other terms, there is a single-branding obligation when a supplier obliges a buyer to make at least 80% of its purchases for a product or service from that supplier. Previous regulation had set the threshold at 70%, that is a supplier would have enforced single-branding obligation by requiring to provide at least 30% of a buyer's total purchases.

Previously, no single-branding obligation would benefit from the block exemption, but under the new regulation, single-branding obligations on dealers (sales market) will benefit from the block exemption, provided they have terms no longer than five years or they may only be extended by mutual consent after five years. No such exemption is provided for the after-sales market which was determined to be less competitive than the sales market in the 2011 study. Chains of independent spare parts providers will benefit from the block exemption for single-branding obligations of terms no longer than five years.

Thus, the new regulation is more permissive towards vertical agreements limiting multi-branding in the sales market. Similar regulatory changes were introduced by the European Commission, based on the observation that the previous regulation did not succeed in introducing in-store competition between brands providing little benefit from increased competition while introducing additional costs as manufacturers demanded greater levels of investment from their dealers to defend their brand identity against multi-branding.

This block exemption will not apply to obligations relating to the establishment of additional spare parts sales outlets or after-sales service facilities, however suppliers may prevent dealers in the sales market from establishing new outlets. Again, this differentiated approach mirrors the study findings of limited competition in the after-sales service and spare parts market.

Equivalent Spare Parts are Underutilized but Certification Has Been Introduced

The after sales market has been observed to be dependent on Original Equipment (OE) spare parts, supplied by the manufacturer of the vehicle. OE equivalent parts have low market share and are found only at independent service providers because certification of OE equivalence was not introduced until recently. In their study, the Competition Authority determined that certification of equivalent spare parts was necessary to improve market competition. Since then, Prime Ministry's Undersecretariat of Treasury has issued Circular No 2015/2 dated January 13, 2015, effective June 1, 2015 which tasked Turkish Standards Institute (TSE) with the certification of equivalent spare parts for a term of two years. After the expiration of that term, accredited bodies will be allowed to certify spare parts as equivalent to OE. As before, in their new communiqué, TCA has excluded from the block exemption any vertical restrictions on the procurement of OE or OE equivalent spare parts from third parties, other than for work carried under warranty cover.

Regulation of Access to Technical Information is Outside the Scope of the Communiqué

Independent after sales service providers should have access to the same technical information, training and equipment as service providers in the authorized network. However, TCA has removed relevant regulation from the new communiqué since such access is extensively regulated by European Community regulations No. 715/2007 and No. 595/2009 published in issues No. 27207 (dated April 21, 2009) and No. 28014 (dated August 3, 2011), respectively, of the Official Gazette of the Republic

of Turkey. Regarding access to technical information on vehicles sold before 2008 or technical information not within the scope of the referred directives, TCA would evaluate the matter according to Article 6 of Act No. 4054. However, it could be argued that access to technical information is necessary primarily for new models of vehicles and therefore lack of regulation on this matter is not expected to limit market competition.

Out-of-Warranty Cover Repair or Maintenance Work During the Warranty Period is Not Addressed

TCA has argued before releasing this communiqué that existing regulations imply that authorized after-sales service providers should execute out-of-warranty work during the warranty period and no stipulations should be introduced with a communiqué even though independent service providers have been restricted from the after sales market for warranty-covered vehicles. Allowing authorized service providers to recoup their investment should ensure availability of after sales service and assure parts supply. TCA has cited Article 7 of the "Implementing Regulation on Introductory Guide and User's Manual" on the determination of the timing and provision of periodic maintenance, Article 11 of the "Implementing Regulation on Certificate of Guarantee" on the determination of whether any defects were caused by misuse and Article 14 of the "Regulation on After Sales Services" on the provision of after-sales service. These regulations were published in issue No. 29029 (dated June 13, 2014) of the Official Gazette of the Republic of Turkey. With these regulations, the manufacturer or importer, vendors and authorized service centers have been authorized to determine existence of misuse and obliged to determine details of periodic maintenance and to provide after-sales service. As stated above, TCA has argued that these regulations imply that out-of-warranty work should also be performed by authorized after-sales service providers on vehicles covered by warranty.

Final Remarks

The new communiqué differentiates between the sales and after-sales markets following the findings of the sector inquiry of 2011. Since the sales market was deemed to be vibrant, some of the restrictions on vertical agreements have been removed, allowing single-brand obligations and allowing suppliers to deny dealers additional sales outlets. In contrast, the after-sales market has been found to have limited competition based on the dominance of authorized service providers for repair and maintenance work during the warranty period and limited availability of certified OE equivalent spare parts. Therefore, the Competition Authority has preserved restrictive provisions found in the previous regulation.

In other changes, general conditions and the obligations to provide access to technical information have been left out of the scope of this regulation, based on the argument that such provisions may be found in other regulations or laws.

Many thanks for reading the inaugural issue of Turkey Competition Quarterly Newsletter authored by Eren Gunay, PhD and Faruk Aktay, LL.M., Esq. You may find our authors' short resumés below:

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