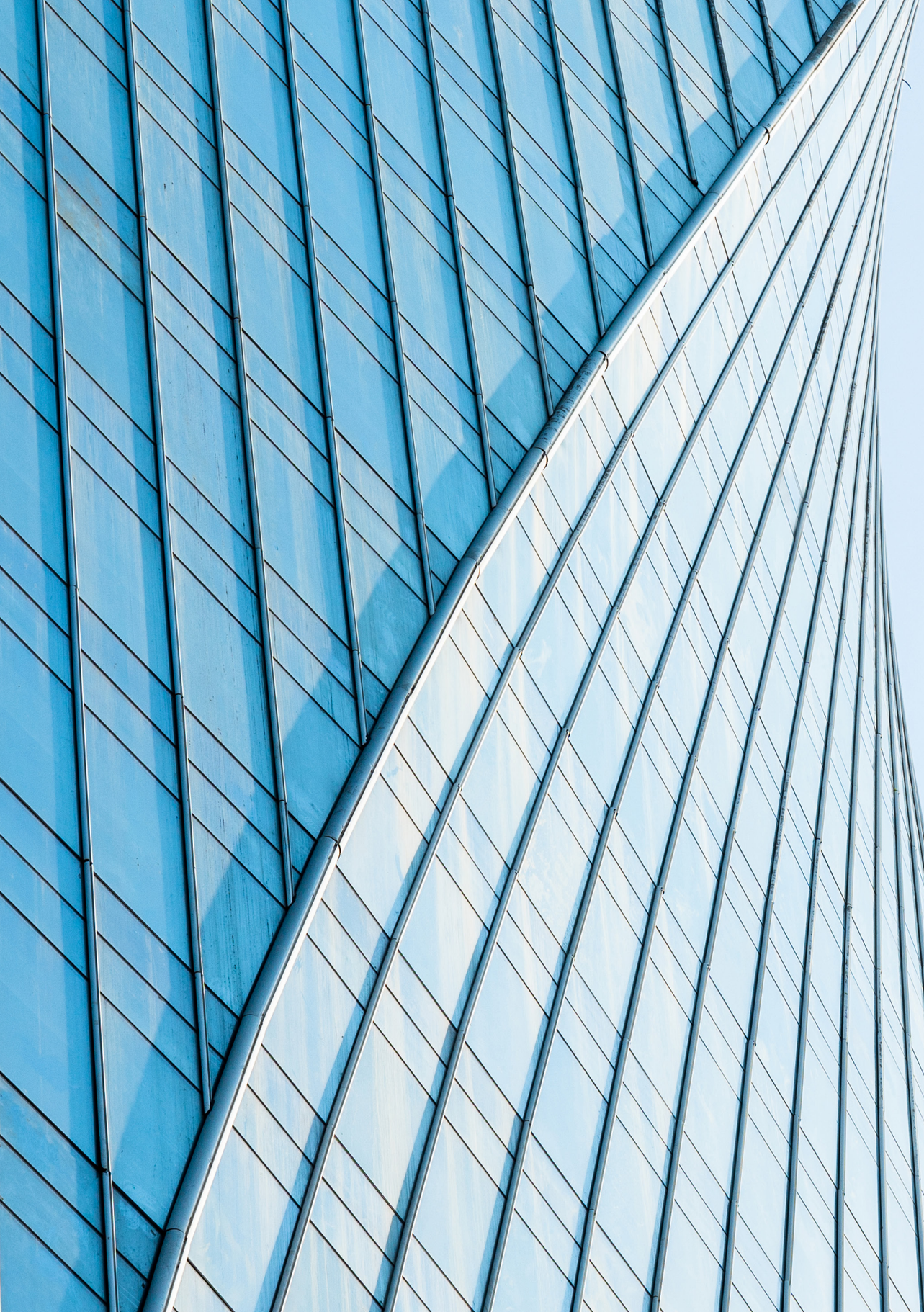
5 YEARS OF BEST PRACTICE IN COMPETITION TÜRKİYE

MOROĞLU ARSEVEN



Introduction

We are pleased to release Moroğlu Arseven's 5 years of best practice in competition law. This publication aims to offer a comprehensive overview on competition law trends of Türkiye and landmark decisions as there were important developments between the years 2018-2022. Topics covered include: (**i**) information on the Turkish Competition Authority's increased information gathering powers and jurisdiction in light of its recent decisional practice, (**ii**) developments regarding recently introduced commitment and settlement procedures, (**iii**) the headline figures from 2018-2022, (**iv**) significant decisions of the Competition Board, and (**v**) information on current as well as upcoming legislative developments.

Overall, the last 5 years were busy and harbored significant developments in competition law, and further new developments are on the way. Indications suggest that the Competition Board's investigation-focused workload will continue through 2023, and cartel cases will remain one of the targets in 2023. Additionally, the latest decision of the Turkish Constitutional Court is important as it stipulates for the first time the necessity of the Turkish Competition Authority to conduct on-the-spot inspections through a court decision as workplaces are evaluated as private property. Although there are not any amendments made in the Law No. 4054 on the Protection of Competition, 2023 is also expected to be a significant year in terms of on-the-spot inspections.

Among other things, current and upcoming legislative developments indicate that the Competition Board will also keep digital markets and players under scrutiny. With the amendment to Communiqué No. 2010/4, the Competition Authority revised the turnover thresholds for notification requirements and has, *inter alia*, introduced a definition of "technology undertaking" into the merger control legislation to catch technology-related transactions as well as "killer acquisitions". As is the case anywhere around the world, the adaptation of competition legislation to the assessment of digital markets and online gatekeepers is a much anticipated and significant topic for the Competition Authority. In this regard, we expect similar legislative amendments to the Turkish legislation as have been made in European Union with the introduction of Digital Markets Act and Digital Services Act.

We trust the following information will be useful and informative for the reader. Moroğlu Arseven will come with an update with Competition Round Up 2023 at the end of this year, accordingly you will be able to keep up with the developments through our annual publications. If any aspects are of particular interest or importance, please do not hesitate to contact us for further discussion.

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1. LEGAL BACKGROUND

1.1. Regulatory Framework

1.1.1. Oversight and Enforcement

Article 167 of the Turkish Constitution requires the state to take all necessary measures to provide and promote healthy and orderly transactions in money, credit, capital, goods and services, as well as to prevent *de facto* monopolies and cartels.

Accordingly, the Turkish Competition Authority ("**Authority**") was established in 1997 and, under the Law No. 4054 on Protection of Competition ("**Competition Law**"), was charged with preventing cartelization and monopolization, increasing consumer welfare, contributing to the beneficial functioning of the relevant product/geographical markets, and ensuring that the investment environment functions in a healthy way by decreasing entry barriers. The Authority is an active, independent and autonomous administrative authority.

The Competition Board ("**Board**") operates as the Authority's decision-making body and, *inter alia*, conducts preliminary as well as full-fledged investigations, initiates settlement and commitment procedures, establishes sectoral inquiries, and imposes administrative monetary fines for violations of the Competition Law.

The Board considers issues and allegations regarding:	
Anti-competitive agreements and concerted practices	**Article 4**
Negative clearance and individual exemptions	**Article 5**
Abuses of dominant position	**Article 6**
Merger control rules	**Article 7**

1.1.2. The Authority's Structure

The Authority consist of 7 members, as follows:	
Chairman	Birol KÜLE
Deputy Chairman	Ahmet ALGAN
Board Member	Şükran KODALAK
Board Member	Hasan Hüseyin ÜNLÜ
Board Member	Ayşe ERGEZEN
Board Member	Cengiz ÇOLAK
Board Member	Berat UZUN

The Board was unable to convene and take decisions in 2015 as no new members were appointed to the vacant seats on the expiration of the Board Members' office terms. In June 2022, a similar situation occurred, and the Board was unable to meet from June to September 2022 and therefore could not take decisions on many ongoing cases. With the appointment of Ahmet ALGAN, Şükran KODALAK and Hasan Hüseyin ÜNLÜ in September 2022, the meeting and decisional quorum was reached, and the Board became fully operational with its re-established members.

1.1.3. Increased Information Gathering Powers of the Authority

The Authority holds wide powers to:

• initiate preliminary investigations and full-fledged investigations, both *ex officio* and on receipt of complaints,

• request any and all kinds of information and documents it deems necessary from any public institution, organization, undertaking or association of undertakings while carrying out its duties under the Competition Law. Those concerned must submit the requested information after receiving an official information request conveyed by the Authority,

• request written or oral statements on particular issues, and

• conduct on-site inspections at the premises of undertakings, and review all books, notes and electronic communications, including personal devices containing work-related correspondence, and make copies if needed.

In this respect, the Board has issued Guidelines on the Examination of Digital Data During On-Site Inspections dated 08.10.2020 and numbered 20-45/617, which broaden its information-gathering powers during on-site inspections by setting out principles in relation to the review of documents, correspondence and data held in electronic media and information systems. These Guidelines grant the Authority the right to:

• examine servers, computers and all kinds of portable data storage devices, such as CDs, DVDs, USBs, hard disks, backup records and cloud services,

• identify deleted communications or documents and/or take copies of digital data and documents by using digital forensic software, and

• review mobile phones, tablets or any portable devices containing work-related information, regardless of whether the device and/or the line is provided by the company.

The Authority's Guideline on the Examination of Digital Data During On-Site Inspections is in line with the European Commission's ("**EC**") Explanatory Note on Commission Inspections pursuant to Article 20(4) of Council Regulation No 1/2003, as well as the Board's jurisprudence regarding on-site inspections.

The Board has previously levied administrative monetary fines for prevention, distortion or obstruction of on-site inspections where undertakings:

• failed or delayed in providing access to Office 365 and eDiscovery systems,

• deleted work-related electronic communications on WhatsApp or mobile applications, or

• failed to provide electronic documents for the case handlers' review where the document was alleged to be subject to attorney-client privilege.

Before our explanations on the main exemplary Board decisions, it should be noted that the Turkish Constitutional Court has issued a very recent and significant decision[1] where it reveals that if the on-site inspection authority is exercised by the Board without a judge's decision, it will be contrary to Article 20 of the Turkish Constitution regulating the privacy of private life and Article 21 regulating the inviolability of domicile. Although Article 15 of Competition Law enforces the on-site inspection of Authority is still in force, it is foreseen that this decision will bring some changes in the legislation in the near future further the notification of the decision to the Parliament.

[1] The Turkish Constitutional Court's *Ford Otomotiv* Decision dated 23.03.2023 numbered 2019/40991.

1.1.4. Inability to Access Office 365 and eDiscovery Systems Result in Sanctions

Date: 09.01.2020 No: 20-03/31-14	Groupe SEB Istanbul Decision[2]
Decision Type	Other[3]
Market	Not defined
Complainant	Türk Philips Tic. A.Ş.
Allegation(s)	Information exchange among competitors.
Board Decision and Sanction	Obstruction of on-site inspection resulting in the imposition of an administrative fine of 0.5% of Groupe SEB Istanbul's Türkiye-related gross revenues for the year 2018.

During an on-site inspection at the premises of Groupe SEB Istanbul Ev Aletleri Tic. A.Ş. (**"Groupe SEB Istanbul"**), the case handlers requested access to the mailbox of the former General Manager of Groupe SEB Istanbul, who at the time of the decision was Groupe SEB Eurasia's Senior Vice President operating in France.

In response to this request, the undertaking's representative stated that the request for access could not be granted in line with the local law and within the scope of the French local legislation and the General Data Protection Regulation ("**GDPR**"). Although the current position of the former General Manager of Groupe SEB Istanbul was confirmed as being Senior Vice President Eurasia through the Office 365 address book, the case handlers informed the undertaking's representatives that the relevant employee's work-related correspondence conducted during their term of office could not be considered to be personal data and that they should have been able to access their former mailbox. The case handlers decided to impose an administrative fine of 0.5% of Group SEB Istanbul's Türkiye-related gross revenues for the year 2018.

[2] The Board's *Groupe SEB Istanbul* Decision dated 09.01.2020 and numbered 20-03/31-14.

[3] The reasoned decision referred to as "other" herein is related to reasoned decision concerning on-the-spot inspections.

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Date: 07.11.2019 No: 19-38/581-247	Siemens Türkiye Decision[4]
Decision Type	Other
Market	Not defined
Complainant	Initiated *ex officio* by the Authority.
Allegation(s)	Information exchange among competitors.
Board Decision and Sanction	Obstruction of on-site inspection resulting in the imposition of administrative monetary fines of 0.5%, and a daily fine for 12 days of 0.01% of Siemens Healthcare's Türkiye-related gross revenues for the year 2018 for not granting access to the eDiscovery system.

During an on-site inspection at Siemens Healthcare Sağlık A.Ş. (**"Siemens Türkiye"**), the case handlers assigned to the case by the Board requested a search with specific dates and keywords to cover all Siemens Türkiye employees. The representatives of the undertaking indicated that the global headquarters had to be consulted on how such an examination could be conducted within the Microsoft Office 365 system used by the relevant undertaking.

Siemens Healthineers AG, the global headquarters of Siemens Türkiye, indicated that such a search could be made through "eDiscovery", but permission had to be granted at the global level. Subsequently, the case handlers in charge of the file requested global authorization to enable access for the search for employees working in Türkiye only. This time, the representatives of the undertaking indicated that a search conducted within the scope of "eDiscovery" would grant access to the electronic communications of all Siemens Healthineers AG employees and would be against the GDPR rules. As access to eDiscovery was not granted, the case handlers imposed an administrative monetary fine of 0.5% of Siemens Türkiye's Türkiye-related gross revenues for the year 2018 for obstruction of on-site inspection. In addition, since access to eDiscovery was not provided for 12 days, the Board imposed an administrative monetary fine of 0.1% of Siemens Türkiye's Türkiye-related gross revenues for the year 2018 for each day of delay.

[4] The Board's *Siemens Türkiye* Decision dated 07.11.2019 and numbered 19-38/581-247.

Date: 09.06.2022 No: 22-26/426-175	**A.B. Gıda Decision**[5]
Decision Type	Other
Market	Not defined
Complainant	Initiated *ex officio* by the Authority.
Allegation(s)	Anti-competitive agreements among egg producers (Article 4).
Board Decision and Sanction	Obstruction of on-site inspection resulting in the imposition of administrative monetary fines of 0.5% of A.B. Gıda's Türkiye-related gross revenues for the year 2021.

During an on-site inspection conducted at the premises of A.B. Gıda San. ve Tic. A.Ş. ("**A.B. Gıda**") on 17.05.2022, the case handlers appointed to the case noticed that the employees' e-mail accounts only contained electronic communications conveyed or received on the day of the on-site inspection, and therefore requested to examine the records of the e-mail accounts through the server.

The undertaking's representative stated that e-mails were deleted regularly at the end of each day, and that the company's IT infrastructure was outsourced to an independent company named AKCOM, meaning that access to the server could only be granted by AKCOM. However, further to discussion with the AKCOM representative, it was understood that the server could only be accessed if the authorization password was provided by the A.B. Gıda representative to AKCOM.

On 26.05.2022, the case handlers conducted a second on-site inspection at A.B. Gıda premises. During the second inspection, the case team could only initiate its inspection at 11.51 (after 1.5 hours of delay), and the General Manager of the Board of Directors refused to attend to the on-site inspection, without providing any justification. The Board imposed an administrative monetary fine of 0.5% of A.B. Gıda's Türkiye-related gross revenues for the year 2021 for obstructing on-site inspection. The Board only levied one administrative monetary fine as it determined that both of the obstructions of on-site inspections were connected and could not be evaluated as separate conducts.

Further to the on-site inspections at A.B. Gıda, the case team conducted a separate inspection at the premises of AKCOM. However, the AKCOM representative could not be reached at the AKCOM premises and therefore the AKCOM representative was called. The AKCOM representative indicated during the telephone conversation that:

- He was doing an installation at another customer's premises and he could only arrive within 2-3 hours.

- He was the sole employee and the owner of AKCOM and therefore he could not have someone else open the office to allow the case handlers to carry on with the inspection.

[5] The Board's *A.B. Gıda* Decision dated 09.06.2022 and numbered 22-26/426-175.

- He did not have access to A.B. Gıda's database or server, since A.B. Gıda's e-mails were stored in the "Microsoft Office 365" cloud system.

- He did not provide such a service to A.B. Gıda or its remaining customers.

- He was ready to assist the case handlers with the requested information and inspection as soon as the installation he was providing for another customer was completed.

In light of these explanations, the Board imposed an administrative fine of TL 47,409 on AKCOM, which was the lower limit of the administrative fines available (before 31.12.2022) for obstructing an on-site inspection.

The decision was adopted with one dissenting vote of the Chairman of the Board, Birol KÜLE, who indicated in his opinion that:

- It was relatively uncharacteristic to use the Authority's inspection powers in conducting an on-site inspection at the premises of an IT undertaking that was not an investigated party within the investigation (which was initiated against egg producers).

- Effective communication with the AKCOM representative could not be achieved by telephone.

- It was natural for AKCOM to not understand the importance of on-site inspection since it was a relatively small undertaking with one founder employee (who was in a meeting at the time of the on-site inspection), and which was not a party to the ongoing investigation.

- The information and documents requested by the case handlers were essentially the responsibility of A.B. Gıda, which was a direct party to the investigation.

- If all undertakings evaded their responsibility to assist case handlers' reviews during on-site inspections of the companies from whom they purchased infrastructure services, the Authority's investigative powers would be deficient.

- It was incorrect to hold AKCOM responsible for hinderance of the on-site inspection for which A.B. Gıda should be held responsible.

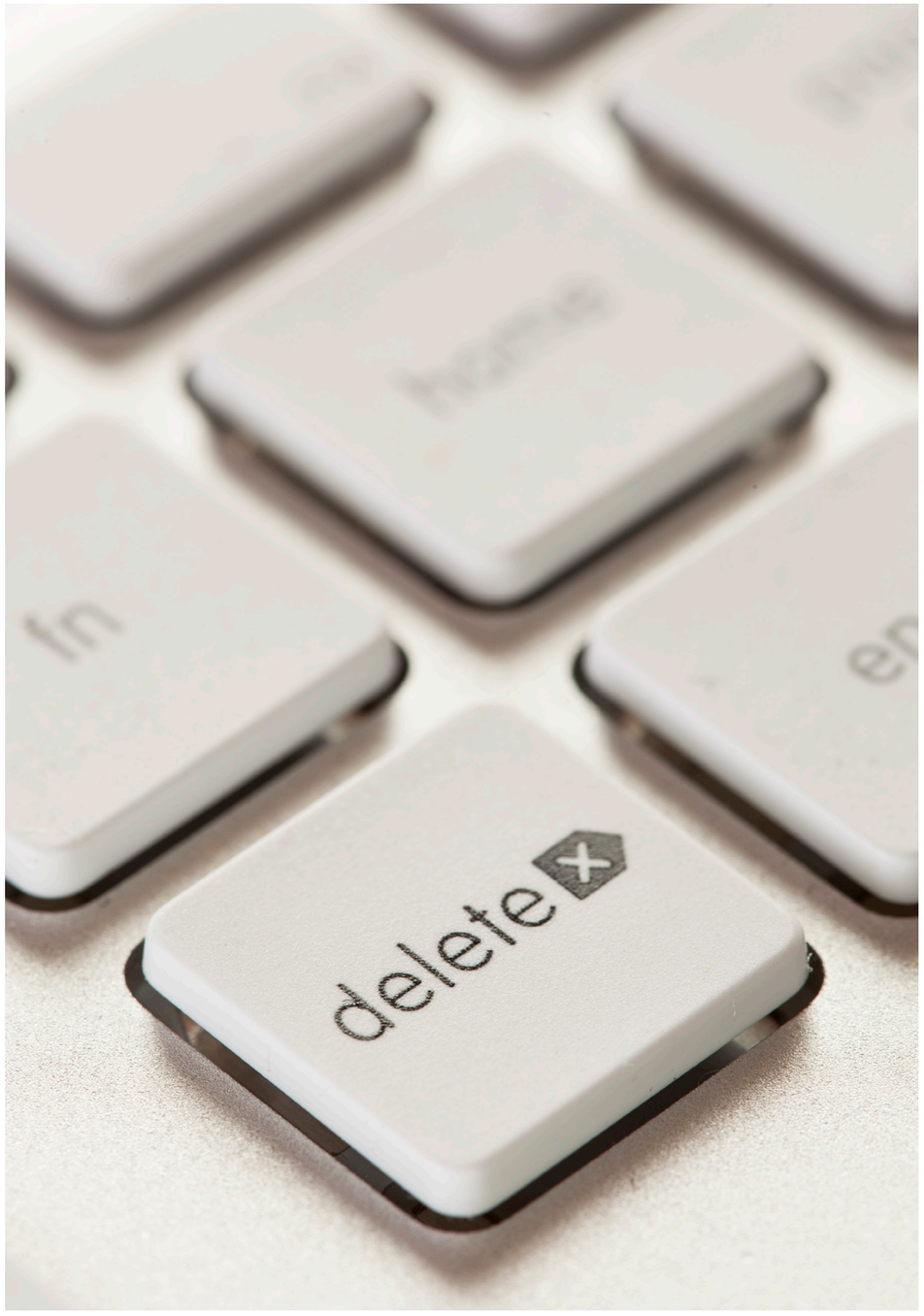
1.1.5. Deletion Of Work-Related Electronic Communications on WhatsApp or Mobile Applications

Date: 09.09.2021 No: 21-42/618-305	LG Decision[6]
Decision Type	Other
Market	Not defined
Complainant	Initiated *ex officio* by the Authority.
Allegation(s)	Obstruction of on-site inspection.
Board Decision and Sanction	Obstruction of on-site inspection resulting in the imposition of administrative monetary fines of 0.5% of LG's Türkiye-related gross revenues for the year 2021.

During an on-site inspection at LG Electronics Tic. A.Ş. ("**LG**"), it was noticed that some employees had deleted and reinstalled the WhatsApp application on their phones. Due to the lack of back-ups before the deletion, the correspondence could not be retrieved, and the examination could not be carried out on the devices.

The employees who had deleted the application stated that the mobile devices initially provided by LG were also used as personal devices harboring personal data, and that it was LG's company policy to delete and reinstall the WhatsApp application at the beginning of each month. The case handlers found no evidence showing the deletion process being routinely performed every month, and it was determined that there were no written documents showing a company policy regarding the deletion and reinstallation of the WhatsApp application at the beginning of each month. Based on the misleading statements by employees and the deletion process, the Board imposed an administrative fine of 0.5% of the undertaking's Türkiye-related gross revenues for the year 2021.

[6] The Board's *LG* Decision dated 09.09.2021 and numbered 21-42/618-305.



Date: 17.06.2021 No: 21-31/400-202	Medicana Samsun Decision[7]
Decision Type	Other
Market	Not defined
Complainant	Initiated *ex officio* by the Authority.
Allegation(s)	Obstruction of the on-site inspection.
Board Decision and Sanction	Obstruction of on-site inspection resulting in the imposition of administrative monetary fines of 0.5% of Medicana Samsun's Türkiye-related gross revenues for the year 2020.

During an on-site inspection conducted at Medicana Samsun Özel Sağlık Hiz. A.Ş. ("**Medicana Samsun**"), on the request of the case team to review the General Manager's mobile device, the General Manager stated that his mobile device was in his vehicle, and that he would bring it for examination within 10 minutes. Although the case team clearly informed the General Manager as to the implications of deleting communications during an on-site inspection, when the phone was examined the case team found that content in his mobile device had been deleted during this time. Accordingly, the Authority imposed an administrative monetary penalty of 0.5% of Medicana Samsun's Türkiye-related gross revenues for the year 2020.

Date: 08.07.2021 No: 21-34/452-227	Procter and Gamble Decision[8]
Decision Type	Other
Market	Not defined
Complainant	Initiated *ex officio* by the Authority.
Allegation(s)	Obstruction of on-site inspection.
Board Decision and Sanction	Obstruction of on-site inspection resulting in the imposition of administrative monetary fines of 0.5% of Procter and Gamble's Türkiye-related gross revenues for the year 2020.

During the examination of the mobile device of an employee of Procter and Gamble Tüketim Malları San. A.Ş. ("**P&G**"), it was observed that the employee had left many WhatsApp correspondence groups despite being warned not to delete any data. The employee stated that the deleted content related to his personal correspondence and had been deleted before the case handlers initiated the inspection. However, it was determined that the deleted content was related to group discussions including other employees of the undertaking, and the Board therefore decided to impose an administrative fine of 0.5% of P&G's Türkiye-related gross revenues for the year 2020.

Date: 25.01.2021 No: 21-26/327-152	Unmaş Decision[9]
Decision Type	Other
Market	Not defined
Complainant	Initiated *ex officio* by the Authority.
Allegation(s)	Obstruction of on-site inspection.
Board Decision and Sanction	Obstruction of on-site inspection resulting in the imposition of administrative monetary fines of 0.5% of Unmaş's Türkiye-related gross revenues for the year 2020.

During an on-site inspection conducted at Unmaş Unlu Mamuller San. ve Tic. A.Ş. ("**Unmaş**") premises, the Board imposed an administrative monetary fine against Unmaş of 0.5% of its Türkiye-related gross revenues for the year 2020 as it was noticed that the employees had deleted WhatsApp communications. Although the deleted content was restored and eventually examined by the case handlers, the Board indicated that such acts of deletion may result in spoilage of evidence and jeopardize the smooth examination process. The Board highlighted that the accessibility of deleted data through the help of forensic devices did not affect the nature of these acts as hindering the on-site examination, and that accepting otherwise could constitute an incentive to undertake such acts. This again demonstrated the strict attitude of the Board towards deleted electronic communications.

[7] The Board's *Medicana Samsun* Decision dated 17.06.2021 and numbered 21-31/400-202.
[8] The Board's *Procter and Gamble* Decision dated 08.07.2021 and numbered 21-34/452-227.
[9] The Board's *Unmaş* Decision dated 25.01.2021 and numbered 21-26/327-152.

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1.1.6. Attorney-Client Privilege

Attorney-client privilege is protected under Turkish law; however, scope and elements are rather generic compared to the likes of common law jurisdictions. As per Article 36 of the Attorneyship Law, attorneys cannot disclose any document or information obtained while practicing their profession. There are also related provisions in Code of Penal Procedure ("**CPP**"), regulating the issues concerning attorney-client privilege and attorneys' exemption from ordinary criminal investigation processes within these privileges.

As per Article 130 of CPP, attorney offices and residences can only be searched by court warrant and with the participation of the registered bar association representative, under the supervision of the public prosecutor, regarding the event specified in the warrant. The attorneys working in that office, the president of the bar association, or the attorney representing the president of the bar association may assert that an item to be seized is subject to attorney-client privilege. In this situation, the item is placed inside a separate envelope or package to be stamped. If the courts determine, within 24 hours, that the item is subject to attorney-client privilege, the seized item is returned immediately to the attorney.

Furthermore, as per Article 58 of Attorneyship Law, an attorney cannot be searched except in the case of red handedness for a crime that falls within the jurisdiction of the high criminal court. Investigations against attorneys or those in the organs of the Union of Turkish Bar Associations or bar associations, for crimes arising from their duties or committed during their duty are carried out by the public prosecutor of the place where the crime was committed, upon the permission of the Republic of Türkiye Ministry of Justice.

In reference to the provisions of the Attorneyship Law and the CPP, in the practice that attorney-client privilege applies very broadly to all materials and information that comes to the knowledge of attorneys while they practice their profession, which also includes information found out during internal investigations.

The attorney would be bound with the attorney-client privilege rule even in the case when the assistance given by third parties to lawyers, so long as the information is obtained during the performance of professional duties. Nevertheless, this does not prevent the third party from disclosing the information within the scope of any juridical proceedings, subject to the third parties' own rights and protections that could be attributed under the respective laws in any given case.

Holding a position as in-house counsel, on the other hand, is qualified as among the occupations that attorneys can act upon. Though, there is no specific provision or clear guidance in relation to what extent the attorney-client privilege is applicable and whether to in-house legal counsels. The principle, in the spirit of the law, requires independence of legal counsel, therefore; validity of it for in-house counsel is a controversial topic that needs attention on a case-by-case basis. Within the precedents of the Board, there is a distinction on the application of this rule between external and in-house counsel.

Although there are no rules stipulating attorney-client privilege in the competition law, pursuant to the Board's practice, case law and administrative judicial decisions, correspondence and documents containing legal opinions may fall under the scope of attorney-client privilege if the following all apply:

- There is no employment agreement between the company and the independent attorney creating an employee-employer relationship.

- The communications are conducted between an independent attorney and the company.

- The correspondence is made for the purpose of exercising the undertaking's right of defense.

Accordingly, documents and correspondences that are considered to fall under the scope of attorney-client privilege should not be subject to review during an on-site inspection or conveyed to the Authority within an information request.[10]

However, correspondences and/or documents that are not directly related to the exercise of the right of defense, such as documents or communications drafted to determine a company's compliance stage and/or to assist or conceal a current or upcoming competition infringement, is considered by the Authority not to benefit from attorney-client privilege, which is clearly differenciated from the provisions of the CPP and of the Attorneyship Law.

Additionally, paragraph 12 of the Guidelines on the Examination of Digital Data in On-Site Inspections dated 08.10.2020 and numbered 20-45/617 further implements the Board's approach towards attorney-client privilege issues by indicating that[11]:

> *"(12) Data copied during on-site inspections are protected under the principle of attorney-client privilege. Accordingly, any correspondence between a client and an independent lawyer with no employee employer relationship with the client aimed at the exercise of the client's right to defense is accepted to belong to the professional relationship and are covered by the attorney/client privilege. However, correspondence that is not directly related to the exercise of the right to defense do not benefit from the privilege, especially if they involve giving assistance to an infringement of competition or concealing an ongoing or future violation."*

In light of the above, attorney-client privilege is currently among not settled subject under competition practice and time will show how to Authority will position itself due to its contrary approach to the CPP and Attorneyship Law.

[10] Ankara Regional Administrative Court 8th Administrative Case Chamber's decision numbered 2018/658 E. and 2018/1236 K.
[11] Guidelines on the Examination of Digital Data in On-Site Inspections, paragraph 12.

Date: 14.11.2019 29.04.2021 No: 19-40/670-288 21-24/287-130	Huawei and DSM Decisions[12]
Decision Type	Other
Market	Not defined
Complainant	Initiated *ex officio* by the Authority.
Allegation(s)	Certain documents obtained from an on-site inspection were to be returned in accordance with attorney-client privilege.
Board Decision and Sanction	The documents in question did not meet attorney-client privilege.

Within the scope of on-site inspections conducted separately at Huawei Telekomünikasyon Dış Tic. Ltd. Şti. (“**Huawei**”) and DSM Grup Danışmanlık İletişim ve Satış Tic. A.Ş. (“**DSM**”) premises, the case team requested to review documents that were evaluated by Huawei and DSM as being subject to attorney-client privilege. The relevant documents were submitted for the Board’s assessment in a sealed envelope signed by both the case team as well as the company representatives.

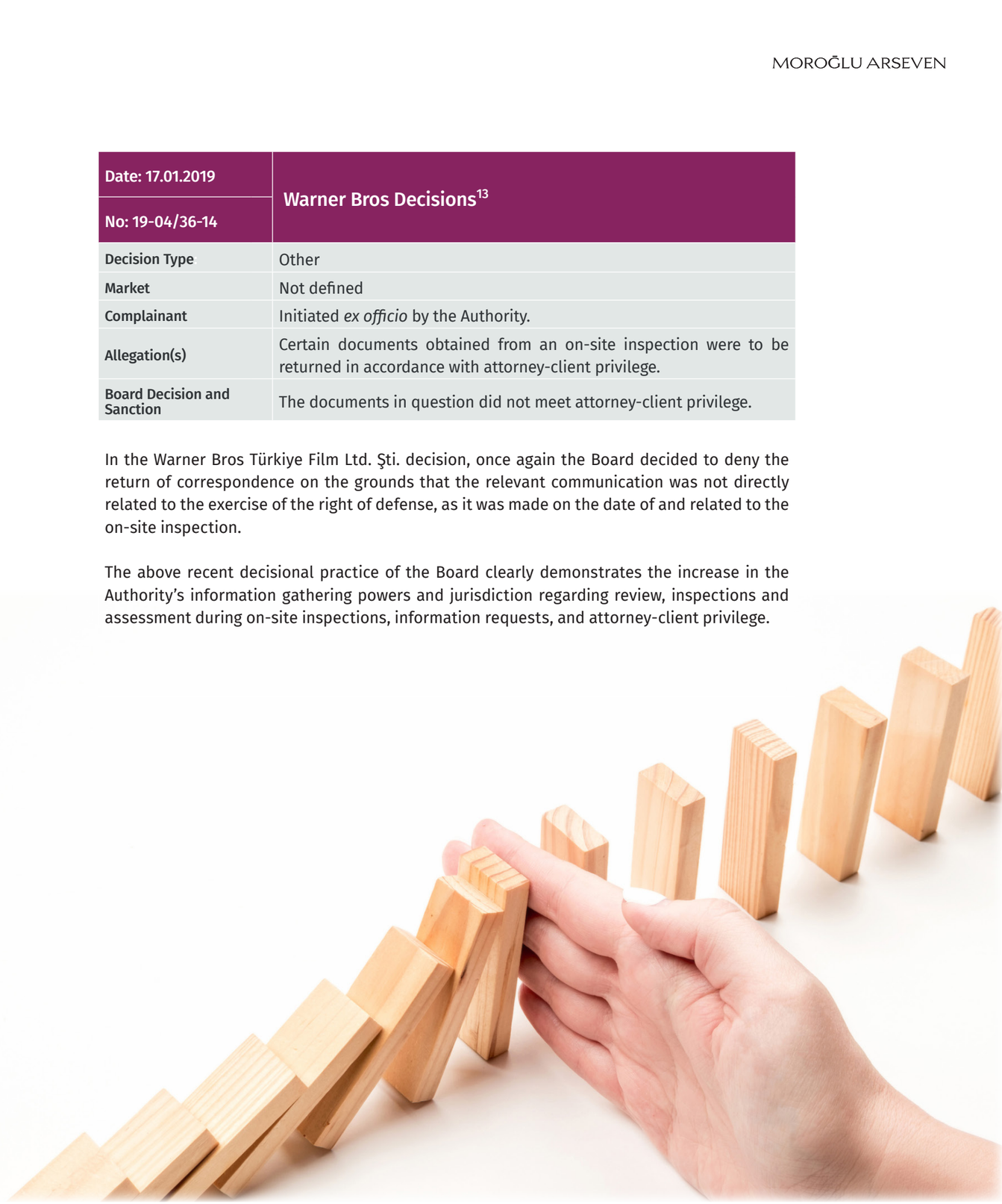
In relation to the Huawei documents, the Board noted that the requested mail chain concerned data collection for an action for damages, and that the correspondence was conducted between in-house legal counsel and Huawei employees, while independent legal counsel did not make any statements and was solely cc’d into the email chain. In relation to the DSM documents, the Board noted that the correspondence concerned communication between independent legal counsel and the compliance and risk manager. However, the communication was not related to the exercise of the right of defense. Therefore, the Board decided that both the Huawei and DSM documents did not benefit from attorney-client privilege and therefore could be reviewed by the case team.

[12] The Board’s *Huawei* Decision dated 14.11.2019 and numbered 19-40/670-288, and *DSM* decision dated 29.04.2021 and numbered 21-24/287-130.

Date: 17.01.2019 No: 19-04/36-14	Warner Bros Decisions[13]
Decision Type	Other
Market	Not defined
Complainant	Initiated *ex officio* by the Authority.
Allegation(s)	Certain documents obtained from an on-site inspection were to be returned in accordance with attorney-client privilege.
Board Decision and Sanction	The documents in question did not meet attorney-client privilege.

In the Warner Bros Türkiye Film Ltd. Şti. decision, once again the Board decided to deny the return of correspondence on the grounds that the relevant communication was not directly related to the exercise of the right of defense, as it was made on the date of and related to the on-site inspection.

The above recent decisional practice of the Board clearly demonstrates the increase in the Authority’s information gathering powers and jurisdiction regarding review, inspections and assessment during on-site inspections, information requests, and attorney-client privilege.



[13] The Board’s *Warner Bros* Decision dated 17.01.2019 and numbered 19-04/36-14.

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1.2. Investigation Process

1.2.1. Complaint Procedures

Consumers and undertakings have the right to submit complaints (which may also be anonymous) to the Authority on undertakings' activities that they believe have harmed competitive market structure. The Board can also initiate *ex officio* investigations based on its own knowledge and market observations, as well as sectoral inquiries.

The Board can expressly reject complaints that it does not consider serious. Complaints are deemed to have been rejected if the Board does not respond to the applicant within 60 days.

1.2.2. Preliminary Investigation

An appointed case team prepares a report within 30 days and presents it to the Board.

The Board decides within ten days whether it is necessary to proceed to a full-fledged investigation.

1.2.3. Full-Fledged Investigation

A full-fledged investigation is initiated either directly or after a preliminary investigation.

Parties are notified within 15 days of the beginning of the investigation and are asked to send their first written defense within 30 days. Complainants (if any) are also notified of the investigation.

Full-fledged investigations generally last six months but can be extended for a further six months if necessary.

The investigation team drafts an investigation report and delivers this to the Board and the parties. The investigation report evaluates all evidence obtained via information requests, as well as on-site inspections.

Parties must send their second written defense within 30 days, responding to the investigation report.

The investigation team issues its supplementary opinion within 15 days of receiving the second written defense.

The parties must send their third written defense within 30 days, responding to the investigation team's supplementary opinion.

An oral hearing is held, if the Board deems this necessary or a party requests it.

The Board must grant its short form decision within:

- 15 days of the oral hearing
- 30 days of the end of the investigation period (if no oral hearing occurs).

1.3. Negative Clearance and Exemption

If an agreement potentially causes competition law concerns, the parties can voluntarily or (if the conditions are met) mandatorily will be required to apply for either a negative clearance or individual exemption.

1.3.1. Negative Clearance

The Board may grant a negative clearance, which essentially indicates that, based on the available information, an agreement, decision, practice, or merger and acquisition does not violate Articles 4, 6 or 7 of the Competition Law.

1.3.2. Individual Exemption

The Board may grant an individual exemption for agreements that are initially deemed to be anti-competitive pursuant to Article 4 of the Competition Law but that also cumulatively fulfil all the following criteria:

a) Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods or provision of services.

b) Benefiting consumers.

c) Not eliminating competition in a significant part of the relevant market.

d) Not limiting competition more than is necessary to achieve the goals in (a) and (b).

1.3.3. Block Exemption

The Authority has issued a range of communiqués providing exemptions for certain agreements and industries, including for:

- Vertical agreements.
- The motor vehicle sector.
- Research and development agreements.
- Technology transfer agreements.
- The insurance sector.
- Specialization agreements.

Agreements that meet the conditions for a block exemption are automatically exempted from Article 4 of the Competition Law. The parties do not need to apply to or notify the Board. The Board has also published guidelines to assist in interpreting and applying block exemptions.

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1.4. Commitment and Settlement Mechanisms

As investigations have increased both in terms of number and complexity, are taking longer, have high public costs, and expose undertakings' trade secrets and deteriorate their public image, the Authority has deemed it necessary to support its traditional investigation methods with alternative procedures. Accordingly, settlement and commitment mechanisms similar to those practiced in various other jurisdictions entered into force under the Competition Law with the Law No. 7246 Amending the Law on the Protection of Competition ("**Law No. 7246**") published in the Official Gazette dated 24.06.2020 and numbered 31165.

Although there is a violation determination after the initiation of a full-fledged investigation in both mechanisms, there is no administrative fine sanction in the commitment mechanism, since the Board deems that the violation is eliminated by the commitments. In the settlement mechanism, the undertaking accepts the alleged violation and faces an administrative monetary fine that may be reduced by 10% to 25%.

1.4.1. Commitment

The commitment mechanism was introduced into the Turkish competition law legislation by Article 43 of the Competition Law. Under the commitment mechanism, the parties are given the opportunity to submit a commitment during the preliminary investigation or full-fledged investigation stages of an ongoing investigation, provided that the subject matter of the investigation does not contain a clear and serious violation allegation. If this commitment is approved by the Authority, it becomes binding for the parties, and the Authority may decide not to conduct a full-fledged investigation (if the investigation is at the preliminary investigation stage) or may decide to terminate the investigation (if the investigation is at the full-fledged investigation stage).

To apply for a commitment within the scope of the Communiqué No. 2021/2 on Commitments to be Submitted in Preliminary Investigations and Full-Fledged Investigations Regarding Competition-Restricting Agreements, Concerted Practices and Decisions and Abuse of Dominant Position:

- The alleged infringement should not have the characteristics of a *clear and serious* infringement, defined as:
  - » price fixing between competing undertakings, allocations of customers, suppliers, territories or trade channels, restrictions of supply or impositions of quotas, collusion in tenders, sharing of competition-sensitive information such as future prices, production or sales volumes, and/or
  - » resale price fixing through the establishment of a fixed or minimum selling price of the buyer in vertical relationships.
- The application to the commitment mechanism should be submitted to the Authority within 3 months starting from the notification of the full-fledged investigation.
- The commitment should be submitted pursuant to the acceptance of the commitment during negotiation period by the Authority.
- The commitment should be clear, proportionate, suitable and address the competition concerns in a short period of time.

If all the above conditions are met, the Authority may decide to terminate the preliminary investigation or full-fledged investigation process initiated against the undertaking. Since its implementation, undertakings have been seen to have rapidly adopted the commitment mechanism.

Date: 02.09.2021 No: 21-41/610-297	Coca Cola Decision[14]
Decision Type	Full-fledged investigation/commitment
Market	Carbonated drinks, cola drinks and flavored carbonated drinks.
Complainant	Confidentiality request.
Allegation(s)	It was alleged that Coca Cola violated Articles 4 and 6 of the Competition Law with various applications by creating *de facto* exclusivity by preventing the sale of competing products at sales points.
Board Decision and Sanction	The Board accepted the commitment text submitted by the undertaking as eliminating competition problems, thereby making the commitments binding for the undertaking and terminating the initiated full-fledged investigation.

The Board initiated a full-fledged investigation against Coca Cola Satış ve Dağıtım A.Ş. ("**CCSD**") for allegedly violating the Competition Law by preventing the sale of competing products at sales points. During the investigation process, CCSD applied for the initiation of the commitment process regarding the allegations. As part of the negotiation process, on 02.09.2021, CCSD proposed the following 6 commitments:

1. The requirement to sign three separate contracts for (**i**) "cola drinks", (**ii**) "flavored soda" and "plain soda" under the "other carbonated products" category, and (**iii**) "water and mineral water", "fruit juice and iced tea", "energy drinks" and "sports drinks" under the "non-carbonated products" category, instead of a single contract covering CCSD's entire product portfolio.

2. The application of the same policy to the customers for discounts and promotions in relation to the same type of beverages.

3. There being no exclusivity in non-carbonated products.

4. Requirements not to exceed 2 years for contract periods, granting sales points the right to terminate the contract without any penalty and removing "regularly and continuous purchasing" language in all CCSD contracts except contracts containing cash investment.

5. Allowing sales points to put CCSD's competitors' products in 25% of CCSD's refrigerators.

6. An obligation to inform sales points of these commitments and to renew contracts with all sales points.

The Board determined that the proposed commitments were clear, proportionate, suitable and sufficient to address the competition concerns attributed to CCSD. Accordingly, the commitment text was accepted and rendered binding for CCSD, leading to the termination of the investigation with commitments.

[14] The Board's Coca Cola Decision dated 02.09.2021 and numbered 21-41/610-297.

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Date: 24.03.2022 No: 22-14/221-95	Baymak Decision[15]
Decision Type	Preliminary investigation/commitment
Market	Not defined
Complainant	Confidentiality request.
Allegation(s)	It was alleged that Baymak prevented active sales by authorized service providers by imposing regional restrictions without granting exclusivity, in violation of Articles 4 and 6 of the Competition Law.
Board Decision and Sanction	The Board decided to accept the commitments of Baymak to end its practices regarding territorial restrictions in its authorized services, thereby making the commitments binding and terminating the preliminary investigation.

The Board initiated a preliminary investigation against Baymak Makine San. ve Tic. A.Ş. ("**Baymak**") for allegedly violating Articles 4 and 6 of the Competition Law by restricting the activities of authorized service providers in Türkiye. In the preliminary investigation, it was alleged that Baymak prevented active sales by authorized service providers by imposing regional restrictions without granting exclusivity. Before the initiation of a full-fledged investigation, Baymak submitted a commitment package to the Authority stating that it would end the active sales restrictions and allow all its authorized services to provide free services to all regions in Türkiye. Following the Authority's acceptance of Baymak's commitment package, the Authority terminated the preliminary investigation without initiating a full-fledged investigation against Baymak.

[15] The Board's *Baymak* Decision dated 24.03.2022 and numbered 22-14/221-95.

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1.4.2. Settlement

In essence, the competition law settlement procedure is a 25% discount from the fine imposed at the end of the investigation in return for the investigated undertaking's acceptance of the existence and scope of the infringement and the finalization of the decision.

The main purpose of the settlement mechanism is to accelerate the investigation process, manage public resources properly and finalize the investigation processes at an early stage. The settlement mechanism is regulated under Article 43 of the Competition Law, and further guidance is provided under the newly introduced "*Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position*".

Under the settlement mechanism:

- The settlement procedure should be initiated, and the settlement text should be conveyed to the Authority before the issuance of the investigation report.

- The Board's evaluation of the settlement text and determination of the discount will take into account:
  - » the number of investigation parties,
  - » whether a considerable portion of the investigation parties applied for settlement,
  - » the scope of the violation and the quality of the evidence, and
  - » whether it is possible to arrive at a common understanding with the investigated parties regarding the existence and scope of the violation.

- If the undertaking and the Authority reach a common understanding as to the existence and scope of the alleged infringement:
  - » the undertaking may benefit from a reduction to the administrative monetary fine of 10% to 25%
  - » the investigation is terminated with a final settlement decision,
  - » the undertaking waives its rights to appeal the administrative monetary fine and settlement text to the administrative courts, and
  - » the decision is deemed to be the final decision.

Importantly, there is no rule stipulating that settlement negotiations will always result with settlement. In the event that either (**i**) the undertaking fails to submit the settlement text within the time given, (**ii**) the settlement text is not found to remedy the competition concerns, (**iii**) the Board decides to terminate the settlement process, or (**iv**) the settlement party withdraws from the settlement process, it will be accepted that the process has not resulted with settlement for the relevant party, and the ordinary full-fledged investigation process will follow. In this scenario, the information and documents submitted by the settlement undertaking within the scope of the settlement negotiations will be excluded from the file and will not be used as a basis for the final decision taken as a result of the investigation.

Another important point is that the settlement discount rate is at the Board's discretion. Accordingly, the following recent decisions of the Authority may shed light on both the settlement mechanism and the discount rates applied by the Board.

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Date: 05.08.2021 No: 21-37/524-258	**Türk Philips Decision**[16]
Decision Type	Full-fledged investigation/settlement
Market	Not defined
Complainant	Confidentiality request.
Allegation(s)	Infringement of Article 4 of the Competition Law through price fixing and restricting internet sales.
Board Decision and Sanction	Termination of the infringement through settlement and imposition of an administrative monetary fine.

A full-fledged investigation was initiated against five undertakings operating in the small household appliances market: (**i**) Türk Philips Tic. A.Ş. ("**Philips**"), (**ii**) Dünya Dış Tic. Ltd. Şti. ("**Dünya**"), (**iii**) Melisa Elektrikli ve Elektronik Ev Eşyaları Bilg. Don. İnş. San. Tic. A.Ş. ("**Melisa**"), (**iv**) Nit-Set Ev Aletleri Paz. San. ve Tic. Ltd. Şti. ("**Nit-Set**") and (**v**) GİPA Dayanıklı Tüketim Mamülleri Tic. A.Ş. ("**Gipa**"), in relation to restricting competition through resale price maintenance by dealers/authorized resellers and the prevention of internet sales.

Internet sales are considered to be passive sales, and under Article 4 of the Group Exemption Communiqué No. 2002/2 on Vertical Agreements, the restriction of suppliers' passive sales by buyers is a vertical restraint considered to be an anti-competitive behavior under Article 4 of the Competition Law.

Initially, following the investigation notice, the investigated undertakings applied for the commitment mechanism to conclude the investigation without any penalty. However, the Board did not accept the commitment request since the allegations were considered to be a "*clear and serious infringement*". The investigated undertakings then subsequently applied to the settlement mechanism.

As a result of the settlement negotiations, all the investigated undertakings submitted their settlement text to the Authority's records in due time, accepted the existence and scope of the infringement, waived their right to appeal the Board's decision and settlement text to the administrative courts, and requested the maximum administrative fine reduction rate applicable in the settlement mechanism.

[16] The Board's *Türk Philips* Decision dated 05.08.2021 and numbered 21-37/524-258.

Accordingly, the Board accepted the settlement proposal and decided to grant a reduction of 25% to all the five investigated undertakings, which was the highest applicable discount rate. As a result of the Board's final decision, due to the infringement of Article 4 of the Competition Law, the Board imposed administrative monetary fines of:

1. TL 23,743,658.34 on Philips.

2. TL 290,884.20 on Melisa.

3. TL 1,235,043.69 on Gipa.

4. TL 387,053.81 on Dünya.

5. TL 268,305.17 on Nit-Set.

Date: 08.12.2022 No: 22-54/834-344	Aslan Ticaret Decision[17]
Decision Type	Full-fledged investigation/settlement
Market	Not defined
Complainant	Confidentiality request.
Allegation(s)	It was alleged that Aslan Ticaret violated Article 4 of Competition Law through resale price maintenance and restricting online sales of its dealers on e-marketplace platforms.
Board Decision and Sanction	Termination of the infringement through settlement and imposition of an administrative monetary fine.

The Board initiated a full-fledged investigation against Aslan Ticaret Dayanıklı Tüketim Malları ve Ltd. Şti. ("**Aslan Ticaret**") based on the allegation that Article 4 of Competition Law was violated through resale price maintenance by its dealers and restrictions on its dealers' online sales through e-marketplace platforms.

In the full-fledged investigation, a settlement text was submitted to the Authority by Aslan Ticaret together with a settlement request. In the settlement text, the existence and scope of the violation were accepted, their appeal right was waived, and the maximum administrative fine discount rate was requested. The Board decided to impose an administrative fine of TL 4,013,024.56 over the undertaking's gross income for 2021, to apply a 25% discount as a result of the settlement procedure reducing the fine to TL 3,009,768.42, and to terminate the investigation through the conclusion of the settlement procedure.

[17] The Board's *Aslan Ticaret* Decision dated 08.12.2022 and numbered 22-54/834-344.

Date: 30.06.2020 No: 22-29/483-192	Numil Decision[18]
Decision Type	Full-fledged investigation/settlement
Market	Baby formula market.
Complainant	Initiated *ex officio* by the Authority.
Allegation(s)	Resale price maintenance infringing Article 4 of the Competition Law.
Board Decision and Sanction	Termination of the infringement through settlement and imposition of an administrative monetary fine.

The Board initiated a full-fledged investigation against Numil Gıda Ürünleri San. ve Tic. A.Ş. ("**Numil**") concerning a violation of Article 4 of Competition Law through resale price maintenance practices. On the initiation of the investigation, Numil made a settlement application accepting the existence and scope of the infringement, waiving its appeal rights and requesting the highest administrative monetary fine reduction available (25%).

On the review of the settlement request, a majority of the Board decided to:

- impose an administrative fine of TL 57,083,623 (excluding the export turnover) on Numil's Türkiye-related gross revenues for the year 2021,
- apply a 15% discount as a result of the settlement procedure, and
- impose a resulting administrative fine of TL 48,521,080 on Numil.

The decision, besides being the first not to grant the maximum administrative monetary fine reduction rate of 25%, is also important as it contains important dissenting opinions by Board Members Hasan Hüseyin ÜNLÜ and Berat UZUN indicating that Numil's export revenues should also be included in its turnover calculation. Although the dissenting opinions had no influence on the final decision, the Board's decision is of importance, as it may be of guidance regarding the Board Members' opinions concerning undertakings' turnover calculations when imposing administrative monetary fines.

[18] The Board's *Numil* Decision dated 30.06.2022 and numbered 22-29/483-192.

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2. BOARD ACTIVITY

Competition Round Up | Türkiye 2022

The five-year period of 2018-2022 was busy in many aspects for Türkiye and globally. Significant regulations came into force and the number of investigations continued to increase gradually. According to the statistics provided by EC[19], total number of case investigations of which the Network has been informed is 148 in 2022, which was 145 in 2021. In terms of regulations, as a result of the discussions about platform economies, European Union regulated digital markets comprehensively.

In terms of Turkish competition law practice, cartel investigations initiated in various sectors, including traditional sectors such as cement but also in the retail, human resources and car manufacturing markets, and new types of infringements such as hub-and-spoke cartel violations or gentlemen's agreements regarding the transfer of employees has been discussed. These unusual and important cases have also initiated an important discussion regarding the standard of proof for cartel cases, and this will be one of the hot topics in 2023, as the administrative courts are to submit their opinions and decisions on the matter.

Besides investigations under Article 4 of the Competition Law, 2022 was also an interesting year for Article 6-related infringements, as digital players such as Meta and Google were the subject of separate full-fledged investigations that provided a glimpse of the Authority's eagerness to review significant digital market players, platforms and gatekeepers.

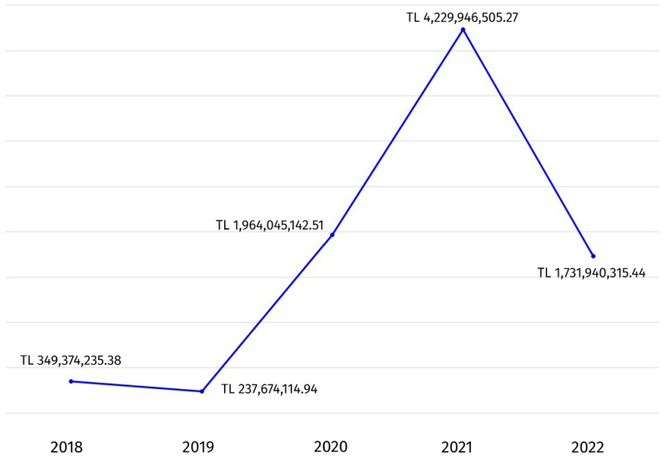
Accordingly, after providing information on the headline figures for the last five years, we will discuss the Authority's significant cartel investigations and the new types of cartel infringements together with the required standard of proof. We then review the abuse of dominance cases.

[19] https://competition-policy.ec.europa.eu/european-competition-network/statistics_en

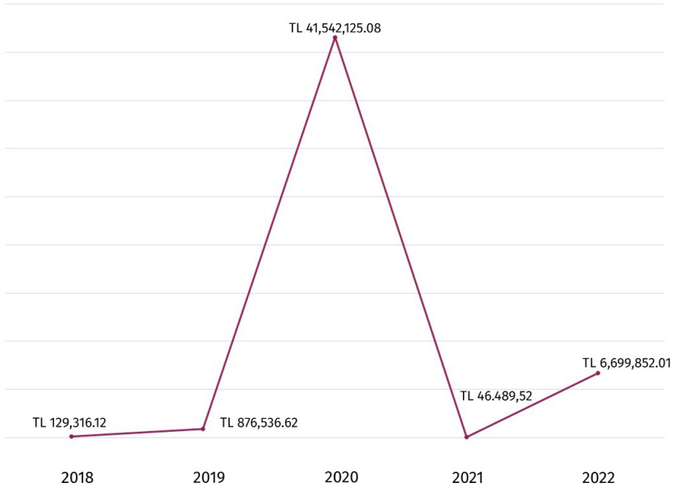
2.1. Headline Figures

2.1.1. Graphs of Administrative Monetary Fines (2018-2022)

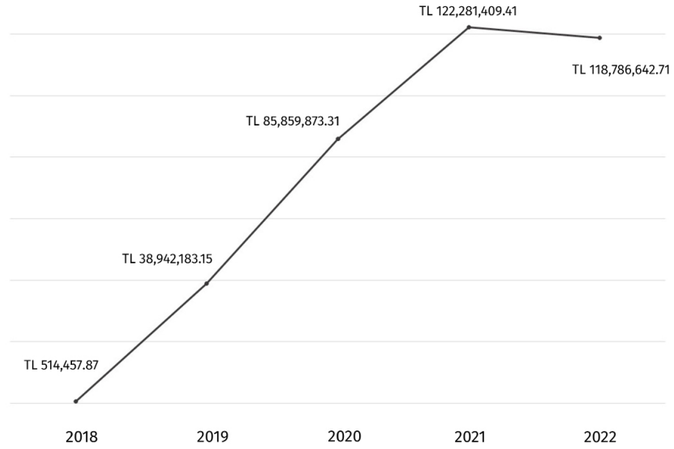
Graph-1: Total Administrative Monetary Fine Imposed by the Authority



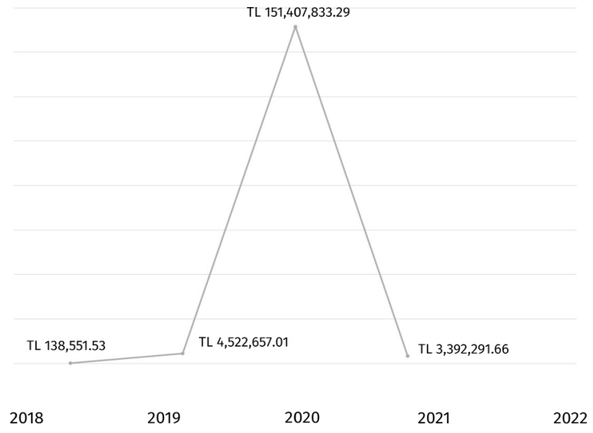
Graph-2: Administrative Monetary Fines Imposed Due to Competition Law Violation (Art. 4, 6)



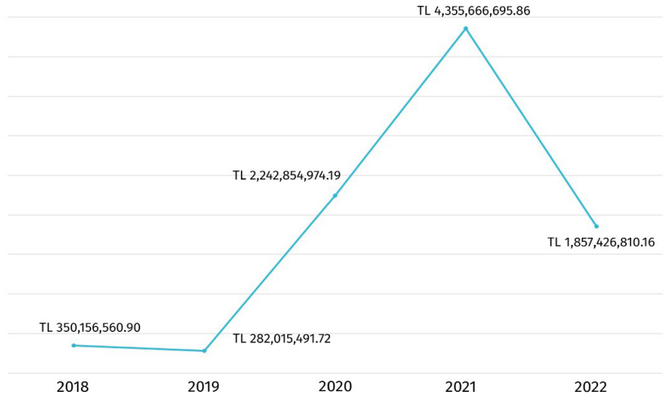
Graph-3: Total Administrative Monetary Fines Imposed Due to Faciliate to Comply with Notification Requirement (Gun Jumping, Individual Exemption)



Graph-4: Administrative Monetary Fines Imposed on a Daily Basis



Graph-5: Administrative Monetary Fines Imposed After Judicial Decision



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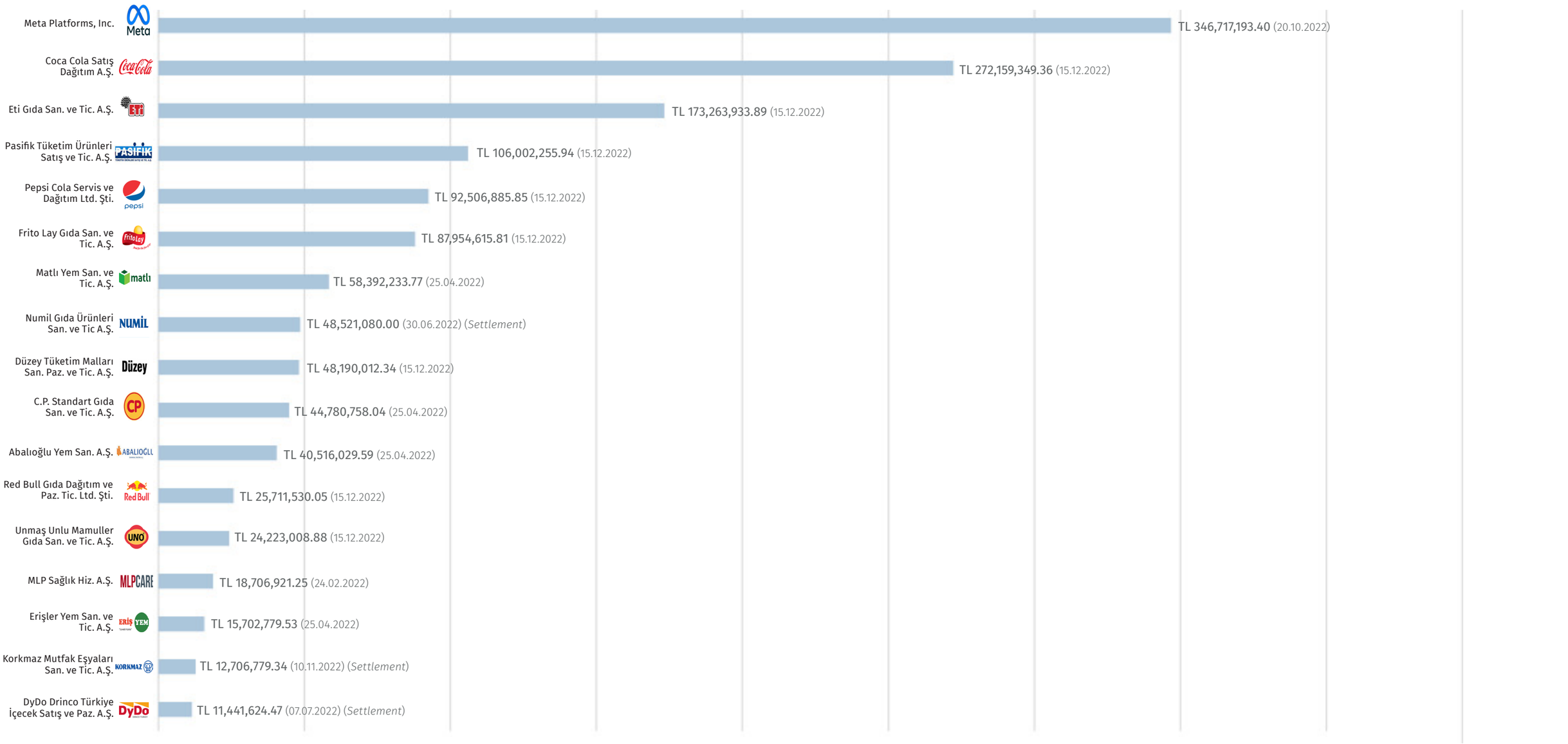
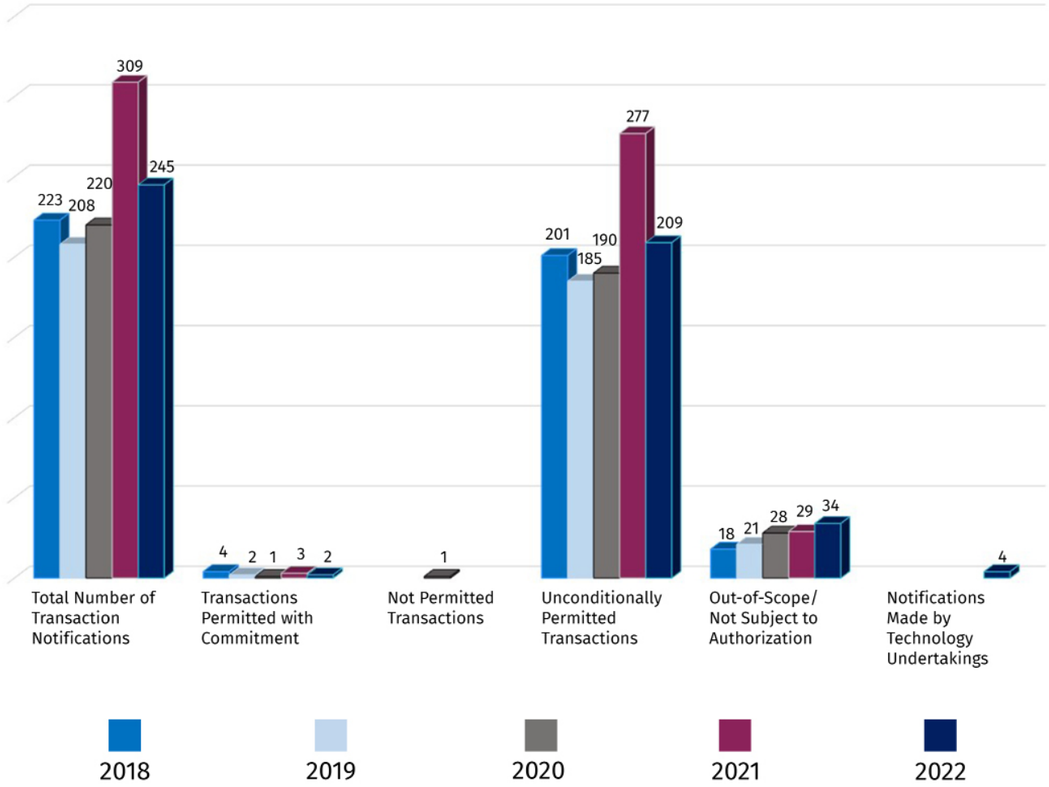
2.1.2. Fines in Significant Cases



2.1.3. Number of M&A Transactions (Article 7)



When the statistics are examined, assuming that another factor has not changed, the decrease in the total number of merger and acquisition transaction notifications in 2022 can be explained as the increase in turnover thresholds (see the related section below) with the legislative amendment made.

2.1.4. New Investigations Initiated

The Board initiated a number of new investigations in 2022. The following is a selection of notable investigations recently launched by the Board.

Undertakings	Allegation
17 Ready-Mixed Concrete Producers Operating in Ankara and Kırıkkale Provinces	Anti-competitive agreements among competitors (Article 4)
• Danone Tikveşli Gıda ve İçecek San. ve Tic. A.Ş. • Eti Gıda San. ve Tic. A.Ş. • Horizon Hızlı Tüketim A.Ş. • Nestle Türkiye Gıda San. A.Ş.	Exchange of competitively sensitive information (Article 4)
• Nestle Türkiye Gıda San. A.Ş.	Resale price maintenance and imposition of regional/customer restrictions on distributors (Article 4)
8 Private Schools Operating in Ankara: • ABC Koleji Spor Kulübü Derneği İktisadi İşletmesi, • Aydın Yayıncılık ve Eğitim Hiz. İnş. Tic. ve San. A.Ş., • Çözüm Dergisi Yay. Tic. Ltd. Şti., • ESS Eğitim Hiz. A.Ş., • Maya-Gen Eğitim Yayıncılık Bilgisayar İnş. Gıda Turizm Tic. Ltd. Şti., • Özel Arı Eğitim ve Öğretim San. Tic. A.Ş., • Sınav Basın Yayın Dağıtım Org. San. ve Tic. A.Ş., • Yükselen Koleji Eğitim A.Ş.	Anti-competitive agreements among competitors (Article 4)
• Saint-Joseph Private French High School • Saint-Benoît Private French High School • Notre-Dame de Sion Private French High School • Saint Michel Private French High School • Sainte Pulchérie Private French High School	Prices Fixing (Article 4)
• Biota Bitkisel İlaç ve Kozmetik Laboratuarları A.Ş. • Colastin Sağlık Ürünleri A.Ş. • Gerçek Kozmetik San. ve Tic. Ltd. Şti. • Kozmoklinik Kozmetik ve Medikal Ürünler Paz. ve Tic. A.Ş. • MOT Grup Bilişim Ltd. Şti.	Resale price maintenance and restriction of internet sales. (Article 4)
• Tetra Laval Holding - Finance SA	Abuse of dominant position through exclusionary practices (Article 6)
• Whirlpool Beyaz Eşya San. ve Tic. A.Ş. • Vestel Tic. A.Ş. (On judicial decision)	Anti-competitive agreements among competitors (Article 4)
• Iveco Araç San. ve Tic. A.Ş.	Imposing territorial and customer restrictions, including the internet sales (Article 4)

Undertakings	Allegation
• AGCO Tarım Makineleri Tic. Ltd. Şti. • Argo Tractors Türkiye Traktör San. ve Tic. Ltd. Şti. • Başak Satış Pazarlama ve Yatırım A.Ş. • Erkunt Traktör San. A.Ş. • Hattat Traktör San. ve Tic. A.Ş. • IPSO Tarım A.Ş. • Kubota Türkiye Makine Tic. Ltd. Şti. • Same Deutz Fahr Traktör San. ve Tic. A.Ş. • Tümosan Motor ve Traktör San. A.Ş. • Türk Traktör ve Ziraat Makinaları A.Ş.	Anti-competitive agreements among competitors (Article 4)
• Alphabet Inc. • Google LLC • Google International LLC • Google Ireland Limited • Google Reklamcılık ve Paz. Ltd. Şti.	Abuse of dominant position (Article 6)
• Çimsa Çimento San. ve Tic. A.Ş., • KÇS Kahramanmaraş Çimento Beton Sanayi ve Madencilik İşletmeleri A.Ş., • M.M. Tiftik Kardeşler Nakliye İnşaat Emlak Petrol ve Tarım Ürünleri Paz. San. Tic. Ltd. Şti., • Oyak Çimento Fabrikaları A.Ş. • Samet Hazır Beton İnşaat Madencilik Lojistik Enerji Ltd. Şti.	Anti-competitive agreements among competitors (Article 4)
• Sector inquiry was initiated in 11 provinces affected by the earthquakes that occurred on 06.02.2023, to identify competition problems that may arise in the markets.	Initiated to identify potential competitive problems in the earthquake zone that could delay both social and economic recovery.
• Mobile ecosystem players	Initiated to review mobile ecosystems and determine possible competition law restrictions such as exclusionary practices, limitation of consumer choices or restriction of innovation.

2.2. Notable Decisions of 2022: A Year Focused on Cartel Cases

The number of reasoned decisions regarding cartel cases issued by the Authority on its official website was 5 in 2018, 2 in 2019, 15 in 2020 and 2021, and 10 in 2022. Although it is not possible to refer a continuous increase in cartel cases, which are considered to be the most serious violations in terms of competition law, it is possible to indicate that the activity of the Authority increased from 2018 until the end of 2022. Indeed 2022 was as expected an important year with regards to the cartel cases and standard of proof.

2.2.1. Significant Cartel Cases:

2022 saw significant cartel cases including **(i)** Retail Investigations that defined hub-and-spoke infringement and **(ii)** a Human Resources Investigation regarding gentlemen's agreements in labor markets.

Date: 28.10.2021 19.12.2022 **No: 21-53/747-360 22-55/863-357**	**2.2.1.1. Retail Investigations[20]**
Decision Type	Full-fledged investigation
Market	Production/supply of cleaning/hygiene products, food products, retail sale of cleaning/hygiene products and retail sale of food products.
Complainant	Initiated *ex officio* by the Authority.
Allegation(s)	Anti-competitive pricing behavior.
Board Decision and Sanction	Violation of Article 4 of the Competition Law through hub-and-spoke agreements and resale price maintenance practices.

The Authority initiated a full-fledged investigation to evaluate pricing behaviors during the COVID-19 pandemic against several chain stores active in food and hygiene product retail, as well as undertakings operating as suppliers at the producer and wholesale level ("**Retail I**").

The Board unanimously decided that the investigated chain stores, Yeni Mağazacılık A.Ş. ("**A101**"), BİM Birleşik Mağazalar A.Ş. ("**BİM**"), CarrefourSA Carrefour Sabancı Ticaret Merkezi A.Ş. ("**Carrefour**"), Şok Marketler Tic. A.Ş. ("**ŞOK**") and Migros Tic. A.Ş. ("**Migros**"), and one of the investigated suppliers, Savola Gıda ve San. Tic. A.Ş. ("**Savola**"), had infringed Article 4 of the Competition Law through hub-and-spoke exchanges of competitively sensitive information on future prices, price change dates, seasonal activities and special offers among the chain stores through their common supplier Savola. Accordingly, the Board imposed a record administrative monetary fine of total of TL 2,671,434,094.38 on the chain stores and Savola for hub-and-spoke cartel violations. In addition, Savola received a further fine of TL 11,105,499.32 for resale price maintenance violations.

[20] The Board's *Retail I* Decision dated 28.10.2021 and numbered 21-53/747-360, and *Retail II* Decision dated 19.12.2022 and numbered 22-55/863-357.

The Retail I decision, besides being the first hub-and-spoke infringement decision under Turkish competition law, is important as it (**i**) defines hub-and-spoke infringement as a cartel infringement (whereas in the Authority's previous decisions it was deemed to be part of "other infringements") and (**ii**) determines the criteria for hub-and-spoke violations together with the required burden of proof.

In this regard, the following must be present for a hub-and-spoke infringement violation determination by the Board:

- Spoke A (in this case the chain store) conveyed competitively sensitive information to the hub B (in this case the supplier) with the aim of affecting the strategic decisions of a competitor, spoke C.

- The hub B then in fact conveyed the competitively sensitive information to the competitor, spoke C (as intended by spoke A).

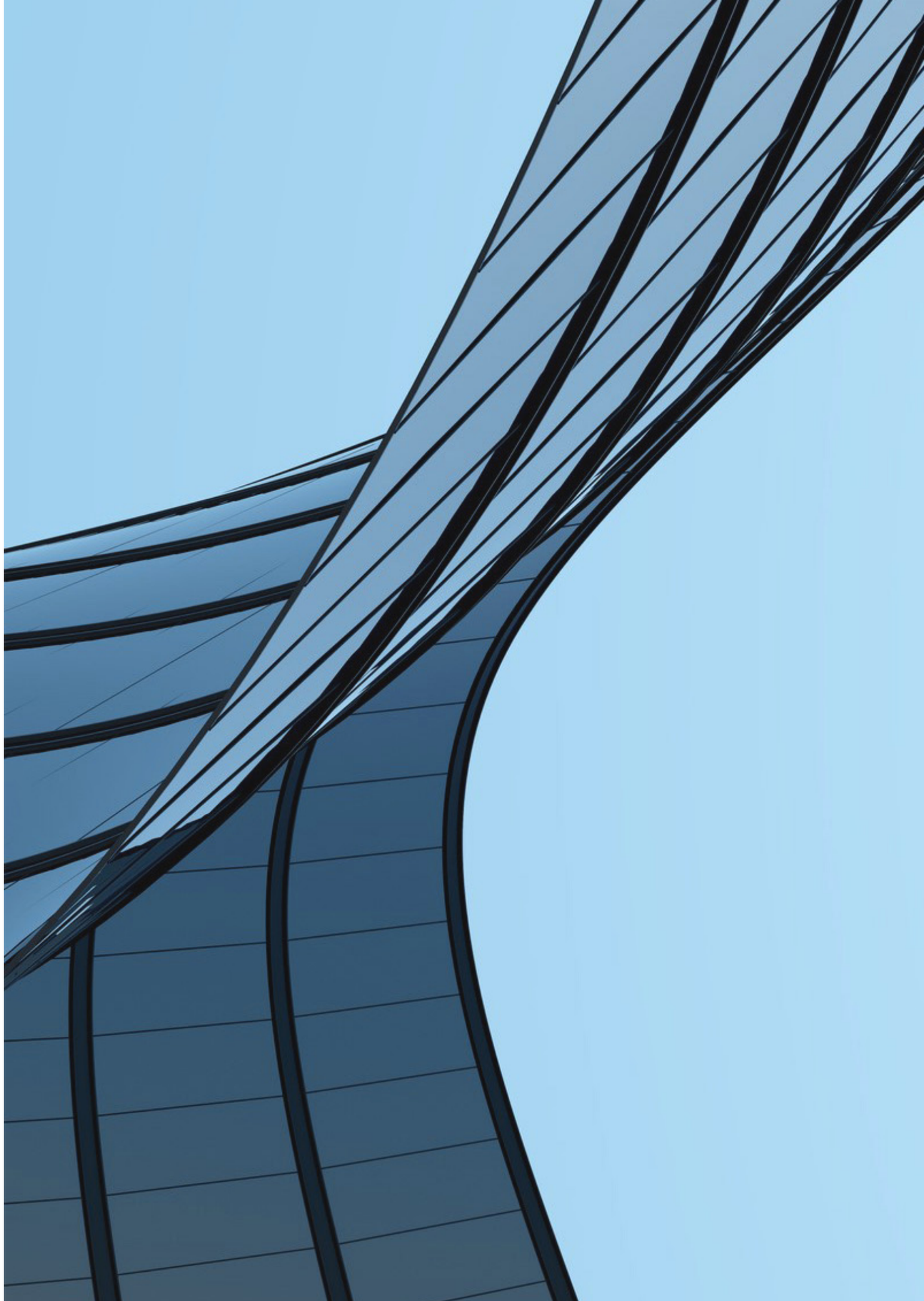
- Spoke C in fact used the relevant information knowing that the strategic information belonged to its competitor spoke A.

In addition, the hub must have (**i**) established the conditions of the anti-competitive agreement among spokes separately, (**ii**) coordinated the concurrences of wills or the common understanding among the spokes and, (**iii**) made certain that all spokes complied with the anti-competitive agreement.

Based on these grounds, the Board started a new retail investigation ("**Retail II**"), this time first including the suppliers to the full-fledged investigation and then incorporating the chain stores that were initially fined in the Board's Retail I decision.

Based on the hub-and-spoke infringement criteria set out under the Retail I Investigation, the Board imposed administrative monetary fines against 12 suppliers for hub-and-spoke infringement and against 10 suppliers for resale price maintenance violation. As A101, BIM, Carrefour, ŞOK and Migros were initially fined in the Retail I investigation, under the "*ne bis in idem*" principle the Board decided not to impose a new administrative monetary penalty on these chain stores.

The burden of proof for hub-and-spoke as well as resale price maintenance infringements is expected to be one of the hot topics of 2023, with anticipated decisions and opinions of the administrative courts that may require the Board to re-evaluate its previous decisions and the requirements for such infringements.



Date: 26.07.2023 No: 23-34/649-218	2.2.1.2. Human Resources Investigation[21]
Decision Type	Full-fledged investigation/settlement
Market	The reasoned decision has not yet been issued.
Complainant	The reasoned decision has not yet been issued.
Allegation(s)	Anti-competitive agreements through non-poaching and/or wage fixing agreements so as to restrict competition in the labor market.
Board Decision and Sanction	The Board decided to impose administrative monetary fines on 16 undertakings, 11 undertaking have completed the investigation through settlement procedure and 21 investigated undertaking did not receive any administrative monetary fine.

The Board initiated an investigation against 32 undertakings (subsequently increased to 48), without taking into consideration the markets in which they operated, due to the allegation that the undertakings had conducted non-poaching and/or wage fixing agreements so as to restrict competition in the overall labor market.

Non-poaching agreements are defined in the Authority's website as "agreements made directly or indirectly with an undertaking to not offer employment to another undertaking's employees or recruiting them"[22]. Although the reasoned decision has not been issued by the Authority, it is expected that the Authority will identify:

- Non-poaching and/or wage fixing agreements as "by-object" infringements.

- The relevant product market as the "labor market" without making distinctions based on the operations of the investigated undertakings.

- Non-poaching and/or wage fixing agreements as cartel cases.

It was unanimously decided that following 16 undertakings had (**i**) entered into non-poaching agreements to prevent the employment of each other's employees and to restrict the mobility of employees, and (**ii**) conducted agreements to limit wages and fringe benefits, which artificially deprived wages of their real value, constituting a violation of Article 4 of Competition Law. The Board then, indicated that the acts in question could not benefit from individual exemption provided under Article 5 of Competition Law.

Consequently, the Board unanimously decided (with different reasons submitted by the Board Members Hasan Hüseyin ÜNLÜ and Berat UZUN) to impose administrative monetary fines amounting to:

[21] The Board's *Human Resources Investigation* Decision dated 26.07.2023 and numbered 23-34/649-218.
[22] https://www.rekabet.gov.tr/tr/Sayfa/Yayinlar/rekabet-terimleri-sozlugu/terimler-listesi?icerik=88f2f59c-5eb8-458e-8fd5-00c1fa2ac709

1. TL 2,159,522.60 on Arvato Lojistik Dış Ticaret ve E-Ticaret Hiz. A.Ş.	9. TL 1,094,131.66 on Sosyo Plus Bilgi Bilişim Teknolojileri Danışmanlık Hiz. Tic. A.Ş.
2. TL 2,183,227.89 on Bilge Adam Yazılım ve Teknoloji A.Ş.	10. TL 7,293,869.36 on TAB Gıda San. ve Tic. A.Ş.
3. TL 49,831.55 on Binovist Bilişim Danışmanlık A.Ş.	11. TL 41,022,658.16 on Türk Telekomünikasyon A.Ş.
4. TL 517,883.20 on Çiçeksepeti İnternet Hiz. A.Ş.	12.TL 1,116,070.57 on Veripark Yazılım A.Ş.
5. TL 4,834,124.55 on D-Market Elektronik Hiz. ve Tic. A.Ş.	13. TL 1,218,089.30 on Vivense Teknoloji Hiz. ve Tic. A.Ş.
6. TL 18,021,702.86 on Flo Mağazacılık ve Paz. A.Ş.	14. TL 5,319,292.25 on Vodafone Telekomünikasyon A.Ş.
7. TL 6,513,239.09 on Koçsistem Bilgi ve İletişim Hiz. A.Ş.	15. TL 192,973.74 on Zeplin Yazılım Sistemleri ve Bilgi Teknolojileri A.Ş.
8. TL 59,590,457.10 on LC Waikiki Mağazacılık Hiz. Tic. A.Ş.	16. TL 20,827.94 on Zomato İnternet Hiz. Tic. A.Ş.

It was decided that no administrative fine should be imposed on the following 21 undertakings since no evidence of violation was found:

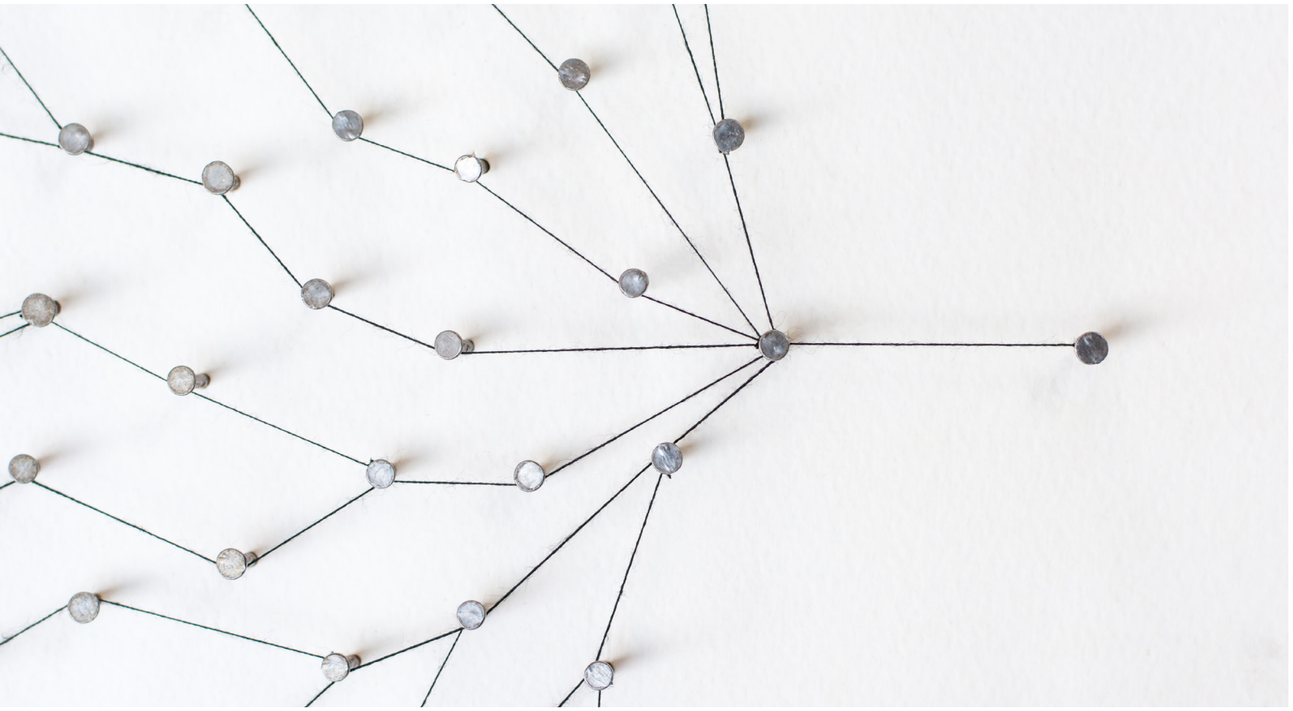
1. 41 29 Medya İnternet Eğitimi ve Danışmanlık Reklam Sanayi Dış Tic. A.Ş.	12. Mobven Teknoloji A.Ş.
2. Anadolu Restoran İşletmeleri Ltd. Şti.	13. Mynet Medya Yayıncılık Uluslararası Elektronik Bilgilendirme ve Haberleşme Hiz. A.Ş.
3. Doğuş Planet Elektronik Ticaret ve Bilişim Hiz. A.Ş.	14. Net Danışmanlık Eğitim ve Tic. Ltd. Şti.
4. Etiya Bilgi Teknolojileri Yazılım San. ve Tic. A.Ş.	15. Noktacom Medya İnternet Hiz. San. ve Tic. A.Ş.
5. Google Reklamcılık ve Paz. Ltd. Şti.	16. NTV Radyo ve Televizyon Yayıncılığı A.Ş.
6. Grupanya İnternet Hizmetleri İletişim Organizasyon Tanıtım ve Paz. A.Ş.	17. Peak Oyun Yazılım ve Paz. A.Ş.
7. Havas Worldwide İstanbul İletişim Hiz. A.Ş.	18. Pizza Restaurantları A.Ş.
8. İş Gıda A.Ş.	19. Sahibinden Bilgi Teknolojileri Paz. ve Tic. A.Ş.
9. Logo Yazılım San. ve Tic. A.Ş.	20. Valensas Teknoloji Hiz. A.Ş.
10. Meal Box Yemek ve Teknoloji A.Ş.	21. Yeşil Vadi Tarım Gıda A.Ş.
11. Migros Tic.	

11 undertakings have completed the investigation through the settlement procedure. The settled administrative monetary fine reduction ratio and the allegations will be indicated in the reasoned decision of the Authority along with their commercial titles.

2.2.2. Developments Regarding the Standard of Proof

An analysis of the Board's decisions regarding preliminary investigations and full-fledged investigations in recent years, and especially in the last year, reveals the importance of the standard of proof. The level of doubt required to turn preliminary investigations into full-fledged investigations and the standard of proof required to establish the existence of a competition violation are increasingly being discussed and becoming the subject of decisions.

Cartel cases are considered to be the most serious violation under competition law and are subject to the highest penalty rate under the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices, Decisions Limiting Competition and Abuse of Dominant Position. For this reason, the standard of proof required for cartels is high, in proportion to the penalty, and the violation needs to be demonstrated with clear and concrete evidence in a way that leaves no room for doubt. In this context, the MDF and Yonga Levha Decision is important in terms of developments regarding the standard of proof for cartels.



Date: 01.04.2021 No: 21-18/229-96	**MDF and Flakeboard Decision**[23]
Decision Type	Full-fledged investigation
Market	MDF and flakeboard markets.
Complainant	Initiated *ex officio* by the Authority and confidentiality request.
Allegation(s)	Anti-competitive agreement to determine the percentages and timing of the price increases (Article 4).
Board Decision and Sanction	The Board decided that the companies under investigation violated Article 4 of the Competition Law by reaching an agreement among themselves and imposed a total administrative monetary fine of TL 271,061,660.

The Board imposed an administrative monetary fine against 11 undertakings, including Kronospan Orman Ürünleri San. ve Tic. A.Ş. ("**Kronospan**"). The main basis of the fine was the MDF and Flakeboard Industry Association meeting dated 05.03.2014, where the undertakings had allegedly engaged in an agreement/concerted practice to determine the percentages and timing of price increases.

Although no documents other than the correspondence and minutes of the relevant meeting were obtained in the investigation, and Kronospan was not among the participants of the meeting, the Board found that Kronospan had infringed of Article 4 of the Competition Law because Kronospan was on the Association's Board of Directors when board meetings took place on compatible dates, and the price increases of Kronospan were compatible with those of the other undertakings.

When the case was appealed, the 13th Administrative Court of Ankara annulled the decision in regard to Kronospan. According to the 13th Administrative Court of Ankara, there was no evidence that Kronospan attended the meetings in question, and the price increases by Kronospan were made after the other undertakings. Therefore, the 13th Administrative Court of Ankara found that the standard of proof was not fulfilled, and the violation could not be established beyond a reasonable doubt.

The decision is important as the 13th Administrative Court of Ankara underlined the standard of proof in Article 4 related infringements and especially in cartel cases. The currently ongoing investigations will shed light on whether the Board's view of the required standard of proof will change to attain approval from the appellant courts.

[23] The Board's *MDF and Flakeboard* Decision dated 01.04.2021 and numbered 21-18/229-96.

2.3. Digital Players and Abuse of Dominance Cases

Date: 30.09.2021 No: 21-46/667-332	**TT Decision**[24]
Decision Type	Full-fledged investigation
Market	Fixed broadband internet services market.
Complainants	• Vodafone Net İletişim Hiz. A.Ş. • Cem Kaya • Unknown complainant • Superonline İletişim Hiz. A.Ş. • TurkNet İletişim Hiz. A.Ş.
Allegation(s)	Abuse of a dominant position by refusing to conclude contracts on unjustified grounds.
Board Decision and Sanction	The Board made no finding of abuse and did not impose a sanction.

The Board examined allegations that Türk Telekomünikasyon A.Ş. ("**TT**") was in a dominant position in the wholesale fixed broadband internet services market and had prevented its competitors in the retail fixed broadband services market from providing services and acquiring subscribers on unreasonable and unfair grounds in violation of Article 6 of the Competition Law. It was alleged that TT had rejected the requests for wholesale broadband internet access services made by Vodafone, Superonline and Turknet on unjustified grounds.

The Board determined that TT was in a dominant position in the wholesale fixed broadband internet access services market and subsequently assessed whether TT's behavior constituted an abuse of dominance.

The Board determined that refusals by TT to provide infrastructure to internet service providers ("**ISPs**") by allocating ports to them were indirect refusals to enter into contracts, and that such behavior could also constitute discrimination. It was therefore appropriate to assess the refusals to allocate ports as a refusal to enter into a contract, as the allegations were a natural consequence of the refusal to provide goods.

[24] The Board's *TT* Decision dated 30.09.2021 and numbered 21-46/667-332.

The Board then assessed whether the following conditions for a refusal to conclude a contract to be an anti-competitive practice were present:

- The refusal had to relate to a product or service that was indispensable to allow participation in the downstream market.
- The refusal had to be likely to eliminate effective competition in the downstream market.
- The refusal had to be likely to cause consumer harm.

The Board concluded that the first condition was met, since the infrastructure owned by TT was a necessary element for ISPs to provide services to end users, as it was not economically feasible to create a new infrastructure as an alternative to the existing infrastructure in the short term.

However, as a result of the economic analysis, it was determined that there had been an increase, albeit limited, in the market shares of ISPs, that TT's behavior within the scope of the file did not have a negative impact on the market shares of other ISPs, and that there was no elimination of effective competition. Therefore, the Board decided that the second condition was not met.

Finally, the Board assessed the rate at which applications to TT were concluded, in other words, the proportion of ports actually allocated to ISPs, and examined the number of cancellations of the undertakings' applications for plain xDSL, PSTN and xDSL in 2015-2019. The Board concluded that there was a very small difference between TT's subsidiary TTNet A.Ş. and its closest competitor, and that the data did not indicate a significant anti-competitive closure rate in the market.

As a result of these assessments, no finding was made that TT's behavior within the scope of the investigation made it difficult for the activities of competing undertakings requesting ports/infrastructure and led to anti-competitive market closure, and no finding was made that TT had abused its dominant position within the scope of Article 6 of the Competition Law by refusing to conclude contracts during the period under investigation.

Date: 20.10.2022 No: 22-48/706-299	Meta Decision[25]
Decision Type	Full-fledged investigation
Market	Personal social networking services and online video advertisement markets.
Complainant	Initiated *ex officio* by the Authority.
Allegation(s)	Abuse of dominant position through WhatsApp's updated data policy.
Board Decision and Sanction	Imposition of an administrative monetary fine and behavioral remedies for violation of Article 6 of the Competition Law.

The Board initiated a full-fledged investigation to determine whether Meta Platforms, Inc, Meta Ireland Limited, WhatsApp LLC and Madoka Turkey Bilişim Hiz. Ltd. Şti. ("**Meta**") had violated Article 6 of the Competition Law in updating the WhatsApp platform's terms of use and privacy policy to impose an obligation for users to accept the sharing with Meta of user data held by WhatsApp in order to continue using WhatsApp after 8 February 2021. The Board also suspended the enforcement of WhatsApp's terms of use and privacy policy and informed the relevant users of the investigation, as per Article 9 of the Competition Law.

Although the reasoned decision has not been published yet, the Board has unanimously decided to impose an administrative fine of TL 346,717,193.40 against Meta (excluding Madoka Turkey Bilişim Hiz. Ltd. Şti) with the determination that Meta obstructed competitors' activities in the online display and personal social networking services markets, and prevented competitors' market entry, by merging users' data collected from Meta's core services Facebook, Instagram and WhatsApp.

Accordingly, in addition to the monetary fine imposed on Meta, the Board also required Meta to:

- submit to the Board the necessary measures to end the infringement and to ensure the establishment of effective competition in the market within 1 month at the latest from the notification of the reasoned decision.

- take the necessary measures within 6 months from the notification of the reasoned decision.

- submit a report to the Board once a year for 5 years from the start of implementation of the first compliance measure.

[25] The Board's *Meta* Decision dated 20.10.2022 and numbered 22-48/706-299 (the reasoned decision has not been published).

Date: 08.04.2021 No: 21-20/248-105	Google Decision[26]
Decision Type	Full-fledged investigation
Market	General search services market.
Complainant	Initiated *ex officio* by the Authority.
Allegation(s)	Abuse of its dominant position in the general search services market by Google in favoring its own local search and accommodation price comparison services to the exclusion of its competitors.
Board Decision and Sanction	Imposition of an administrative monetary fine and behavioral remedies for violation of Article 6 of the Competition Law.

The Board examined an allegation that Google Reklamcılık ve Paz. Ltd. Şti., Google International LLC, Google LLC, Google Ireland Limited and Alphabet Inc.'s economic unity ("**Google**") had abused its dominant position in the general search services market by promoting its local search and accommodation price comparison services to the exclusion of its competitors.

The investigation determined that:

- Google had positioned and displayed its own service, Local Unit, more advantageously than competitors in the local search services market and that Google did not include Local Unit's competitor sites.

- Google Hotel Ads was positioned and displayed more advantageously than competitors on the general search result page in Google's accommodation price comparison service market.

It was then evaluated whether the behaviors in question constituted abuse of a dominant position.

The first assessment was whether Google was in a dominant position. Google was found to be dominant in the general search market and to have very high indirect network effects in the search services market, which was a multilateral platform.

It was concluded that Google had violated Article 6 of the Competition Law by giving its local search and accommodation price comparison service an advantage over its competitors in terms of position and display on the general search results page, and by preventing rival local search sites from entering the Local Unit service, thereby making it difficult for competitors to operate, and distorting competition in the local search services and accommodation price comparison service markets.

The Board imposed an administrative fine of TL 296,084,899.49, as well as requirements to:

- provide competing local search services and competing accommodation price comparison services with conditions that were not disadvantaged in relation to Google's own relevant services on the general search results page.

- submit annual reports to the Authority for five years from the start of the implementation of the first compliance measure.

[26] The Board's *Google* Decision dated 08.04.2021 and numbered 21-20/248-105.

3. LEGISLATIVE DEVELOPMENTS

Since 2018 there have been significant legislative developments. That being the case, the amendments with regards to (**i**) the Amendment of the Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorization of the Board ("**Communiqué No. 2022/2**") as well as (**ii**) the Draft Law on the Amendment of the Law No. 4054 on the Protection of Competition ("**Draft Law**") may be seen as ground-breaking developments. Initial indications are that both legislative developments primarily demonstrate the Authority's aim to adapt its competition legislation to the rapidly developing digital markets and to adjust its assessment tools towards an ex-ante review approach so as to catch and review digital market players and gatekeepers even before any competitively restrictive behaviors occur.

3.1. Legislative Changes in the Merger Control Regime in Türkiye

Communique No. 2022/2 was published in the Official Gazette numbered 31768 and dated 04.03.2022, and entered into force on 04.05.2022, two months after its publication.

Communiqué No. 2022/2 brought the following significant changes and implementations to the merger and acquisition regime:

• The turnover thresholds required for a merger and acquisition transaction to be subject to the approval of the Board have been increased.

• The concept of "technology undertaking" was defined, and an additional notification obligation was introduced for these technology undertakings.

• The template notification form annexed to Communiqué No. 2010/4 has been amended,

• The transition from the "dominant position" test to the "significant impediment to effective competition" ("**SIEC**") test was included in the secondary legislation.

• Compliance with current legislation has been achieved in regard to the calculation of turnover thresholds for financial institutions.

MOROĞLU ARSEVEN

3.1.1. Amendment of Turnover Thresholds

Prior to Communiqué No. 2022/2's amendment of the turnover thresholds, according to Article 7 of Communiqué No. 2010/4, for a merger and acquisition transaction to be subject to mandatory notification, the transaction parties (i.e., the target company and the ultimate acquiring entity) had to exceed one of the following thresholds:

- Aggregate Türkiye-related turnover of the transaction parties exceeding TL 100 million, and the turnover of at least two of the transaction parties separately exceeding TL 30 million, or

- The asset or activity subject to acquisition in acquisition transactions, and at least one of the parties of the transaction in merger transactions, having a Türkiye-related turnover exceeding TL 30 million and another party to the transaction having a global turnover exceeding TL 500 million.

Communiqué No. 2022/2 updates and increases these thresholds to be as follows:

- Aggregate Türkiye-related turnover of the transaction parties exceeding TL 750 million and the turnover of at least two of the transaction parties separately exceeding TL 250 million, or

- The asset or activity subject to acquisition in acquisition transactions, and at least one of the parties of the transaction in merger transactions, having a Türkiye-related turnover exceeding TL 250 million and another party to the transaction having a global turnover exceeding TL 3 billion.

The main purpose for amending the turnover thresholds is to adapt the turnover thresholds to the current inflationary economic conditions and the last years' greatly increasing exchange rates. Subsequent to the amendment, only transaction parties with turnover figures exceeding the amended threshold are mandatorily subject to the notification requirement, with the exception of target undertakings qualified as "technology undertakings" (see section below).

3.1.2. Technology Undertaking Definition and Additional Notification Obligation

Communiqué No. 2022/2 defines the concept of "technology undertaking" for the first time in the Turkish competition legislation and implements an additional notification requirement for such undertakings for the purposes of preventing "killer acquisitions"[27] and the impediment of competition and innovation through such takeovers.

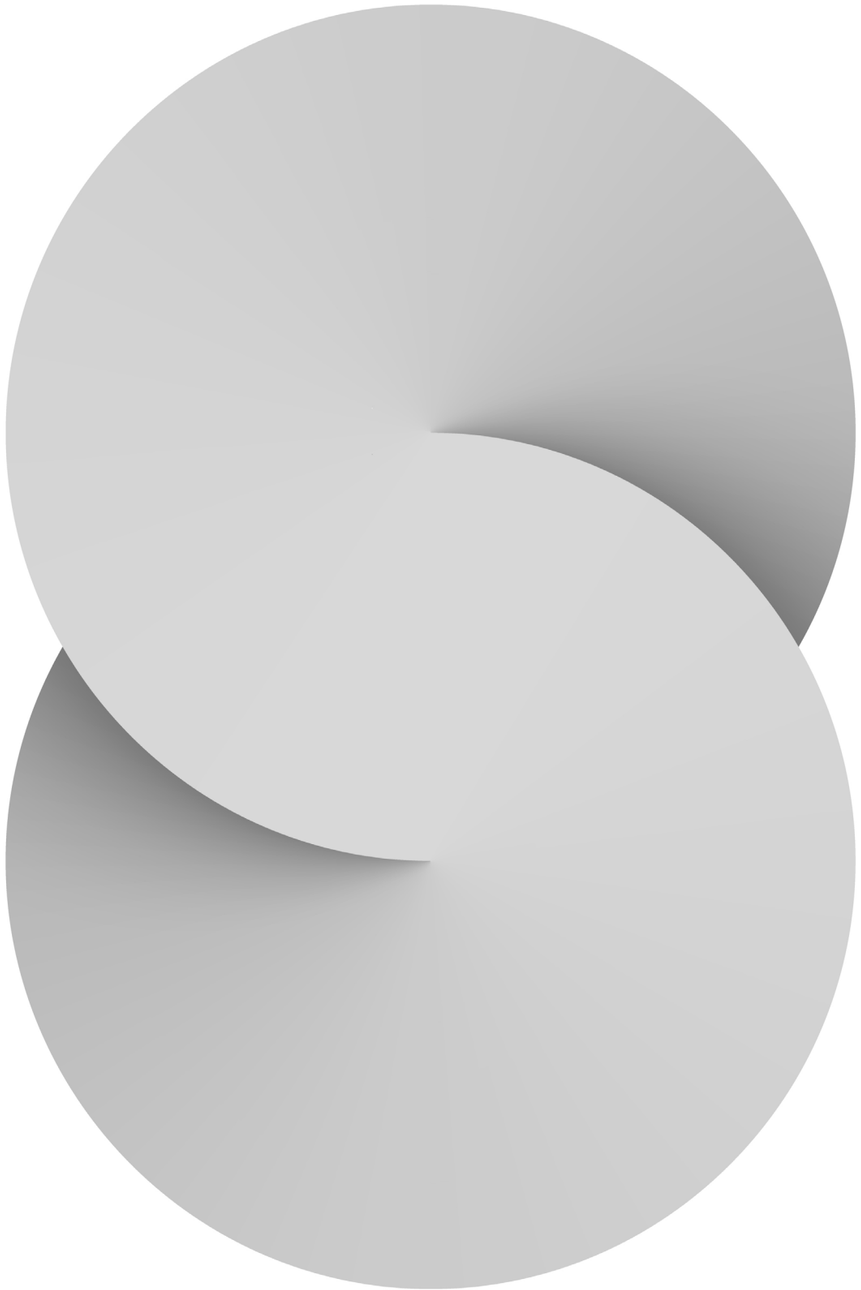
Undertakings or related assets operating in the fields of "*digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals and health technologies*" are considered to be technology undertakings. These technology undertakings are then subject to additional notification requirements regardless of whether their Türkiye-related turnover figures exceed the TL 250 million turnover threshold, provided that the aggregate Türkiye-related turnover of the transaction parties (or of the acquirer, in case the target has no revenue) still exceeds the amended notification thresholds of TL 750 million generated in Türkiye or at least one of the transaction parties (and generally the acquirer) having a global turnover exceeding TL 3 billion.

Therefore, transactions will be subject to mandatory notification to the Authority and require the approval of the Board if both:

- The target company or companies are technology undertakings carrying out their activities in Türkiye as a geographical market, or that have R&D activities or provide services to users in Türkiye, regardless of their turnover thresholds, and

- The acquiring ultimate entity exceeds the amended turnover thresholds.

[27] The term "killer acquisition" means the acquisition of newly developing technology undertakings (such as start-ups) by dominant technology undertakings that are considered to be gatekeepers.



3.1.3. Changes to the Notification Form

The information required in the amended notification form is categorized as: (**i**) information on transaction, (**ii**) information on parties, (**iii**) information on market, and (**iv**) joint ventures. The required information is rather more detailed than the previous notification form. By including footnotes and explanations in the form, the aim is to present the information in a more systematic and practical manner to facilitate the examination process by the Authority's case handlers.

3.1.4. The Significant Impediment to Effective Competition (SIEC) Test

The SIEC test has been included in the review of merger control regime in place of the dominant position test. Therefore, even if a merger or acquisition transaction does not create a dominant position or strengthen an existing dominant position, the Board will not approve the transaction if the transaction is deemed to result in a significant impediment to effective competition.

3.1.5. Procedures for Calculating Turnover Thresholds for Financial Institutions

Communiqué No. 2022/2 applies the communiqués issued by the Banking Regulation and Supervision Agency ("**BRSA**") and the Capital Markets Board ("**CMB**") to calculation of turnover thresholds for financial institutions. It is foreseen that the following communiqués and regulations will be taken as a basis:

- For banks: Communiqué on Financial Statements to be Disclosed to Public by Banks and Explanations and Footnotes Thereof published in the Official Gazette dated 28.06.2012 and numbered 28337, issued by the BRSA.

- For financial leasing, factoring and financing companies: Regulation on Accounting Applications and Financial Statements of Financial Leasing, Factoring, Financing and Savings Financing Companies published in the Official Gazette dated 24.12.2013 and numbered 28861, issued by the BRSA.

- For intermediary institutions and portfolio management companies: Communiqué Concerning the Principles on Financial Reporting within the Capital Market, published in the Official Gazette dated 13.06.2013 and numbered 28676, issued by the CMB.

3.2. Draft Law on the Amendment of the Law No. 4054 on the Protection of Competition

3.2.1. Emergence, Purpose and Scope of Draft Law

As the importance of digital markets is increasing on a global scale, *ex ante* supervision and regulation of the markets has started to be discussed in Türkiye, as in the EC and many other jurisdictions. Following the publication of the "Digital Markets Act" ("**DMA**") in the Official Journal of the European Union on 12.10.2022, the DMA entered into force on 01.11.2022 and is implemented as from 02.05.2023. Similarly, the Authority submitted the Draft Law document for evaluation of various institutions in October 2022. On examination, the Draft Law can be seen to be inspired by the DMA and Article 19(a) of the German Competition Law.

The preamble of Draft Law states that changes in consumer habits stimulated by developments in technology and the internet necessitate a change in Competition Law. While there are benefits to consumers from increased innovation and price competition, the benefits of this digital transformation have been mainly attained by large-scale undertakings due to chronic problems such as barriers to entry to digital markets, high entry costs, excessive data processing, unfair use of data, network effects, economies of scale and economies of scope. Article 1 of Draft Law states that it aims to "*establish and protect a fair and competitive market structure*" in digital markets where market failures are common by envisaging certain "*ex-ante*" obligations for such undertakings, as well as sanctions in case of failure to fulfil these obligations.

The scope of Draft Law is limited to Article 2 and "*undertakings with a significant market share that provide basic platform services to end users or business users established or residing in the Republic of Türkiye*". This means that the "*effects doctrine*" adopted in Competition Law has also been adopted in Draft Law. In other words, an undertaking with significant market power ("**gatekeeper**") that provides a core platform service in Türkiye but does not have headquarters in Türkiye will fall within the scope of Draft Law if it provides services to end users and business users established or residing within Türkiye.

3.2.2. Important Definitions Introduced into Draft Law

Draft Law proposes the introduction of new concepts and definitions into Article 3 of Competition Law such as "*personal data*", "*undertaking with significant market power*", "*end user*", "*core platform service*", "*online intermediation services*", "*online search engines*", "*online social networking services*", "*video-sharing platform services*", "*number-independent interpersonal communication services*", "operating systems", "web browsers", "*virtual assistants*", "*cloud computing services*", "*online advertising services*", "*business user*" and "*ancillary services*".

In the event Draft Law enters into force, this will include certain definitions that will be important in terms of determining the scope of the law and clarifying the related obligations and sanctions, including the following:

- Core Platform Services *are defined as: "Online intermediation services, online search engines, online social networking services, video/audio sharing and streaming services, number-independent interpersonal communication services, operating systems, web browsers, virtual assistants, cloud computing services and online advertising services offered by the provider of any of the services."*

- Ancillary Services *are defined as: "Services determined by the communiqué, particularly payment services offered in the context of or together with core platform services, technical services supporting the provision of payment services, in-app payment systems, delivery services, fulfillment, identification or advertising services."*

The fact that certain services are signified as "*particularly*" in the definition and that these services will be determined by a communiqué to be published by the Authority is worthy of consideration. The Draft Law's reference means that these types of services are not numerus clausus, in other words, these services may be extended by a communiqué to be issued by the Board after the Draft Law enters into force.

- Gatekeepers: The definition of "gatekeepers" as undertakings with significant market power is another striking new addition. Since the undertakings considered to be gatekeepers are expected to be subject to some additional obligations, the conditions under which an undertaking will fall into this category should be examined. An undertaking will be deemed to have significant market power if it satisfies the following criteria for one or more core platform services:

» It has a significant impact at a certain scale on the reach of end users or the activities of business users.
» It has the power to sustain this impact in an established and permanent way, or if it can be foreseen that the undertaking will be able to maintain it in an establishedand permanent way.

According to Article 8/A of Draft Law, it is foreseen that undertakings determined to be gatekeepers exceeding quantitative thresholds to be specified by a later communiqué will be able to submit any objections to the determination to the Authority within 30 days.

In contrast to DMA, even if the quantitative thresholds are not exceeded, the Board is authorized to make qualitative determinations by taking into account some or all of the following elements in the context of the structure of core platform services: *network effect, data ownership, vertically integrated and conglomerate structure, economies of scale and scope, deadlock and evolution impact, switching costs, multiple access, user trends*. Arguably, subjecting undertakings to obligations based on qualitative criteria without providing quantitative thresholds may expose undertakings to the risk of sanctions.

The determination of an undertaking as gatekeeper under Draft Law is foreseen as being valid for 3 years, and if the undertaking does not apply to the Authority within 90 days before the end of the relevant period, the undertaking will be deemed to have significant market power for the 3-year period.

3.2.3. Additional Obligations for Undertakings Considered to be Gatekeepers in Draft Law

Article 6/A of Draft Law aims to impose some additional obligations on undertakings that are considered to be gatekeepers to provide *ex-ante* protection of the competitive market environment. Although it has been stated that the procedures and principles regarding the obligations imposed on gatekeepers will be determined by a communiqué to be issued after Draft Law enters into force, the major proposed obligations are as follows:

- Providing fair and transparent conditions to their business users, and not favoring their own goods and services against goods and services of other business users.

- Not using personal data in competition with business users.

- Not making the services they offer to business and end users dependent on the goods and services they offer.

- Not preventing business users from working with competitors.

- Not advertising and offering different prices and conditions on different core platform services.

- Not preventing the entry of competitors by creating barriers to entry to the market.

- Not using end user data especially for targeted advertising and other services.

3.2.4. Obligations and Principles Regarding On-Site Inspections in Draft Law

On-site inspection is one of the most important competences used by the Board in determining competition violations and is based on Article 15 of Competition Law. Draft Law aims to impose additional obligations on undertakings that offer at least one core platform service in Türkiye (regardless of whether they are established in Türkiye) to fulfil certain technical and administrative requirements to enable the use of the Authority's on-site inspection competences.

In addition, another important proposal regarding on-site inspections is the participation of experts who are not primarily professional personnel of the Authority, where the inspection requires their special expertise or technical knowledge. Undertakings are likely to be concerned by the participation of experts who are not public officials in on-site inspections where sensitive information that may contain undertakings' trade secrets is obtained. In addition, the Draft Law indicates that the rights and obligations of the expert will also be determined by the communiqué to be issued by the Board.

3.2.5. Increased Sanctions in Draft Law

Draft Law would make amendments to Article 16 of Competition Law to impose administrative fines at the following rates:

- 20% of annual gross income of an undertaking for non-compliance with the obligations imposed on gatekeepers.

- 0.5% of the annual gross income of an undertaking that offers at least one basic platform service in Türkiye for failure to meet the technical and administrative requirements to enable the use of the Authority's on-site inspection competences (which are to be introduced into the second paragraph of Article 15 of Competition Law).

- 0.1% of the annual gross income of an undertaking for non-compliance with the notification obligations in Article 8/A of Competition Law and submitting incomplete, incorrect or misleading information or documents, failure to provide documents or failure to do so within the specified period.

As Draft Law aims to double the upper limit of the current sanction of 10% of annual gross income for violations even in cases where the breach of an obligation has not yet had an impact on the market, an undertaking will encounter 20% of annual gross salary of an administrative fine.

While the main principle is that the Board decides on behavioral remedies before making structural remedies, and that structural remedies are only given where behavioral remedies fail to yield results, this amendment would give the Board a competence to directly issue structural remedies.

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4. CONCLUDING REMARKS

In the light of our analysis above, it is possible to point out that the five years period has been full of intense developments in terms of competition law policies. Similar to global trends, technology markets and labor markets are considered to be at the center of competition law practice and policy, as we observe that the number of cartel investigations and the number of administrative fines increased between 2018 and 2022.

The protection of consumer welfare, one of the primary objectives of competition law, remained on the agenda between 2018 and 2022. The Impact Assessment Report for the years 2021-2022[28] published by the Authority covers the importance and impact of the Authority's activities on consumer welfare. When the statistics regarding the violation decisions rendered as a result of the investigations conducted by the Board in 2021-2022 and the decisions concluded with a ban or conditional authorization from merger/acquisition transactions are evaluated, it is stated that:

- 37% of the total 43 decisions that can be evaluated within the scope of impact analysis are related to agreements between undertakings and concerted practices under Article 4, and

- 6% of them related to abuse of dominance under Article 6.

In the same period, in a total of 5 resolutions, the Board authorized 5 mergers and acquisitions under certain conditions to eliminate possible anti-competitive effects. This study, which was conducted to estimate the effects of the Authority's activities on consumer benefit for the 2021-2022 period, finds that the Authority's activities enabled consumers **to save between TL 26.55 billion and TL 67.32 billion** on average annually. Again, as a result of these calculations, it is stated that the resulting benefit was between 82.06 times and 208.07 times the average annual budget expenditure of the Authority in the relevant period. In this context, these assessments demonstrate the important function of the Authority in the economy and the efficiency of its activities.

As elaborated in this publication and the Impact Assessment Report, while the decrease in the number of notified merger and acquisition transactions is expected to reduce the administrative workload, contrary to expectations, it is seen that the last part of the 5 year period was busy for the Authority due to the increase in the number of investigations, on-site inspections and legislative work. The Authority aimed to quickly finalize investigations and notified transactions through legislative studies on the procedural economy and the efficient use of public resources. In this regard, we anticipate that 2023-2024 is expected to be even busier with the continuing progress of Draft Law and pro investigative approach of the Authority.

We look forward to your continued interest in our Competition Round Up 2023 edition. If any of these issues are of particular interest or importance, please do not hesitate to contact us to discuss them further.

[28] Impact Assessment Report for the years 2021-2022 published by Competition Authority: https://www.rekabet.gov.tr/Dosya/2021-2022-etki-analizi-raporu.pdf

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