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Quarterly Competition Law Bulletin

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TCA'S Time-Limited Exemption Decision on Payment Systems

1. Background

With its decision dated 8 December 2022 and numbered 22-54/833-343, the Turkish Competition Authority ("**TCA**") rendered a decision regarding the banking sector. The decision concerns the preliminary investigation ("**Pre-Investigation**") on whether the relevant practice of a bank violated Law No. 4054 on the Protection of Competition ("**Law No. 4054**").

The Pre-Investigation was initiated following a complaint alleging that certain banks active in debit and credit card issuance in Türkiye violated Law No. 4054 by preventing payment institutions from accessing their POS services and engaging in various exclusionary practices. In this context, the TCA assessed whether the relevant bank violated Art. 4 of Law No. 4054 by imposing customer restriction on payment institutions.

As a result of the Pre-Investigation, the TCA considered that the relevant bank's practice fulfilled all the conditions of individual exemption stipulated in Art. 5 of the Law No. 4054 and, thus, granted individual exemption for this practice. Accordingly, the TCA decided that there was no need to launch a full- fledged investigation against the relevant bank.

2. The TCA's assessment

The complainant submitted to the TCA a correspondence between the relevant payment institution's employee and the relevant bank's employee, where the payment institution's employee requested that the relevant bank activate the POS assigned to the merchant with an agreement. However, the relevant bank responded negatively to this request on the grounds that it had already been providing POS services to the relevant merchant and the relevant merchant was excluded from the list of merchants whose POS access would be activated for processing. The TCA considered that this correspondence might raise doubt that the relevant bank violated Art. 4 of Law No. 4054 (prohibiting anti-competitive agreements) by preventing a payment institution from providing POS services to merchants to which the relevant bank directly provides these services.

The TCA considered that there was a vertical relationship between banks (suppliers) and payment institutions (buyers) for the provision of POS services. As a consequence, payment institutions are required to procure POS integration infrastructure services from banks to provide payment services to merchants. Based on the information provided within the file, the TCA noted that the relevant bank's development tests for the relevant technical infrastructure would be completed in January 2023.

The TCA assessed that the relevant bank's preventing a payment institution from providing POS services to some merchants to which the relevant bank provides POS services directly constituted interference with the resellers' sales terms and this falls within the scope of Art. 4 of Law No. 4054. In this scope, the TCA first assessed whether this conduct benefits from the block exemption under Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("**Communiqué No. 2002/2**")

2.1 Block exemption assessment

For an agreement/practice restricting the buyers' sales to customers to benefit from the block exemption under Communiqué No. 2002/2, it should mainly fulfill the following conditions cumulatively:

1. The restriction should be specific to the exclusive group of customers that the provider has allocated to itself or to another buyer.
2. The restriction only covers the buyer's active sales and does not restrict its passive sales.

In terms of the customer restriction imposed by the relevant bank, in the context of establishing the distribution network, the TCA did not determine that there was specific group of exclusive customers allocated by the relevant bank to itself or to any other buyer and that the relevant restriction covered only active sales. Accordingly, the TCA concluded that the customer restriction imposed by the relevant bank did not benefit from the block exemption under Communiqué No. 2002/2. In this regard, the TCA continued with an individual exemption analysis for the relevant conduct.

2.2 Individual exemption assessment

To qualify for an individual exemption under Art. 5 of Law No. 4054, four conditions, two positive and two negative, need to be cumulatively met. In this context, the TCA assessed whether the relevant conduct fulfilled each of these conditions and granted an individual exemption to the relevant practice since all the conditions were fulfilled.

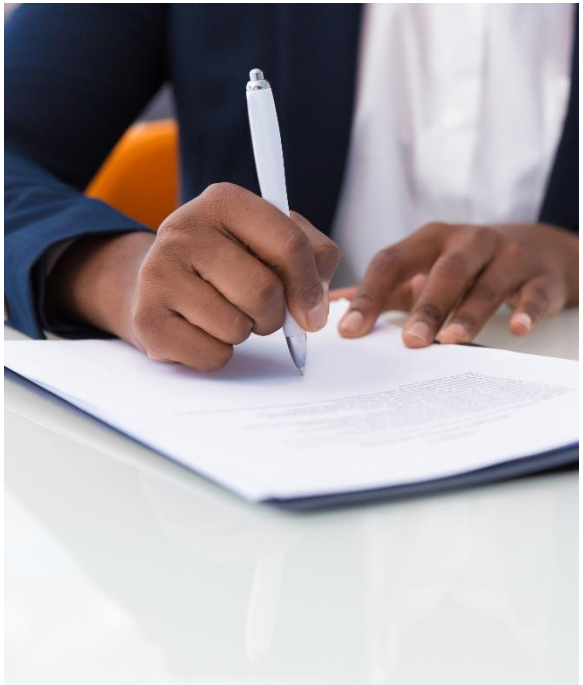
a) The agreement must promote developments and improvements or technical or economic progress for the production and distribution of goods and provision of services.

The TCA noted that through the physical POS services pilot project, the relevant bank was establishing the technical infrastructure for the physical POS services to be provided to merchants to enable them to accept payments. The TCA stressed that the aim was to provide better-quality services to merchants as customers. The TCA considered that testing the relevant pilot project with a limited group of customers would allow it to mitigate the security vulnerabilities and costs that might arise in the process until the technical infrastructure reaches the required level. The TCA stated that if merchants were integrated into the relevant bank's physical POS system, including the relevant bank's existing customers, before the necessary technical infrastructure has been fully established, potential customer dissatisfaction due to technical failures that might occur during the process and prevent payments from being received may lead to the risk of the relevant bank forfeiting its existing customer portfolio.

In this respect, the TCA found that limiting the scope of the cooperation between the relevant bank and the relevant payment institution by excluding the merchants to which the relevant bank currently provides physical POS services was reasonable in terms of establishing better business operations in the market. According to the TCA, this practice may contribute to the provision of better-quality services covering all customers in the market in the long-term and thus may lead to efficiency in the market.

b) Consumers must benefit from the results.

The TCA concluded that this practice enabled the establishment of a better-quality physical POS infrastructure and ultimately enabled consumers to benefit from payment services without any problems.



c) The agreements must not eliminate competition in a substantial part of the relevant market.

The TCA found that the relevant bank has a limited market share in the market for POS services (card acceptance transactions) in terms of the volume of payment transactions directly mediated by the relevant bank in both virtual and physical POS services. The TCA also noted that the analysis of the total volume of (virtual and physical) transactions realized through the relevant bank's POS revealed that the effect of the relevant bank's practice on the market was quite limited. Finally, the TCA underlined that the customer restriction imposed by the relevant bank only applied to physical POS and that there was no customer restriction for the use of virtual POS, so the impact of the relevant bank's practice on the market was even more limited.

The TCA assessed the above-mentioned issues holistically and concluded that this practice did not cause any harm or restriction of competition beyond the intended benefit.

d) They must not restrict competition more than necessary to achieve the objectives listed in sub-paragraphs (a) and (b).

The TCA concluded that the customer restriction imposed by the relevant bank also satisfied the condition of not restricting competition beyond the necessary level on the following grounds:

1. It is not applicable to virtual POS services.
2. It only covers the relevant bank's current customers and does not cover merchants considered as potential customers of the relevant bank.
3. It aims to minimize customer dissatisfaction and any other risks arising from problems that may arise during the development of the technical infrastructure required to work with payment institutions using physical POS.
4. It is an objective practice that serves the purpose of limiting the effect of the disruptions that may be experienced while developing the technical infrastructure.

3. Conclusion

The TCA concluded that the relevant bank's conduct fulfilled all of the conditions of individual exemption.

On the other hand, the TCA stated that the relevant conduct (i) could be carried out while developing the technical infrastructure required to ensure the smooth functioning of the trilateral workflow, consisting of banks, payment institutions and merchants in physical POS services, and (ii) should be terminated after the necessary technical infrastructure has been established. The TCA emphasized that after this infrastructure has been established, the customer restriction would not continue to meet the conditions of individual exemption.

In this respect, the TCA considered that the deadline for payment service providers to finalize the technical preparations they require to make their payment infrastructure accessible to other payment service providers was 28 February 2023 as per the provisional Art. 1 of the Payment Services Regulation. Accordingly, the TCA limited the duration of the exemption granted for the relevant bank's relevant conduct until this date.

Evolving Standards of Proof: A New Approach to RPM Violations?

The recent decision

With its decision dated 09.03.2023 and numbered 23-13/209-67, the TCAconcluded its preliminary investigation against Sezen Gıda Mad. Tarım ve Hayvancılık Ürün. Tic. ve San. Ltd. Şti. ("**Anavarza**"), a producer / provider of honey in the FMCG sector, which assessed whether Anavarza violated Article 4 of the Law No. 4054 by way of determining its customers' resale prices ("**RPM**"). While the TCA concluded that the evidence was not sufficient to establish the violation "beyond any reasonable doubt", the decision holds significance as it can shed light on TCA's future stance on RPM violations, particularly in consideration of the recent *Henkel* judgement[1] of the Council of State.

The reason behind the preliminary investigation

Within the scope of the TCA's investigations against other undertakings active in the consumer goods market, aimed at detecting violations of Article 4 Law No. 4054 through resale price maintenance practices, the TCA's case handlers conducted on-site inspections at the premises of the undertakings under preliminary investigation. These inspections yielded sufficient evidence, raising competition law concerns against Anavarza. Anavarza which has the third largest market share in the packaged honey market in Turkey, acts as a supplier, conducting its sales through a network of regional distributors, local stores, and resellers. Accordingly, the TCA launched preliminary investigation to dig deeper and conducted on-site inspections at Anavarza's headquarters to have access to documents with further details in relation to the RPM concerns.

Majority of the findings involved e-mail conversations between Anavarza and its group of resellers. The e-mails concerned showed that Anavarza was sharing price lists, guidelines on applying discounts and campaigns on certain goods, and reminders on price updates. In addition, there were e-mails forwarded by resellers of Anavarza requesting support for price discrepancy amongst competitors.

[1] *Henkel* decision of the Turkish Council of State dated 06.07.2021 and numbered e 2021/969 E., 2021/2654 K.

The TCA's assessment

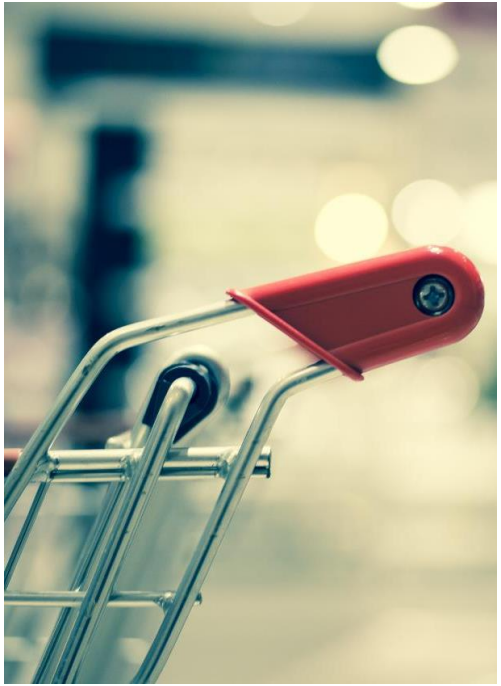
Lately, the TCA's approach has been quite strict when it comes to RPM practices of undertakings, which is also underlined within the decision, as it's the case for many of its assessments in previous precedents. This stance is so strict that the object to restrict competition could be deemed sufficient, without even assessing the effects. In the given decision, however, the TCA focused on the absence of evidence regarding pressure, incentives, and threats exerted by Anavarza. It highlighted that an undertaking was entitled to recommend price lists as long as these prices are not dictated upon the resellers to the extent of establishing fixed market prices, infringing resellers' right of determining their own prices.

In general, the TCA assessed each evidence on its own, along with Anavarza's contracts with its resellers, and briefly provided the following takeaways **(i)** the internal correspondences with statements that could lead to anti-competitive concerns would not face serious consequences without sufficient supportive evidence or practical results (e.g., implemented RPM conducts etc.) **(ii)** with reference to German Competition Authority's (*Bundeskartellamt*) guidance on vertical price fixing, a distributor's / reseller's request of intervention does not give rise to a concern as long as it does not receive a positive response from the provider (Anavarza), leading to an attempt to exert pressure on a competing reseller to change its price policy accordingly, **(iii)** it is not a violation for an undertaking to monitor the prices of the products, **(iv)** even if a correspondence can raise initial suspicions, there has to be adequate evidence to substantiate the anti-competitive claims and it is necessary to demonstrate the exertion of pressure and incentives practiced by the undertaking, thereby establishing the causal link between the undertaking's practices and resulting fixed prices in the market.

In conclusion, the TCA held that no concrete evidence existed to support the claim that Anavarza was interfering with the shelf prices 'beyond reasonable doubt'. Additionally, since there was no apparent effort of Anavarza to ensure the recommended prices are implemented as fixed prices, the need to dig deeper with a full-fledged investigation for RPM concerns was deemed unnecessary.

What is the 'Takeaway'?

The TCA's rather exceptional approach in this case bears resemblance to its past decisions in the last ten years in terms of the standard of proof required for RPM violations. In referring to recent precedents where fines were imposed for similar violations, the TCA appears to distinguish the correspondences in the current context as mere reporting of recommendations and emphasizes the unanswered requests of resellers. While the anticompetitive nature of RPM violations remain uncontested, the critical factor in the conclusion centered around the significance attributed to the absence of pressure and incentive elements alongside the absence of concrete evidence supporting the claim of intervention in resale prices. This perspective resonates with the recent judgment of the Council of State, which annulled the *Henkel* decision. While it's too early to definitively state a shift in the TCA's approach towards RPM violations, which has grown stricter in recent years, this decision may signal an elevation in the standard of proof in establishing an RPM violation.



The Settlement Trend Continues: The Turkish Competition Authority's Hiksan decision

I. Background

With its decision dated 22 December 2022 and numbered 22-56/882-365, the TCA concluded its investigation on Hiksan Teknoloji Sanayi ve Ticaret Ltd. Şti. ("**Hiksan**"), an undertaking engaged mainly in the sales of manual breast pump products.

The TCA determined that Hiksan violated Article 4 of the Law No. 4054 through RPM. The investigation concluded with a settlement, which is a mechanism available for undertakings engaged in any type of violation falling under Articles 4 and 6 of the Competition Law, including RPM.

II. The TCA's findings and conclusion

According to the decision, the TCA initiated the investigation based on a complaint that Hiksan allegedly interfered with the pricing of its resellers. The complainant alleged that Hiksan interfered by contacting resellers when they reduce the price of the product and warned them to immediately increase the price unless they want to experience a supply shortage.

The TCA summarized its recent approach regarding RPM. Accordingly, the TCA explained that monitoring the price of products and conveying the resale price to the dealers mean direct intervention. Moreover, the TCA stated that in many cases, it was decided that RPM was considered as a restriction of competition by object, and thus there was no need to demonstrate the effects of such actions. Furthermore, the TCA referred to the EU competition law rules and indicated that RPM was also considered as restriction of competition by object under EU competition law.

As a result of the dawn raids, several documents that are considered to have the purpose of setting resale prices or that may have this effect were obtained. These documents mostly consist of emails and WhatsApp messages between Hiksan's employees and resellers, as well as internal correspondence of Hiksan. In the emails and WhatsApp messages, Hiksan's employees mention their sensitivity to the discrepancy in product prices and their expectation from the resellers to comply with the single price practice. Furthermore, the internal correspondences indicate that certain resellers' prices must be corrected, and those resellers should be warned. Moreover, some resellers complain about the other resellers that are not complying with the determined resale price and requesting Hiksan to intervene those noncompliant resellers.

The TCA argued that Hiksan was monitoring the resale prices of its resellers and got in touch with a reseller that set a resale price lower than the general price level. Accordingly, the TCA found out that Hiksan was expecting uniform prices to be applied by its resellers and intervened by requesting them to adjust their price level.

As the conclusion, the TCA decided that Hiksan violated the Competition Law by maintaining resale price of its resellers.

Although the TCA stated that RPM constituted a restriction of competition by object, it explained that the competitive structure of the market, the level of the inter-brand competition, whether there was a buyer power in the market, whether the resellers followed the recommended resale price, and whether the supplier established a control/sanction mechanism could be take into consideration in the evaluation of anti-competitive effects of RPM. The TCA explained that that the effects of RPM may play a role in determining the level of fine.

Hiksan made a settlement application within the period determined in the Competition Law (i.e., until the official service of the investigation report). The TCA accepted Hiksan's settlement application and applied the maximum reduction rate (25%) to the fine to be imposed on Hiksan. Accordingly, the TCA concluded its investigation with a settlement decision.

III. The takeaway

The Hiksan decision does not deviate from the TCA's settled case law regarding RPM and mirrors the recent decisions where the TCA adopted a strict by object approach in relation to RPM practices. The TCA assessed the effects of RPM practice only for the determination of the level of the fine in the case at hand. Even though, the TCA signaled that it will adopt its approach on RPM violations in line with the Council of State's Henkel decision in its *Anavarza* decision, the TCA did not evaluate the existence of the element of pressure and incentive set forth in the Council of State's decision regarding the indirect RPM practices in this decision. This is likely because the RPM practice in the case at hand constituted direct rather than indirect RPM.

Moreover, this decision indicates that the TCA encourages the undertakings to apply for the settlement and utilize the benefits of procedural efficiency granted with this tool by granting a maximum reduction (i.e., 25%) as a result of the settlement even for a hardcore violation, as in its rather recent Gençler/Punto/Korkmaz decision dated 10 November 2022 and numbered 22-51/754-313.

Do Formally Executed Cartel Contracts Still Exist? Apparently yes…

As the enforcement track of the TCA has become stronger over the decades so has the markets' competition law sensitivity and awareness. This is why one might expect formally written and signed cartel contracts, which the TCA often uncovered in the early days of enforcement and used as cartel evidence, are no longer present. The recent cartel case of the TCA, *Alanya Electrical Engineers*, shows otherwise.[2]

[2]*Alanya Electrical Engineers*, 5 January 2023, 23-01/25-11.

Upon multiple complaints to the TCA about alleged cartel activity between members of the Chamber of Electrical Engineers Alanya District Representative Office ("**EMO Alanya**"), the TCA launched a full-fledged investigation to find whether the claims of a competition law violation actually hold true. At the very beginning of the investigation, all 10 investigated undertakings requested to settle with the TCA, even before exercising their right to provide written defenses in response to the inquiry's launch. The TCA entered the settlement discussions with a price-cartel finding on its hands. In turn, the investigated undertakings accepted this charge and the TCA terminated the investigation with a settlement decision.

What did the TCA bring to light?

Based on evidence proffered from a single custodian, the TCA found that 10 independent consulting electrical engineers active in the Alanya market for electrical engineering services agreed on a minimum price level for their project fees. As such, the TCA dealt with real persons and established that they qualify as "undertakings" from a competition law perspective since they **(i)** produce services and **(ii)** are able to decide independently. These competing undertakings also drafted a protocol to put their agreement in writing. The protocol provided for a clear-cut calculation method to determine each year's agreed project fee. This was also coupled with a sanctioning mechanism. The EMO Alanya members under investigation agreed to act to complicate and/or delay the municipality approval, which the undertakings need to obtain, if one of them diverts from the cartel.

A trade union decision or an agreement?

Since the undertakings in question are all members of a trade union, EMO Alanya, the TCA asked itself whether the present collusion was in the form of **(i)** a trade union decision or **(ii)** an agreement between undertakings. According to the TCA, for an agreement to qualify as the former, the "decision" needs to do the following:

i. Result from the union's statute and reflect its executive bodies' will.

ii. Be legally valid.

Applying these criteria to the case at hand, the TCA determined that these undertakings' union has no executive body to enforce decisions. The TCA also noted that the particular decision was not legally valid since EMO Alanya did not have the authority to adopt decisions. Rather, it can only execute those of its higher branches. On this basis, the TCA ruled that the present collusion constituted an agreement between undertakings.

No justifying efficiency gains

The TCA probed whether the agreement can qualify for an individual exemption within the scope of the Art. 5 of the Law 4054. The TCA did not carry out a thorough analysis and decided that it was not possible to provide an individual exemption. The TCA rested this decision on generic explanations, i.e., cartels do not produce efficiency gains but lead to consumer harm.

Settlement rewards recouped

Moving on to the issue of fines, although the reasoned decision does not disclose the base fine, it provides that the TCA did not increase the fine due to the infringement's duration for it lasted less than a year. In addition, the TCA noted that the undertakings' infringing activities accounted for a small part of their turnover. As such, the TCA deemed this a mitigating circumstance and reduced the base fine by 60%. Moreover, it awarded the maximum settlement reduction available under law, which is 25%.

Overall, *Alanya Electrical Engineers* confirms that there are still geographic or product-wise areas of the economy, which have room to grow in terms of competition law awareness. The decision also exhibits the benefits of applying for settlement at the early stages of an investigation to potentially recoup high reductions in fines.

The TCA's Evaluation on Information Exchange through Joint Venture between Competitors

I. Background

The TCA decided to grant individual exemption to the establishment of a joint venture between several furniture manufacturers with its decision dated 23 November 2022 and numbered 22-52/779-321. The TCA granted individual exemption to the agreement for 10 years on the condition that certain revisions to be made to the agreement.

II. The Agreement subject to the Application

The application concerns FTR Dış Ticaret Mobilya AŞ's ("**FTR**") prospective Joint Venture Agreement and Shareholders Agreement ("**Agreement**") to be concluded with only six furniture manufacturers. According to the applicants, the joint venture will essentially be providing consulting and intermediate services for exports. The purpose of FTR is defined in its Articles of Association as (a) to carry out business and other administrative consultancy activities, including strategic, financial, marketing, production, business processes, projects, management services for export and consultancy on trademark and franchise issues, (b) to provide intermediary services for the import and export of all kinds of forestry products, finished products, semi-finished products and raw materials required for the manufacture of export-oriented furniture and decoration materials, and to provide consultancy services on these issues and to carry out foreign trade, (c) to organize training and consultancy activities related to its field of activity. Accordingly, the parents stated that the scope of FTR's activities is limited with intermediation/consultancy for the export of products and services in the furniture sector.

The applicants stated that the establishment of the joint venture would not result in any negative impact on the competition in Türkiye. Moreover, the applications gave detailed explanations on the relationship between shareholders and the joint venture. Accordingly, there will be mainly two stages of this relationship: (i) taking orders and (ii) evaluating orders. There would be two methods of taking orders for FTR: (i) the joint venture will be negotiating with a potential buyer on the behalf of its parent companies, or the parent companies might decide to reject supplying to potential buyer and (ii) the joint venture will be contacting buyer candidates with purchasing potential of global size on the behalf of its parent companies. In terms of evaluating orders the joint venture will contact the export specialist of its parents to decide which parent or parents will be delivering the order. The applicants explained that a production team will be built up between partners and there are three options based on the intensity of the demand: (i) the parents might separately manufacture the product modules, (ii) the components might be manufactured separately, (iii) the joint venture will act as a consortium when there is a demand with high scale and it will combine parts that is produced by parents through the parents or other partners or subcontractors.

III. The TCA's Evolution

The TCA decided that it cannot grant negative clearance to the agreement since there is a risk of coordination of competitive conducts of the undertakings as the parents will be exchanging competitively sensitive information such as costs, production amounts and capacity. According to the TCA, even if the joint venture's activities will be limited on exports, the parents are the competitors, and they will continue to be active domestically. Moreover, the TCA stated that the agreement stipulate that the shareholders would be meeting regularly and exchange information to increase the exports of the parents. According to the TCA, such factors might increase the risk of coordination. Furthermore, the TCA stated that the persons who will work within the parents and in the joint venture were the same and this create competition law concerns related with information exchange. To that end, the TCA moved into the individual exemption assessment. According to the Competition Law, all of the following conditions must be met cumulatively for the individual exemption to be granted:

- **Ensuring new developments, improvements, or economic or technical improvements in the production or distribution of goods and in the provision of services**

  The parents asserted that FTR will (i) act as a bridge for many small-scale producers which are unable to reach large buyers, (ii) attract buyers to Turkey through its connections, and (iii) allow many local producers to do business with these buyers. Moreover, the parents argued that there are many domestic producers can be contacted for outsourcing in case there are large-scale orders from abroad and they do not have the capacity and technology to meet the incoming demand., . To that end, regarding the first condition of the individual exemption, the TCA evaluated that the joint venture would allow the parents to deliver the orders that are voluminous for one parent to satisfy, the parents would reduce their costs and they would increase their capacity utilization rates. Accordingly, the TCA decided that the agreement satisfied the first condition of individual exemption.

- **Consumers must benefit from the improvements mentioned in the first criterion above**

  Although the Agreement does not provide a direct benefit to consumers, it is assessed that its impact on consumers is neutral and will not put consumers in a worse situation than before the agreement was concluded. Overall, the Agreement does meet the second criterion of individual exemption.

- **Not eliminating competition in a significant part of the relevant market**

  The TCA requested explanation from the parents on whether they would be using the purchase made for the joint venture in case an order was cancelled. The parents stated that the joint venture would return the raw material, if it is possible, and if it is not, the raw material would be stored to be used in further orders. Moreover, the parents explained that they would keep records of the joint venture usage amount of the raw materials, and they would ensure that only joint venture use the raw materials.

  Furthermore, the TCA reviewed the possibility of competitively sensitive information exchange between parents. The parents explained that they would not be able to reach their competitively sensitive information through the joint venture since it would not be possible due to the lack of technical infrastructure. The TCA evaluated that this measure reduced the coordination risk; however, it still was not sufficient to entirely remove such concerns considering that the joint venture would be formed between competitors. Moreover, the parties stated that in case of competitively sensitive information has to be shared with the joint venture, only joint venture would have access to such information and the parents would not have access to each other's information. Additionally, the parties explained that the information would be anonymized/aggregated in case the information on the production capacity and/or cost structure of the parents has to be exchanged. Accordingly, the TCA evaluated that a revision should be made to the relevant article which will clearly indicate that competitively sensitive information should only be exchanged in terms of export activities and the parties would not collect or exchange information regarding domestic sales.

  Lastly, the TCA stated that the agreement stipulates that the regular meetings would be held in order to the parents to get familiar with each other. The TCA evaluated that this would increase the possibility of sharing information about the internal market. To that end, the TCA argued that this article should be removed from the agreement.

- **Not restricting competition more than necessary to achieve the goals set out in the first two conditions above**

  With regard to the third condition of the individual exemption, the TCA found out that there were various players active in the sector, and there were competitors active in the market with high market power and brand awareness. Moreover, the TCA evaluated that the claim made by the competitors asserting that the domestic supply might be reduced since the parents direct their production towards export. To that end, the TCA reviewed the capacity utilization rates of the parents and concluded that the parents had idle capacity which would allow them to make production for the new orders. Thus, the TCA concluded that a reduce of supply in domestic market is not expected after the transaction. In terms of the last condition of the individual exemption, the TCA explained that the agreement would not restrict competition more than it was necessary to achieve benefits of the cooperation in case the revisions suggested by the TCA to be made.

  Accordingly, the TCA granted individual exemption to the agreement for ten years on the condition that (i) the agreement will be revised to include a wording indicating that the competitively sensitive information must only be exchanged in terms of export activities and the parties will not collect or exchange information regarding domestic sales and (ii) the article that foresees that regular meetings between the parent will be held will be omitted.

V. The Takeaway

This decision highlights the TCA's sensitiveness regarding the joint ventures to be established between the competitors, even the main objective of the joint venture will be export sales. The TCA's main focus was the exchange of competitively sensitive information between the competitors that could affect competition in Türkiye. Accordingly, this decision highlights that the undertakings that will enter into an agreement that will focus on export sales should bear in mind that they might need to apply for the individual exemption in case restrictions in such agreement might have effect in Türkiye.

Interim Measure Example for Exclusivity Practice: Nesine Decision

Background

With its decision dated 15 June 2023 and numbered 23-27/520-176 ("**Decision**"), the TCA considered an interim measure under Article 9 of Law No. 4054 on the Protection of Competition ("**Law No. 4054**") regarding the conditions imposed by D Elektronik Şans Oyun ve Yayıncılık AŞ ("**Nesine**") on Maçkolik İnternet Hizmetleri AŞ ("**Maçkolik**") under the Advertising Sales Service Agreement ("**Agreement**").

The Agreement

As background, the Agreement covering the period 2019-2024 was signed between Nesine and Maçkolik, and the most important parts of the Agreement from the investigation standpoint are briefly as follows:

- According to Article 2.2 of the Agreement, Maçkolik shall not publish on its channels advertisements of companies that are competitors of Nesine.
- According to Article 2.5 of the Agreement, Maçkolik will pay a penalty if it does not reach the annual number of clicks it has committed to.
- According to Article 2.7 of the Agreement, if Maçkolik acts in breach of Maçkolik's exclusivity under the Agreement, Nesine shall have the right to immediate termination as well as with a penalty.

In addition, the imposition of a penalty clause on Maçkolik when the click commitment is not satisfied may lead Maçkolik to place Nesine's advertisement on its platform more frequently in order to reach this number provided in the Agreement. Therefore, the click commitment indirectly prevents Maçkolik from entering into an advertising relationship with any competitor of Nesine even in a situation where exclusivity provisions are not considered in the Agreement.

The TCA's assessment

During the preliminary investigation, the TCA conducted an on-site inspection at the premises of Nesine. Within the scope of the preliminary investigation, online interviews were also conducted with the competitors of the undertaking operating in the same market. As a result of the preliminary investigation, the TCA launched a full-fledged investigation regarding the allegation that Nesine violated Articles 4 and 6 of Law No. 4054 with its exclusivity agreements.

During the investigation, Nesine requested to submit two sets of commitments to eliminate the competition concerns related to the exclusivity agreements subject to the investigation. Thereupon, the opinions of third parties regarding the commitment submitted were received. As a result of the TCA’s assessment, it was decided that the commitments were not proportionate to the competition infringements identified within the scope of the investigation, were not suitable to eliminate these infringements, and were not effectively enforceable.

Subsequently, the TCA decided to take an interim measure in order to prevent the possibility of serious and non-compensable damages pending the final decision on the provisions between Nesine and Maçkolik. This interim measure concerns the removal of the exclusivity clause from the contract between the two undertakings.

Evaluation of the interim measure regarding the agreement between Nesine and Maçkolik

Pursuant to Article 9 of Law No. 4054, in cases where there is a possibility of serious and irreparable damage to the market, an interim measure may be imposed until the end of the investigation. Such measure seeks to manage the situation before the infringement and shoud not exceed the scope of the final decision.

Within the scope of the investigation, the TCA assessed that anti-competitive practice will continue by concluding exclusive agreements within the scope of advertising and sponsorship activities as Nesine has a significant market share in terms of the number of members, the number of coupons played, and revenue generated.

In line with the data obtained during the investigation, the Annual Report prepared by Maçkolik, and similar web data, which provide traffic measurement services for websites, Maçkolik is the most preferred live score tracking application in Türkiye and is in a leading position compared to its competitors. In order to determine whether Maçkolik was an important advertising and promotion platform for virtual dealers, the number of clicks of the virtual dealers was compared and deduced that the number of clicks of Nesine was twice the number of clicks of its closest competitor called Bilyoner. In addition, when the number of clicks directed to Nesine through Maçkolik is analyzed, it is concluded that Maçkolik is an important advertising and promotion medium for virtual dealers.

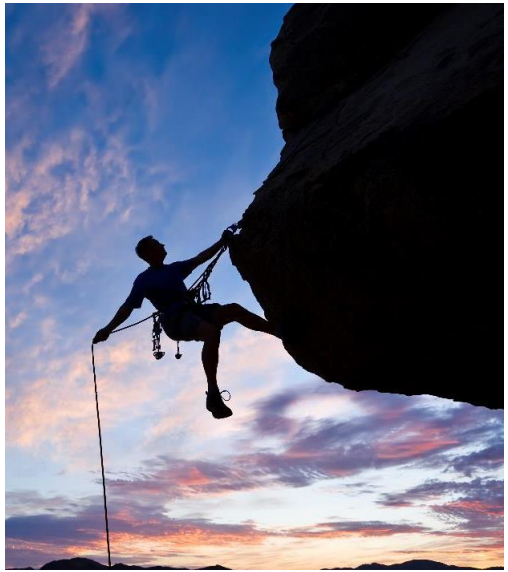
As a result, Maçkolik acts in accordance with the Agreement and does not work with another virtual betting dealer, both with banner and pop-up advertisement areas on its website and by advertising Nesine when certain sections on the website are clicked. It is seen that other dealers are harmed by this exclusivity. The TCA's decision includes examples of platforms operating in a similar field with Maçkolik in various countries and working with more than one betting platform simultaneously (such as Livescores.biz and Aiscore).

Several reasons were presented as justification for the exclusivity signed between Nesine and Maçkolik. First, Nesine finances the vast majority of the business development projects of Maçkolik so that the financial and labor resources of these projects are covered by Nesine. With these projects, Nesine aims to create advertising spaces on Maçkolik's platform and create content such as special banners, statistics, predictions and betting results in certain areas. Second, Exclusivity clauses are also put in place to ensure that these projects remain only between Nesine and Maçkolik. With the removal of these provisions, other undertakings may benefit from these projects and the free rider problem may arise from the parties' perspective. However, the TCA did not accept these explanations and concluded that these projects constituted the subject matter of the agreement raising competitive concerns.

When the statements of the third parties about Maçkolik, Maçkolik's position in the market, live betting rates, and the combined number of clicks of Maçkolik to Nesine put together, it is understood that Maçkolik is a highly significant player in the relevant market. Consequently, to prevent Nesine's competitors from working with Maçkolik and to end the exclusionary effect, the interim measure will be applied until the final decision.

What is the takeaway?

With this decision, the TCA issued an interim measure to nullify the exclusivity clauses in the Agreement because of the concern about the potential for serious and irreparable damage to competition and the market, in addition to the risk of market closure. Therefore, the interim measure aims to maintain the competitive environment during the investigation and in parallel, ongoing sport organizations.



Compliance Check Time for Nadirkitap

1. Background

With its *Nadirkitap* decision dated 29.12.2022 and numbered 22-57/886-366, the TCA has signalled the undertakings that even following complaints, it constantly monitors its decisions on undertakings and warned the undertakings to adhere to the obligations imposed upon them. In this decision, the TCA examined whether Nadirkitap Bilişim ve Reklamcılık A.Ş. ("**Nadirkitap**") acted in accordance with its obligations regarding data portability stemming from a previous TCA decision. The previous *Nadirkitap* decision dated 07.04.2022 and numbered 22-16/273-122 is based on the allegation that Nadirkitap, an online second-hand bookselling platform, hindered its competitors' activities by way of preventing the transfer of data of online second-hand booksellers who intend to sell their books through other digital platforms. Please find our Quarterly Bulletin piece on this decision here.

For background, the TCA previously decided that Nadirkitap must provide book inventory data to seller members in an accurate, understandable, secure, complete, cost-free and suitable format, upon the seller members' request. Based on the complaints lodged to the TCA, Nadirkitap was suspected of not fully complying with the obligations specified in the TCA's decision with respect to the bookseller members who request book inventory data. The TCA requested further information from both Nadirkitap and the booksellers.

In this regard, Nadirkitap has listed the data shared with booksellers as follows: **(i)** book title, **(ii)** author's name, **(iii)** translator's name, **(iv)** publisher, **(v)** place of publication, **(vi)** publication year, **(vii)** language, **(viii)** second language information, **(viii)** hardcover, **(ix)** first edition book, **(x)** author signed book, **(xi)** price, **(xii)** description, **(xiii)** quantity, **(xiv)** shipping details, **(xv)** publishing house, **(xvi)** page number, **(xvii)** ISBN, **(xviii)** book size, **(xix)** cover, **(xx)** condition and **(xxi)** shelf code. Nadirkitap also lists the data not shared with booksellers as **(i)** product code, **(ii)** categorization data and **(iii)** photograph/picture.

2. TCA's assessment

2.1 Assessment on data regarding the magazines, newspapers, ephemera, stamps, banners, posters, plaques, posters and new books

The complainant stated that Nadirkitap had not provided data concerning new books and non-book products such as magazines and ephemera to the bookseller members who requested the inventory data, and only provided second-hand book data; thus, the seller's business integrity has been disrupted, and for the seller, it has become nonsensical to upload a part of its data to a completely different platform. The TCA noted that the TCA's decision on Nadirkitap covered only the inventory data on second-hand books, and therefore, the refusal to provide data on magazines, newspapers, ephemera, stamps, banners, plaques, posters, etc. and new books to the booksellers would not be inconsistent with the relevant TCA decision. The TCA stated that the TCA should make further assessments with respect to the product code, category and photographs/pictures of second-hand books, which are among the data that Nadirkitap has not shared with the booksellers.

2.2 Assessment on "product code" data

The complainant indicated that although "product codes" are among the data that will facilitate the sellers in inventory control, such data is not essential for the transfer of data; however, its presence will provide convenience for the sellers. The TCA stated that not providing the data on the product code is hardly an artificial entry barrier if a seller member wants to list its products on a platform other than Nadirkitap. The TCA concluded that the presence of a product code specifically for the relevant product on a competitor's platform would not reduce the switching costs for the seller member if the same product code is on another platform for a different product.

2.3 Assessment on the "categorization" data

The complainant stated that uploading sellers' product data to platforms without a "category" is not technically possible, since the selection of "category" is mandatory during the stages of product registry and data uploading. The complaint stated that they have no objection to the fact that the category database structure is specific to Nadirkitap, but this should not be a reason to omit the category name chosen by the sellers during the product registry process and to impair the integrity of the data, and even though the category database structure is unique for each platform, such data is not a business secret and is viewable by everyone accessing the website for all platforms. Nadirkitap, on the other hand, stated that category grouping is considered a function or feature developed for its own platform, and a structure unique to its own platform that has been developed over time. In the TCA's decision, the TCA stated that the limited counting is not applied in any part of the decision regarding the content of the inventory data and referred to its previous assessments, stating that category data is also included in the TCA's decision. The TCA stated that the relevant data concerning "category," which is designed as a required field to be filled in by seller members inputting product information to be displayed on the Nadirkitap platform, should be provided to seller members who later request book inventory data.

2.4 Assessment on the photograph/picture data

The TCA found that Nadirkitap does not store the original photographs provided by the booksellers, but instead places a watermark on these photographs and saves them in the database. In other words, Nadirkitap is not storing on its server the original, non-marked versions of the photos actually captured by the booksellers. As a result of its inquiries, the TCA found that the usage of watermarks for online book sales is not a widespread industry pattern. The TCA stated that due to the large number of book photos stored on the platform, technically eliminating the watermarks, desirable as it may be, would incur significant time and financial costs.

The TCA also concluded that the trials on several software applications for watermark removal did not yield results allowing collaboration with competitors, considering the performance rates of the available watermark removal tools, and therefore Nadirkitap could not remove completely the watermarks from the photographs in its database through such method.

In terms of photographs, the TCA noted that the current photographs stored in Nadirkitap's database are only watermarked and it is not currently possible to remove the watermarks in a successful and practical way to enable booksellers to access photographs of books in a secure and convenient format. The TCA emphasized that there is a de facto impossibility in this regard.

The TCA therefore concluded that the failure to provide the photographs to the booksellers did not constitute noncompliance with the obligations stemming from the TCA's decision, but nevertheless Nadirkitap should have informed the seller members when uploading the photographs that they would not be stored in the raw version on the Nadirkitap's servers, and the relevant photographs' file names should have been provided to the seller members together with other book inventory data.

3. Conclusion

In summary, as regards the "category" data, the TCA concluded that Nadirkitap had not fulfilled the obligation to comply with the TCA’s decision. On the other hand, the TCA also found that Nadirkitap had fulfilled a significant part of its obligations within the prescribed period and had provided the booksellers with a large amount of the inventory data. In this context, instead of levying an administrative fine on Nadirkitap, on the basis of the failure to provide "category" related data only, the TCA decided that it would be more reasonable to grant Nadirkitap a 15-day extension to provide book inventory data, including "category" related data, to the booksellers who requested the data.

While this decision illustrates to undertakings the need to comply with the TCA's decisions, it also provides a meaningful legal reference framework for the future on the technical implementation of data portability obligations.

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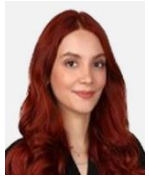

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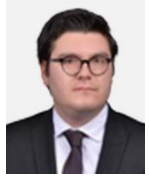

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