

# 2023 YEAR IN REVIEW



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# LETTER FROM THE EDITOR

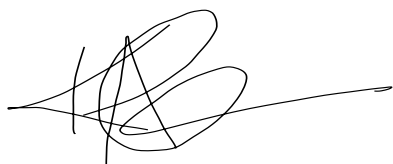
Welcome to the 2023 Antitrust Year in Review, a compilation of the most important recent developments in antitrust law across 17 jurisdictions worldwide. Our contributors, each a leading antitrust practitioner in his or her own jurisdiction, recap key legislation, enforcement actions in respect of mergers, cartels, dominance, and anti-competitive practices, major litigation and other key developments over the past year. This publication acts as a supplement to, and expansion of, the International Antitrust Committee's contribution to the International Law Section's Year in Review issue.

As always seems to be the case, this year was an eventful one in the international antitrust community. In the context of the economic recovery from the COVID-19 pandemic, many jurisdictions are reviewing antitrust legislation, in particular in the context of their merger control rules. Both merger enforcement and actions combatting dominance and anti-competitive behaviour in a wide variety of industries were robust globally in 2023. And “big tech” remains a preoccupation of antitrust authorities, with many jurisdictions offering guidance as to their approach to reviewing conduct in the context of digital platforms, or engaging in enforcement action which engaged large global technology companies. (In deference to the ongoing importance of technology issues to global antitrust enforcement, the editors have turned to AI to generate a cover image – though as the below rejected image options demonstrate, their prompting may use some work.)

The 2023 year in review is the culmination of a great deal of work on the part of our authors and our editorial team. We thank all of our contributors for their targeted and high quality analysis.

We hope you enjoy reading our summary of key competition and antitrust developments, and that this publication becomes a valuable tool for understanding the increasingly important role of antitrust across the world.

Sincerely,



**Kate McNeece**



## 2023 Year In Review – International Antitrust

Kate McNeece, ed.<sup>1</sup>

This Article outlines the most significant development in international antitrust in 2024 in seventeen jurisdictions.

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<sup>1</sup> Kate McNeece is a partner at McCarthy Tetrault LLP in Toronto. The editor would like to thank Aya Fahmi, Steven Marchand, Edwina Mayama and Sam Steeves for their assistance in editing this Article.

#### **XIV. TURKEY<sup>234</sup>**

The Turkish competition law practice witnessed substantial developments in 2023. Not only did the Draft Amendment to Law No. 4054 on the Protection of Competition (“**Draft Amendment**”) continue to be a hot topic of discussion amongst the practitioners and academicians; but also, the Turkish Competition Board (“**TCB**”) rendered notable decisions including extensive legal analyses. A total of 447 decisions were rendered resulting in administrative fines amounting to approximately 2.664 billion Turkish lira. Amongst the decisions issued, 145 cases concerned investigations. Of these, 28 were concluded through commitments, 68 cases were resolved through settlement mechanisms, 37 were rejected and 12 investigations were concluding by imposing administrative penalties.

##### **A. LEGISLATIVE DEVELOPMENTS**

##### **Draft Amendment to Law No. 4054 on the Protection of Competition**

In October 2022, the Turkish Competition Authority (“**TCA**”) shared the Draft Amendment for consultation. Designed in alignment with both the EU’s Digital Markets Act and Section 19a of the German Competition Act, the proposed amendment introduces significant regulations for digital markets: setting criteria for the designation of core platform services with significant market power, imposing ex-ante obligations to such undertakings, regulating the monitoring and auditing powers to ensure compliance with the relevant obligations, and defining sanctions to be imposed in cases of noncompliance. On the basis of the 2022 draft, anticipated changes include regulations targeting the undertakings with significant market power, as also outlined in the Final Report on the E-Marketplace Sector Inquiry, which may be directly added under Article 6 of Law No. 4054

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<sup>234</sup> Sezin Elçin Cengiz, Zeynep Özgültekin, Merve Demirkaya and İlayda Akca of CoPartners.

on the Protection of Competition (“**Law No. 4054**”) on the abuse of dominant position or under a separate article.

Although not yet entered into force, the President of the TCA, recently emphasized the TCA's efforts on the Draft Amendment as it has been formally acknowledged and included in the Medium-Term Program (2024-2026) of the Grand National Assembly of Turkey.

### **Regulation on Active Cooperation for Detecting Cartels**

The Draft Regulation on Active Cooperation for Detecting Cartels (“**Regulation**”) came into force in December 2023. The TCA clarified that, among others, the amendment aims to better distinguish between the settlement mechanism and active cooperation in detecting cartels, and set deadlines for the active cooperation application. Noteworthy changes introduced by the regulation include: (i) a requirement for applicants to submit documents that offer added value; (ii) explicit encouragement for applications from cartel facilitators; and (iii) a stipulation that active cooperation applications must be submitted before the receipt of the investigation report or, in any case, within three months following the receipt of the investigation notification.

### **Cooperation and Information Sharing Protocol Between the TCA and the Turkish Data Protection Authority**

In October 2023, the TCA, and the Turkish Data Protection Authority (“**TDPA**”) officially signed a Cooperation and Information Sharing Protocol (“**Protocol**”). The TCA's announcement regarding the Protocol emphasizes its commitment to fostering robust competition in the market while concurrently empowering consumers to exert greater control over their personal data. Key features of the protocol include: (i) collaborative efforts between the TCA and TDPA on emerging issues that may pose substantial harm, necessitating prompt and effective intervention within the scope of their respective mandates; and (ii) the production of joint reports, particularly in digital

markets. These reports aim to enhance user awareness regarding personal data protection and competition, presenting a unified message to businesses on practices spanning both legal domains.

## **B. MERGERS**

The 2023 M&A Outlook Report (“**M&A Report**”) was published in January 2024<sup>235</sup>, and provided a comprehensive overview and quantitative analysis of TCA’s merger control activity throughout the year 2023. According to the M&A Report, the TCB conducted reviews of a total of 217 M&A transactions; representing an 11% decrease compared to the 245 transactions reviewed in 2022. In addition, the TCB did not issue any conditional approval decisions throughout the year and only conducted a more comprehensive Phase II review for a single transaction.

Three notable developments deserve particular attention:

- The TCA imposed an administrative monetary fine on Elon Musk due to his failure to notify the acquisition of Twitter, on the basis of an *ex officio* review. Although it was decided that the transaction did not significantly impede effective competition in the market, the TCA evaluated the economic entity as Elon Musk himself, and imposed an automatic fine of 0.1% of his Turkish turnover for 2022.<sup>236</sup>
- The TCB unconditionally approved the Microsoft/Activision transaction in July 2023.<sup>237</sup> Although Activision’s turnover did not satisfy the turnover threshold set forth in the legislation, the TCB decided that the transaction was notifiable on the basis that Activision Blizzard is a technology undertaking. Assessing the horizontal and vertical effects of the

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<sup>235</sup>Ekonomik Analiz ve Araştırma Dairesi Başkanlığı, *Merger and Acquisition Outlook Report* (2023), <https://www.rekabet.gov.tr/Dosya/bd-gorunum-raporu-2023-20240105110955842.pdf>.

<sup>236</sup> TCB Decision 23-12/197-66, Mar. 2, 2023.

<sup>237</sup> TCB Decision 23-31/592-202, July 13, 2023.



transaction, the TCB concluded that - due to the existence of powerful competitors in Turkey and worldwide markets, as well as the low market share of Xbox, - that the transaction resulted in no horizontal or vertical competition law concerns.

- Finally, the TCB approved the acquisition of leasing rights and fixed assets of Aymars' 25 stores by Migros,<sup>238</sup> the sole decision in 2023 where a phase II review was conducted. This decision creates an important precedent as one of the key cases considering vertical intersect markets due to the vertical integration of the relevant undertakings. The TCB, adopting the European Commission's approach, initially defined a specific and narrow geographic market. Following the determination of the geographic market, the TCB evaluated stores with a market power exceeding 30% within the specified area; which was a noteworthy evaluation since dominance has been typically considered at 40% in previous decisions and also in the relevant guidelines.<sup>239</sup> Conducting an HHI (Herfindahl-Hirschman Index) analysis, the TCB considered the presence of e-commerce platforms, alternative stores with market power, and competitive pressures.

Finally, the TCB continued to clarify its practice toward “technology undertakings”, which as of 2022 are not subject to financial merger control thresholds so long as there is a “local nexus”. The TCB decisions rendered last year indicate that the TCB will broadly interpret both the concept of “technology undertaking” and the “local nexus” when applying the merger laws. For example, the TCB considers that undertakings using technology, even as ancillary services, fall within the scope of the definition of “technology undertaking”. The TCB has also deemed the “local nexus”

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<sup>238</sup> TCB Decision 22-28/449-181, June 23, 2022.

<sup>239</sup> Rekabet Kurumu, *Guidelines on the Exclusionary Behaviour of Dominant Undertakings* (Jan. 1, 2014), <https://www.rekabet.gov.tr/Dosya/kilavuzlar/hakim-durumdaki-tesebbuserin-dislayici-davranislarina-iliskin-kilavuz1.pdf>.



condition to be satisfied if (i) the target generates minimal revenues in Turkey, (ii) the services provided by such technology undertaking are accessible from Turkey or the customers of the technology undertaking will be able to use its services when they visit Turkey (even if such undertaking at issue has no current or foreseen activities in Turkey); or (iii) when a company in the same economic group as a technology undertaking generates turnover in Turkey, even if the group company is active in an entirely different (i.e., non-technology) market and the technology undertaking has no current or foreseen activities in Turkey.

### **C. CARTELS AND ANTI-COMPETITIVE PRACTICES**

The annual activity report of the TCA for the year 2023 has not been released yet. However, according to recently published decision statistics, the TCA issued a total of 145 decisions related to competition violations in 2023. Out of these decisions, administrative monetary fines were imposed on 12 undertakings, and in 37 cases no fines were imposed. With regard to other cases, 28 investigations were concluded through commitment, and 68 cases were resolved through settlement mechanisms. Regarding the nature of these decisions, 121 of them pertain to anti-competitive agreements, 18 to abuse of dominance, and 6 are of a mixed nature.

#### **Cartels**

The TCB continued to focus on no-poach agreements in 2023.

Following the milestone *Private Hospitals Decision*<sup>240</sup> in 2022, the TCB has continued to treat no-poach and wage-fixing agreements as agreements that restrict competition by object and that do not require an effect analysis. In August 2023, the TCB issued another decision in the *No-Poach* case, representing the most comprehensive investigation launched by the TCA so far that addresses

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<sup>240</sup> TCB Decision 22-10/152-62, Feb. 24, 2022.

no-poach agreements among employers. As a result of the decision, the TCB imposed fines on 16 leading undertakings over TRY 150 million. In addition, in 2023, investigations were initiated against companies, primarily in the pharmaceutical sector, private schools, and technology companies, for engaging in enticing agreements among employees. In public statements, the President of the TCA<sup>241</sup> highlighted that interventions will continue into impermissible agreements affecting labour markets.

In the TCB's *Ophthalmic Lenses* decision,<sup>242</sup> the TCB diverged from its typical approach of treating evidence of restrictive agreements as sufficient to impose administrative fines. Though the investigation found correspondences which gave the impression that competitor managers had engaged in an information exchange and revealed information about the rate of price increases and future price information, the TCB concluded that the relevant evidence was merely an internal company correspondence and could not establish a restrictive agreement. The TCB's decision emphasized that there was no evidence of a detailed, comprehensive, systematic, and mutual sharing of competitively sensitive information, indicating that these factors are required for a violation to be found in the context of an exchange of competitively sensitive information.

### **Resale Price Maintenance and Online Sales Restrictions**

The TCB continues to make enforcement of resale price maintenance (“RPM”) activities a high priority, with RPM decisions continuing to comprise a more significant proportion of competition investigations in 2021-2023 than in the five previous years.

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<sup>241</sup> Mert Davut, News Release, *President of the Competition Authority Küle: Cartels and interventions in shelf prices are our red line* (Dec. 28, 2023), <https://www.aa.com.tr/tr/ekonomi/rekabet-kurumu-baskani-kule-karteller-ve-raf-fiyatlarina-yapilan-mudahaleler-kirmizi-cizgimiz/3094350>.

<sup>242</sup> TCB Decision 23-01/6-5, Jan. 5, 2023.

Notwithstanding this focus, the TCB in 2023 appeared to apply a less stringent approach to RPM cases, finding in two 2023 decisions that emphasize that internal communication alone is insufficient to establish a violation. In the *Sezen Bal* decision,<sup>243</sup> despite the presence of numerous documents clearly indicating RPM, the TCB asserted that these documents did not lead to the creation of a fixed resale price. Similarly, in the *Bosch Siemens Hausgerate* decision<sup>244</sup> the TCB did not impose an administrative monetary fine to the undertaking concerned as it held that the three findings were either draft emails or too vague to demonstrate price interference.

Online sales restrictions have also been on the TCB's agenda in 2023. However, there has yet to be a consistent approach taken by the TCB towards this conduct to date. In some cases, the TCB has evaluated online sales restrictions as part of an RPM strategy, rejecting commitments offered by undertakings in this regard. In other decisions, it has instead clearly distinguished between online sales restrictions and RPM. Amongst the relevant decisions, BSH and Arçelik submitted commitments relating to allegations of online sales restrictions, which were eventually accepted by the TCB; the RPM allegations were separately examined. In the *BSH* decision,<sup>245</sup> despite noting that closing the e-marketplace channel to dealers would be akin to a total ban on internet sales, the TCB approved some of the commitments proposed, allowing suppliers to mandate authorized dealers to sell on specific e-marketplaces meeting specific criteria. Similarly, in the *Arçelik* decision,<sup>246</sup> commitments on data sharing, the trade name used by the company, and the quality and content were approved, including an obligation for authorized dealers to ensure that at least 85% of their total turnover comes from brick-and-mortar sales.

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<sup>243</sup> TCB Decision 23-13/209-67, Mar. 9, 2023.

<sup>244</sup> TCB Decision 22-55/864-358, Dec. 15, 2022.

<sup>245</sup> TCB Decision 22-41/579-239, Sept. 8, 2022.

<sup>246</sup> TCB Decision 22-41/580-240, Sept. 8, 2022.

#### **D. DOMINANCE**

In 2023, the TCB issued 18 decisions related to abuse of dominance. The majority of the TCB's decisions were associated with digital markets, reflecting its role as an authority closely monitoring developments in this space. In the context of dominance investigations, the TCB applied interim measures and subsequently imposed various obligations or actively promoted the commitment mechanism in terms of the dominant position. As a practical matter, therefore, interventions resembling *ex-ante* measures were initiated in certain cases concerning digital platforms even before the Draft Amendment has come into effect.<sup>247</sup>

In September 2023, the TCB published its reasoned decision on Meta,<sup>248</sup> imposing an administrative monetary fine of TRY 346 million for abusing its dominant position by amalgamating data from Facebook, Instagram, and WhatsApp services to Meta Platforms Inc. The TCB held that the relevant practices of the undertakings hindered competitors' activities in personal social networking and online display advertising services while creating entry barriers in these markets.

The TCB also imposed an administrative fine on Trendyol,<sup>249</sup> Turkey's largest e-marketplace, for abusing its dominant position through self-preferencing practices. The TCB concluded that Trendyol abused its dominant position in the multi-category e-marketplaces by gaining an unfair advantage over competitors through algorithmic interventions and utilizing data from third-party sellers on its platform. Additionally, several obligations were imposed on Trendyol.

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<sup>247</sup> Another notable event in the digital markets space involved the TCB's investigation initiated on October 19, 2023. The Board decided to launch an investigation into major online retail sales platforms in Turkey, including Hepsiburada, Trendyol, and Amazon Turkey.

<sup>248</sup> TCB Decision 22-48/706-299, October 20, 2022.

<sup>249</sup> TCB Decision 23-33/633-213, July 26, 2023.

In August 2023, following a comprehensive investigation into Sahibinden,<sup>250</sup> the TCB determined that the undertaking had abused its dominant position by preventing corporate members from using multiple platforms through obstructing data transfers, such as imposing non-compete obligations and *de facto* and contractual exclusivity. In addition to an administrative fine, various obligations were imposed on Sahibinden to rectify the violation and foster effective competition in the market.

#### **E. KEY COURT CASES**

2023 was a noteworthy year in Turkish court decisions, especially concerning the TCA’s power to conduct on-site inspections following a 2020 expansion of the TCA’s powers to scrutinize private phones and electronic devices.

In the a decision rendered by Turkish Constitutional Court (“TCC”), initiated for the annulment of the part of Law No. 4054 that gives the authority to obtain copies of the evidence during the on-site inspections,<sup>251</sup> the TCC held that the relevant article satisfied the principle of legality codified under the Turkish Constitution as it met the criteria of clarity, accessibility, and predictability. During the proportionality assessment, the TCC emphasized that that due to technological advancements and data storage methods, examining competition violations concerning data such as corporate structures and market power is not feasible without this provision, making it suitable for this purpose. Ultimately, the TCC determined that the TCA experts conducted the on-site inspections in accordance with Turkish Data Protection Law and dismissed the case.

Subsequently, in March 2023 the TCC rendered its *Ford Otosan* Decision<sup>252</sup> which was an unexpected, milestone decision regarding the broad powers of TCA experts during on-site

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<sup>250</sup> TCB Decision 23-39/754-263, Aug. 17, 2023.

<sup>251</sup> TCC Decision 2020/67 E. 2022/139 K, Nov. 9, 2022.

<sup>252</sup> TCC Decision 2019/40991, Mar. 23, 2023.

inspections. Ford Otosan (“**Ford**”) filed an individual application to the TCC against the TCB’s 2011 decision that was made based on the evidence acquired during a dawn raid conducted on Ford’s premises, as it was argued that the on-site inspection was conducted without court approval, thereby violating the right of immunity of residence.

In its assessment, the TCC evaluated on the concept of “residence”, defining such term to include any place where a person conducts their profession, such as the registered office of a privately operated business, registered offices, branch offices, and other workplace locations; while emphasizing that the public areas of workplaces that lack a private element and are open and accessible to the public cannot be considered as part of a “residence.” In its decision, the TCC held that the legal provision allowing on-site inspections without a court order violated Article 21 of the Turkish Constitution, safeguarding right of immunity of residence This is because on-site inspections can involve searching an undertaking's whole office, including private areas. The TCC also highlighted that during the on-site inspection certain documents were extracted from an employee’s computer which directly demonstrates the interference to the immunity of residence. As a final point, the TCC has classified the imposition of administrative fines in instances where access is denied to Authority experts as a form of coercion and consequently intervention. As, under the Turkish Constitution, decisions of the TCC are binding on administrative authorities, legislative, executive, and judicial organs of the state, this decision stands out as one of the most significant developments in the Turkish judiciary in 2023 and leaves the status of the TCA’s on-site inspection power unclear.