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The Turkish Competition Board rejects exclusivity allegations against a packaged chips producer (*Frito Lay*)

UNILATERAL PRACTICES, ABUSE OF DOMINANCE, RESALE PRICE MAINTENANCE, AGRICULTURE / FOOD PRODUCTS , REBATES, PRICE FIXING, TURKEY

Turkish Competition Board, Frito Lay Gıda San. ve Tic. A.Ş. / Orkun YAZICI, decision No: 18-19/329-163, 12 June 2018

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This case note analyses the Turkish Competition Board's ("**Board**") *Frito Lay* decision, dated 12.06.2018 and numbered 18-19/329-163. The Board has recently published its reasoned decision regarding the preliminary investigation that was launched against Frito Lay Gıda San. Tic. A.Ş. ("**Frito Lay**") upon the allegations of the complainant, who was a former sales chief of Frito Lay. In this regard, the Board assessed the allegations that Frito Lay had violated the Law No. 4054 on the Protection of Competition ("**Law No. 4054**") through excluding its competitors and engaging in exclusivity practices.

As a result of its preliminary investigation, the Board decided not to initiate a full-fledged investigation against Frito Lay in the relevant market, due to the lack of any finding supporting the complainant's allegations of a violation within the scope of the Law No. 4054.

Relevant Product Market Definition

In its evaluation on the relevant product market definition, the Board stated that, in line with its previous decisions in the same sector, the relevant product market could be defined as the "packaged chips market," in which Frito Lay is active in Turkey. The Board also defined the relevant geographic market as "Turkey." Furthermore, the Board provided general information on the packaged chips market and stated that the market in question could be characterised as a tight oligopoly market, where the sales are mostly conducted by Frito Lay (through its Lay's, Ruffles, Doritos, Cheetos, A la Turca, and Çerezza brands) and DOĞUŞ (through its Patos, Cipso, Chips Master, and Çerezos brands) in Turkey.

The Board's Substantial Assessment

The Board began its assessment by stating that the complainant mainly alleged that Frito Lay had engaged in *de facto* exclusivity practices through granting certain incentives to sales points, including discounts. In this regard, the Board found that the complainant had failed to provide sufficient evidence to support its exclusivity allegations and that the documents collected during the on-site inspections conducted at Frito Lay's premises did not support or substantiate exclusivity allegations either. On the other hand, the Board also declared that the fact that Frito Lay had granted various incentives to sales points and distributors (including discounts) necessitated a more detailed analysis as to whether Frito Lay's practices had led to *de facto* exclusivity in the relevant market.

Furthermore, the Board asserted that, since one of the documents collected during the on-site inspection implied that Frito Lay had intervened in distributors' resale prices and given that the Board had previously examined resale price maintenance ("**RPM**") allegations against Frito Lay in 2017, a separate examination should be conducted as to whether Frito Lay had engaged in RPM practices. Accordingly, the Board reviewed the complainant's allegations under two separate categories, namely: (i) abuse of dominance through *de facto* exclusivity behaviours and rebate systems, and (ii) RPM practices implemented through handheld terminals.

As for the evaluation on the issue of dominant position, the Board did not provide a precise assessment as to whether Frito Lay enjoyed a dominant position in the market, and opted to directly proceed with the examination of the relevant practices.

Assessment on de facto exclusivity and rebate systems

Before examining the specific allegations of the complainant, the Board provided some theoretical background on the subject matter and referred to its landmark decisions involving rebate systems. The Board first noted that, under the Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings ("**Guidelines on Dominant Undertakings**"), rebate systems are considered to be an important tool for increasing efficiency and consumer welfare, as well as fuelling competition among undertakings by lowering prices, increasing output and product diversity, reducing transaction costs resulting from the purchase of individual products, and preventing or reducing the "free-rider" problem. In this regard, the Board observed that, in case such discounts are granted by undertakings holding a dominant position in the relevant market, these may cause *de facto* or potential exclusionary effects in the market. Accordingly, the Board declared that a dominant undertaking may create *de facto* exclusivity and foreclose the market by preventing or hindering its competitors' access to the essential channels, thereby restricting its competitors' ability to appear as effective competitors against the dominant undertaking.

The Board then proceeded to assess the complainant's allegations, by first stating that the agreements concluded between Frito Lay and its distributors did not contain any exclusivity clauses. The Board also noted that the documents collected during the on-site inspections did not imply or suggest that Frito Lay had engaged in exclusivity or exclusionary practices in the relevant market.

On the other hand, the Board observed that Frito Lay established sales objectives for its sales points and granted certain incentives (such as discounts, free products, display prices and stands) to the sales points in order to entice them to attain these objectives. In this regard, the Board concluded that it was necessary to carry out a more detailed analysis as to whether Frito Lay's strategy had an effect of *de facto* exclusivity and market foreclosure in the relevant market.

In its detailed analysis, the Board first noted that Frito Lay's strategy enabled the salespersons of Frito Lay's distributors to receive higher premiums if they reached the relevant sales objectives, and thus, the system increased the employees' motivation to attain the objectives and increase their sales. In this regard, the Board first compared Frito Lay's growth objectives to the general growth level in the relevant market in order to assess whether Frito Lay's practices had had an effect in the market. Accordingly, the Board concluded that Frito Lay's growth objectives were not significantly different from the general growth level in the market. The Board also conducted a separate analysis regarding the İzmir market, where Frito Lay had established higher growth targets compared to other regions. To that end, the Board determined that (i) Frito Lay's growth objectives had only been applied for a relatively short period of time (5 months), (ii) Frito Lay had not implemented such an elevated growth objective before 2018, and (iii) there had been successful new entries into the market. Based on all these considerations, the Board ultimately concluded that there were no grounds or factors leading the Board to initiate a full-fledged investigation against Frito Lay in connection with its rebate systems.

Assessment on the resale price maintenance

As for the allegations that Frito Lay had engaged in RPM practices through handheld terminals, the Board first provided general explanations and background information on the evaluation of RPM issues under the Turkish competition law regime, specifically by referring to Article 4 of the Law No. 4054, Article 4 of the Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("**Communiqué No. 2002/2**"), and the Guidelines on Vertical Agreements. To that end, the Board stated that one of the documents collected during the on-site inspection indicated that the distributors' resale prices were set by Frito Lay's headquarters, and that the distributors were not in a position to change or adjust the prices that were defined in (*i.e. uploaded onto*) the handheld terminals.

In this regard, the Board first referred to its previous Frito Lay decision (11.01.2007; 07-01/12-7), where it had evaluated the RPM allegations against Frito Lay and had decided to send an opinion letter to Frito Lay asking it to abstain from the practices under investigation on the basis of Article 9 of the Law No. 4054, rather than initiating a full-fledged investigation. That decision was based on the limited use of handheld terminals and the distributors' tendency to set different prices, even though the Board concluded that the handheld terminal system used by Frito Lay had the potential of preventing distributors from setting their own resale prices. The Board also referred to another of its decisions (18.07.2013; 13-46/588-258), in which it had once again evaluated Frito Lay's handheld terminal system and concluded that there were no grounds to initiate a full-fledged investigation against Frito Lay, since the system under scrutiny gave distributors enough room and opportunity to change the prices defined in the handheld terminal system.

Pursuant to its examination of Frito Lay's distributorship agreements with respect to the legislative framework applying to distributorship agreements, the Board determined that Frito Lay's agreements complied with the rules outlined in the Communiqué No. 2002/2. The Board also conducted a separate analysis as to whether Frito Lay had intervened in distributors' resale prices in practice through the meetings it had conducted with them. As a result of its examination, the Board concluded that there was no information or document supporting the allegation that Frito Lay had determined the resale prices of its distributors, and thus decided not to initiate a full-fledged investigation regarding the RPM allegations relating to the handheld terminals.

The Board's decision in this case provides an instructive precedent and valuable insight into the Board's approach with respect to rebate systems and RPM practices through an exemplary evaluation of the specific dynamics of the case and a thorough assessment of the evidence in the file.