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Rules of Information Exchange Revisited by Turkish Competition Board in Retail and Wholesale FMCG Sector: A Step Forward for Hub & Spoke Case Law

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(1) Introduction

On January 19, 2022, Turkish Competition Authority (“**Authority**”) has published a highly anticipated decision of the Competition Board (“**Board**”)¹ regarding the investigation against retail grocery chains and suppliers of such chains, active in the fields of retail food and cleaning products (“**Investigation**”). The Investigation involved leading global suppliers of food and cleaning products such as Henkel, Unilever, Nestle, Johnson & Johnson, Procter & Gamble and Nivea as well as almost all retailers active in fast moving consumer goods (“**FMCG**”) business in Turkey including but not limited to the major players such as BİM Birleşik Mağazalar A.Ş. (“**BİM**”), CarrefourSA Carrefour Sabancı Ticaret Merkezi A.Ş. (“**Carrefour**”), Migros Ticaret A.Ş. (“**Migros**”) and Yeni Mağazacılık A.Ş. (“**A101**”)².

¹ Decision of the Board dated 28.10.2021 and numbered 21-53/747-360 (“**Decision**”).

² The full list of undertakings and association of undertakings scrutinized within the scope of the Investigation is as following:

1. BİM Birleşik Mağazalar A.Ş.
2. CarrefourSA Carrefour Sabancı Ticaret Merkezi A.Ş.
3. Çağrı Gıda Temizlik Maddeleri İnşaat Sanayi ve Ticaret A.Ş. (“**Çağrı**”)
4. Metro Grosmarket Bakırköy Alışveriş Hizmetleri Tic. Ltd. Şti. (“**Metro**”)
5. Migros Ticaret A.Ş.
6. Şok Marketler Ticaret A.Ş. (“**Şok**”)
7. Yeni Çağdaş İhtiyaç ve Gıda Maddeleri İnş. Tic. Ltd. Şti. (“**Çağdaş**”)
8. Yeni Mağazacılık A.Ş.
9. Yunus Market İşletmeleri Ticaret A.Ş. (“**Yunus**”)
10. Gratis İç ve Dış Tic. A.Ş. (“**Gratis**”)
11. Beypi Beypazarı Tar. Ür. Paz. San. Tic. A.Ş. (“**Beypi**”)
12. Colgate-Palmolive Temizlik Ürün. San. ve Tic. A.Ş. (“**Colgate-Palmolive Turkey**”)
13. Dalan Kimya End. A.Ş. (“**Dalan**”)
14. Dentavit Sağlık Ürünleri Tic. Ltd. Şti. (“**Dentavit**”)
15. Eczacıbaşı Tüketim Ürün. San. ve Tic. A.Ş. (“**Eczacıbaşı**”)
16. Evpaş Evyap Paz. ve Tic. A.Ş. (“**Evyap**”)
17. Johnson and Johnson Sıhhi Malzeme San. ve Tic. Ltd. Şti. (“**J&J Turkey**”)

The Decision is of particular significance due to several reasons. First, the market coverage of the Investigation that the Decision is rendered upon is extensive, since almost all retail grocery chains as well as all major suppliers of FMCG food and cleaning products in Turkey were scrutinized. Second, the Decision deals with a rather rare conduct, namely, a hub & spoke cartel, which has been discussed in a limited number of Board decisions until now³. Lastly, given that the Investigation has been initiated based on Authority's observations following the COVID-19 pandemic that there has been supply constraints due to the pandemic as well as multiple complaints, the Decision signifies the approach that the Authority would adopt in times of supply and demand shocks affecting the domestic economy as a whole.

(2) Interim Measure Decision

On the date when the Board has initiated the Investigation (i.e. May 7, 2020), the Board also adopted a decision to take an interim measure against the parties to the Investigation ("**Interim Measure Decision**")⁴ as per article 9(4) of the Law No. 4054 on the Protection of Competition ("**Law No. 4054**"). According to the Interim Measure Decision, the Authority requested weekly reports on the price increases of food and cleaning products made by the parties to the investigation. Parties to the Investigation have submitted weekly data on price increases for approximately five months, up to the date that the Board rendered a decision to terminate the interim measure on October 22, 2020⁵.

It is noteworthy to mention that the Board resorts to interim measures once in a blue moon, given that there have been a few instances that the Board adopted interim measure decisions

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18. Karizma Beşler Et Gıda Sanayi Ve Tic. A.Ş. ("**Karizma Beşler**")
 19. A.S. Watson Güzellik ve Bakım Ürünleri Tic. A.Ş. ("**Watsons**")
 20. Banvit Bandırma Vitaminli Yem San. A.Ş. ("**Banvit**")
 21. Katmer Un İrmik San. ve Tic. A.Ş. ("**Katmer Un**")
 22. Küçükbay Yağ ve Deterjan Sanayi A.Ş. ("**Küçükbay**")
 23. Nestle Türkiye Gıda Sanayi A.Ş. ("**Nestle Turkey**")
 24. Nivea Beiersdorf Kozmetik San. ve Tic. A.Ş. ("**Nivea Turkey**")
 25. Procter & Gamble Tüketim Malları San. A.Ş. ("**P&G Turkey**")
 26. Savola Gıda ve San. Tic. A.Ş. ("**Savola**")
 27. Söke Değirmencilik San. ve Tic. A.Ş. ("**Söke Un**")
 28. Türk Henkel Kimya San. ve Tic. A.Ş. ("**Henkel Turkey**")
 29. Unilever Sanayi ve Ticaret Türk A.Ş. ("**Unilever Turkey**")
 30. Food Retailers' Association

³ Decisions of the Board dated 16.12.2015 and numbered 15-44/731-266 ("**LASID Decision**"); dated 07.11.2016 and numbered 16-37/628-279 ("**Consumer Electronics Decision**").

⁴ Decision of the Board dated 07.05.2020 and numbered 20-23/298-145.

⁵ Decision of the Board dated 22.10.2020 and numbered 20-23/298-145.

up until now⁶. Thus, one can draw the conclusion that the underlying reason for the Board's preference to utilize interim measure mechanism is the legitimate reflex to take a pre-emptive stance against a potential collusion between FMCG retailers and suppliers that could feasibly affect a great portion of consumers in the market, given the turbulent supply and demand condition in the market due to COVID-19 pandemic.

(3) Assessment and findings of the Board

The Decision basically deals with three distinct allegations, which are closely related in the sense that two of three conducts subject to such allegations relates to price fixing. That being said, in terms of such price fixing allegations, the Board scrutinizes whether there has been collusion in terms of pricing decisions, separately for retail level and supplier level. In the Decision the Board first elaborates on whether there has been collusion on retail pricing decisions of competing retail grocery chains, then deals with the allegation that Savola, a producer of edible oils has interfered with the retail prices of its customers and lastly proceeds with assessing whether there has been collusion in supplier level.

(a) Assessment regarding Collusion at Retail Level

The Board's assessment regarding collusion at retail level is based on the evidences indicating that there has been direct and indirect communications between A101, BİM, Carrefour, Migros and Şok to coordinate the dates of price changes as well as the level of price increases. Upon the evaluation of the evidences falling within that scope, the Board indicated that A101, BİM, Carrefour, Migros and Şok maintained coordination in terms of pricing decisions via direct communications or by means of common suppliers. Additionally, the Board found that these retailers have exchanged competitively sensitive information on future prices, price change dates, seasonal activities and special offers.

Moreover, the Board also indicated that these retailers employed a mechanism to interfere

⁶ Recent examples of interim measures utilized by the Authority are related with digital markets. In DSM Group Decision dated 30.09.2021 and numbered 21-46/669-334, the Board imposed interim measures upon Trendyol, which is leading online retail platform in Turkey in order to prevent serious and irreparable damages that may arise from Trendyol's self-preferencing conducts such as interference to the platform's algorithms in favour of Trendyol's own products, designing marketing strategies of Trendyol's own brands based on the data obtained through its platform activities as well as discriminatory conducts among third party sellers active on Trendyol platform. Additionally, in WhatsApp decision dated 11.01.2021 and numbered 21-02/25-10, the Board imposed Facebook and WhatsApp an interim measure to prevent WhatsApp from introducing new terms and conditions that enable WhatsApp user data to be utilized in other services, with a view to tackle serious and irreparable damages that may occur due to the changes in WhatsApp terms and conditions.

with any undertaking that undercuts prices or maintain the same level of price despite the majority of retailers raising prices, with a view to ensure that such maverick retailers conform with the pricing decisions of the collusion members. Within that scope, the Board also found that A101, BİM, Carrefour, Migros and Şok have pursued aggressive pricing policies against non-conforming members of the collusion or charged price difference invoices to the common supplier in order to penalize such supplier's failure to interfere with the non-conforming retailer's prices.

In terms of the evidences that allegedly showing indirect contacts between the retailers, the Board indicated that it have found correspondences belonging to the period of May 2018 and February 2021 between Savola on one hand and A101, BİM, Carrefour, Migros and Şok on the other, supposedly indicating that pricing decisions and dates have been coordinated between A101, BİM, Carrefour, Migros and Şok through Savola. Thus, the Board noted that although there have been direct communications between A101, BİM, Carrefour, Migros and Şok to fix pricing decisions, the reason for it to deem Savola as a part of the alleged collusion was that the alleged conduct showed the characteristics of a hub & spoke cartel based on such correspondences.

As for the direct contacts, the Board found numerous evidences that mainly show that the relevant retailers have been in contact and coordinated their pricing behaviours in accordance with such contacts. For instance, the Board confirmed that a simultaneous price increase regarding a certain brand of potato chip from TL 4,25 to TL 4,75 by A101, Carrefour, Migros and Şok, which was followed by BİM with one day delay occurred as a result of direct communication between these undertakings. Within that scope, the Board reasoned that the following correspondences regarding the prices of such potato chip evidenced the collusion: a note that reads as *“Competitor prices will become effective on Monday”* included in a document annexed to an internal correspondence between BİM employees and internal correspondences of Şok made on the same date and two days before that respectively note the following: *“We will change prices with Competitor A simultaneously on Monday”* and *“The market has been organised. Could you please determine “only the sales prices” in the annex effective as of tomorrow?”*.

Against the foregoing, the Board concluded that A101, BİM, Carrefour, Migros and Şok violated article 4 of Law No. 4054 by way of involving in agreements/concerted practices showing characteristics of a hub & spoke cartel. Additionally, the Board noted that efficiency

gains of such conduct could not outweigh its anti-competitive effects, thus it could not benefit from an individual exemption under article 5 of Law No. 4054.

As for Savola's alleged involvement in the cartel, the Board argued that the respective retailers have been able to coordinate price change dates owing to the information that they have received on future pricing behaviours and plans of each other through Savola. Additionally, the Board indicated that the retailers have complained to and steered Savola to interfere, if other retailers involved in the cartel do not comply with the common pricing decisions.

Against the foregoing, the Board found that Savola have partaken in the collusion between A101, BİM, Carrefour, Migros and Şok, by way of facilitating and maintaining coordination/collusion between them as a hub. Thus, the Board determined that Savola is equally liable for the collusion, which the Board characterized as a cartel and violated the article 4 of Law No. 4054.

It is important to note that the Decision does not refer to the criteria that it adopted in two of the previous decisions that it dealt with hub & spoke type arrangements. In LASID Decision, the Board utilized the criteria that originally put forth in the Toys and Kits judgement of the Court of Appeal⁷, by way of referring to Competition Appeal Tribunal's Tesco Decision⁸. The relevant criteria requires the following conditions to be met for establishing a hub & spoke collusion, having as its object the restriction of competition: (i) retailer A discloses to supplier B its future pricing intentions, with an intention that B will make use of that information to influence market conditions by passing that information to other retailers; (ii) B does, in fact, pass that information to retailer C, who knows the circumstances in which the information was disclosed by A to B; and (iii) C does, in fact, use the information in determining its own future pricing intentions. The Board also applied such criteria in its Consumer Electronics Decision. The necessity to apply such criteria to establish the existence of a hub & spoke cartel was also raised by Savola in its defences, however Savola's defence was rejected by the Board without a detailed analysis in terms of such criteria, by way of referring to the findings/correspondences between Savola and the retailers and the internal correspondences of the retailers.

⁷ Judgement [2006] EWCA Civ 1318.

⁸ Tesco v. OFT [2012] CAT 31.

(b) Assessment regarding Resale Price Maintenance

The Decision also indicates that Savola has interfered to resale prices of its retail level customers. In that context, although Savola's defences underscored that Savola has only recommended resale prices to its customers, the Board argued that Savola directly interfered with the resale prices, while, in certain instances, retailers have complied with Savola's interferences. Additionally, the Board noted that Savola has monitored the resale prices of the retailers, interfered to the prices that are below the desired level and even employed incentive mechanisms such as price discounts to maintain retail price levels at the desired level.

It is also noteworthy that, against Savola's defences that an effects-based analysis must be conducted in terms of establishing resale price maintenance, the Board emphasized that resale price maintenance is considered to restrict competition by object, by way of citing its recent decisional practice⁹ on the subject matter. Additionally, the Board underscored that categorization of resale price maintenance as an explicit and hard-core restriction under the secondary legislation regarding the commitment mechanism and *de minimis* principle¹⁰ is a testament to by object character of resale price maintenance.

Furthermore, the Decision indicates that resale price maintenance would not meet the criteria of contributing to new developments or improvements or economic or technical improvement in the production/distribution of goods and services, while allowing consumers a fair share of the resulting benefit, thus such a conduct is unable to benefit from individual exemption under article 5 of Law No. 4054. Accordingly, the Board concluded that Savola has violated article 4 of Law No. 4054 by way of resale price maintenance from the beginning of 2017 to February, 2021.

(c) Assessment regarding Collusion at Supplier Level

Further to its assessment regarding resale price maintenance, the Board proceeded with its assessment on the findings indicating that there have been exchanges of competitively sensitive information between the investigation parties operating on supply level. In that context, the Board initially assessed that the information exchanged between the suppliers

⁹ Sony Eurasia decision of the Board dated 22.11.2018 and numbered 18-44/703-345 and Turkcell-3 decision of the Board dated 10.01.2019 and numbered 19-03/23-10.

¹⁰ Communiqué No. 2021/3 on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings That Do Not Significantly Restrict Competition and Communiqué No: 2021/2 on the Commitments to Be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition, and Abuse of Dominant Position.

were competitively sensitive, given that such information cover sales prices and quantity. That being said, the Board remarked that exchanges of such information could not be deemed as a by object violation of article 4 of Law No. 4054; due to the fact that information exchanged did not reveal future position of the relevant undertakings (i.e. future prices and/or quantities were not included in such information).

Thus, the Board proceeded with an effects based analysis and scrutinized whether the characteristics of information exchanged are adequate to create anti-competitive effect by way of increasing the transparency of the market. Accordingly, the Board first dealt with the findings related with the information exchanges regarding cleaning and hygiene products (the findings are related to the following parties: P&G Turkey, Henkel Turkey, Eczacıbaşı, Unilever Turkey, Colgate-Palmolive Turkey and Evyap) and afterwards the information exchange between flour suppliers (the finding are related to the following parties: Söke Un and Katmer Un).

In assessing the anti-competitive effects of information exchanges between the suppliers of both categories of products the Board followed the guidance set out in the Guidelines on Horizontal Cooperation Agreements (*“Horizontal Guidelines”*) that reads as following: *“When assessing the restrictive effects of information exchange on competition, the characteristics of the relevant market and the nature of the information exchange is taken into consideration”*¹¹.

In terms of its assessment regarding cleaning and hygiene product category, the Board first examined whether the information exchanged could be obtained from publicly available sources. In that context, the Board acknowledged that the information on shelf prices could be obtained by undertakings through their field personnel, but noted that information on sales quantity, turnover and market shares exchanged between the suppliers could not be deemed as publicly available information.

As regards the market coverage, the Board remarked that based on the main categories, the undertakings involved in such conduct covered at least 60% of the market in terms of personal care products, and at least 70% in terms of cleaning products. Accordingly, the Board determined that such suppliers covered a significant part of the market and that was sufficient to facilitate a common understanding prevailing in the market as well as setting a mechanism

¹¹ Horizontal Guidelines, para. 58.

that would target non-compliant new-entrants.

On the other hand, given that the information has been exchanged mainly through local retail chains, the Board also examined that the coverage regarding the downstream market (i.e. retail level). To that end, the Board delved into the market shares of Çağrı, Yunus and Mopaş Marketcilik Gıda Sanayi Ve Ticaret Anonim Şirketi (“*Mopaş*”)¹², which served as a means to exchange competitively sensitive information between the suppliers of the FMCG retailing market and concluded that, even if the information exchanges lead to collusion in the market, the effect would be negligible considering the level of market coverage.

Moreover, the Board examined whether the information exchanged was individualized or aggregated. In that context, the Board found that the nature of information enabled the suppliers to match the relevant information with each supplier, each product and even with the package size of the product. Accordingly, the Board noted that such exchanges of individualized information exceed beyond what is necessary for the undertakings to benchmark themselves against their competitors, thereby improving their efficiency. Additionally, although the findings indicate that the suppliers occasionally could not have immediate access to the information that they required, the Board noted that the frequency of the information exchanges between the suppliers was high and such level of contact might facilitate establishing, maintaining and monitoring a common understanding in the market as well as detecting the diversions from such an understanding.

Against the foregoing, the Board concluded that the information exchanges between suppliers of cleaning and hygiene products could not be deemed as having the effect of restriction competition on the grounds that such information exchanges were not continuous (i.e. the suppliers occasionally could not have immediate access to the information that they required) and especially covered a negligible part of the market. That being said, the Board underscored that such an information exchange could entail competition law related concerns if the market coverage grows by the involvement of other suppliers and retailers. Accordingly the Board decided to issue for and send an opinion letter to all retailers and suppliers involved in information exchanges that were examined under the Investigation, to inform such undertakings to act in compliance with the Board’s remarks in the Decision as well as the guidance set out in the Horizontal Guidelines in terms of exchange of competitively sensitive

¹² Unlike Çağrı and Yunus, Mopaş was not a party to the Investigation.

information regarding competitors with their vertical and horizontal counterparts.

Lastly, in terms of the allegation regarding flour suppliers, the Board determined that Söke Un obtained two price lists of Katmer Un, based on an internal communication between Söke Un employees, where one of Söke Un employees shares Katmer Un's price lists and implies that she/he communicated with a Katmer Un employee. That being said, there is no clear determination in the Decision that the price lists were obtained directly from Katmer Un or not.

Additionally, the Board found that one of the price lists has been put into effect as of the date of Söke Un's internal communication, whereas the other price list was not effective at the date of communication; however it was circulated to the market (i.e. customers of Katmer Un) prior to the date of communication. Thus, the Board remarked that such an exchange of information could not be deemed as a violation by object, given that such exchange does not involve transfer of future information regarding prices and/or quantity before the time customers have no access to such information.

Against the foregoing, the Board concluded that a one-off information exchange regarding historic prices as well as up-to-date effective prices that have been shared with the market was unlikely to restrict competition in the market, thus Söke Un and Katmer Un did not violate article 4 of Law No. 4054. That being said, the Board decided to issue for and send an opinion letter to Söke Un and Katmer Un, to inform such undertakings to act in compliance with the Board's remarks in the Decision as well as the guidance set out in the Horizontal Guidelines.

(4) Conclusion

As a result of the Investigation, an administrative monetary fine totalling to 2.671.434.094,38 TL (approximately 173,8 million EUR) was imposed to A101, BİM, Carrefour, Migros, Şok and Savola for involving in a cartel and Savola was separately imposed another administrative monetary fine of 11.105.499,32 TL (approximately 722,5 thousand EUR) for its resale price maintenance practices. That being said, the Board found no evidence that would establish that article 4 of Law No. 4054 has been violated by Çağrı, Metro, Çağdaş, Yunus, Gratis, Watsons, Karizma Beşler, Henkel Turkey, Banvit, Söke Un, Katmer Un, Evyap, Colgate-Palmolive Turkey, Beypi, Küçükbay, J&J, Unilever Turkey, Nivea Turkey, Dentavit, Eczacıbaşı, Dalan, Nestle Turkey, P&G Turkey and Food Retailers' Association.

The Decision of the Board will serve as a game-changer in the retail and wholesale FMCG

sector given that the remarks of the Board clarify the rules of the game in terms of information exchange at horizontal level as well as vertical level. Although, a relatively few undertakings faced administrative monetary fines as a result of the Investigation, the opinion letters of the Board issued as per the Decision will serve as a means to guide the undertakings active in retail and wholesale FMCG sector in terms of clarifying the boundaries of a legitimate information exchange. Furthermore, the opinion letters of the Board signal vigorous enforcement activity by the Authority, in case of non-compliance to the Board's remarks in the Decision as well as the ones in the Horizontal Guidelines.

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