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Competition Board fines five major retailers in FMCG sector and their common supplier for hub and spoke cartel

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Introduction

On 4 May 2020, the Turkish Competition Board initiated an investigation into whether 29 undertakings,[1] comprising of major retailers that are active in the fast moving consumer goods (FMCG) sector, their suppliers – including major global companies – and an association of retailers' undertakings,[2] violated article 4 of Law No. 4054 on the Protection of Competition[3] through their pricing behaviour during the covid-19 pandemic.

As a result of the investigation, the Board imposed[4] a total administrative fine of 2,682,539,594 Turkish lira on five retailers and their common supplier of edible oils, Savola Gıda ve San Tic AŞ (Savola). The five retailers were:

- Yeni Mağazacılık AŞ (A101);
- Şok Marketler Ticaret AŞ (Şok);
- CarrefourSA Carrefour Sabancı Ticaret Merkezi AŞ (CarrefourSA);
- BİM Birleşik Mağazalar AŞ (BİM); and
- Migros Ticaret AŞ (Migros).

The Board concluded that the retailers and Savola had violated article 4 of Law No. 4054 by way of engaging in agreements or concerted practices showing the characteristics of a hub and spoke cartel. The Board also decided that, in addition to its involvement in the hub and spoke cartel, Savola had also violated article 4 of Law No. 4054 through determining the resale prices of its retailers.

Moreover, the Board noted that an opinion letter would be sent to all investigated undertakings, including suppliers and retailers, setting out the rules with which they should comply when exchanging competitively sensitive information about their competitors or the competitors of the vertically related undertakings.

This article:

- explains the Board's assessment with regard to its findings of the hub and spoke cartel and resale price maintenance as well as the information exchange among the investigated undertakings; and
- provides a brief analysis of the Board's decision.

Decision

Assessment of allegations against retailers and Savola's role in alleged cartel

Based on its assessment of emails, WhatsApp correspondence and various screenshots relating to the price changes in the retail level, the Board found that A101, Şok, CarrefourSA, BİM and Migros had:

- shared competitively sensitive information, such as current and future prices, price transition dates, periodic activities and campaigns through direct contacts and indirect contacts via their shared suppliers; and
- communicated with respect to the coordination of the price changes and the dates and levels of these changes either directly or indirectly through their common supplier, Savola.

When analysing these documents, the Board also assessed the retail shelf prices in order to decide whether the retailers had changed their prices simultaneously in line with the content of the documents.

For example, with respect to the direct contact, the Board found that the prices of private label milk products of CarrefourSA and A101 had been simultaneously increased following a direct correspondence between the general manager of CarrefourSA and the chairman of A101's executive board. To support this finding, the Board used a message exchanged in an internal WhatsApp group between the executive board members of CarrefourSA, which read as follows: "They made a price transition today . . . from A101 was in a good mood. They will make the price transition now."

As for the indirect contact among the retailers, the Board noted that Savola had acted as an intermediary for the exchange of information among the retailers on their future pricing behaviours and had actively taken part in the coordination of retailers' prices and price transition dates. The Board also stated that, in line with the requests of the retailers, Savola had interfered with the shelf prices of competitor retailers that did not increase their prices during the determined price transition periods.

The Board also found that the five retailers had monitored compliance with regard to the prices through sanctioning strategies such as rapidly applying price discounts on a product and/or regional basis, and/or issuing return invoices to the supplier to punish it for its failure to interfere with the prices of the undertakings that did not comply with their pricing decisions.

Therefore, the Board concluded that:

- A101, Şok, CarrefourSA, BİM and Migros had been exchanging competitively sensitive information and acting accordingly to set retail prices;
- Savola had taken part in these practices and had benefited from this behaviour through ensuring price increases; and
- therefore, the relevant undertakings had violated article 4 of Law No. 4054 via agreements or concerted practice that had the effect of a cartel which demonstrated the features of a hub and spoke cartel.

Assessment of whether Savola had engaged in resale price maintenance

Regarding the findings on whether Savola had engaged in resale price maintenance, the Board first noted that there was correspondence among Savola employees and with retailers which indicated that:

- Savola had directly interfered with the sales prices of the retailers;
- the retailers had amended their prices in line with the price determinations/instructions of Savola;
- Savola had monitored the retail shelf prices closely and had contacted the retailers to request a price change; and
- Savola had convinced the retailers that did not increase their prices by coordinating its retailers towards a price increase.

Therefore, the Board argued that it had evidence relating to both communication/cooperation and intervention. Also, the Board found that although the documents showed that there had been instances in which Savola had been unable to manage the price transitions, Savola had pursued a main strategy of "increasing the retailer shelf prices and maintaining them in a very close level in all retail channels".

Therefore, the Board decided that Savola had violated article 4 of Law No. 4054 by determining the resale prices of its retailers. The Board noted, by referring to its case law,[(5)] that it did not need to analyse whether the practice of Savola had had an anti-competitive effect in the market as resale price maintenance is considered as a by-object restriction. Finally, the Board held that Savola's practices could not benefit from an individual exemption under article 5 of Law No. 4054 given that consumers will encounter higher prices as a result of such practices.

Assessment of information exchange among suppliers

Under its assessment of information exchange among suppliers, the Board analysed the exchange among the suppliers of cleaning and hygiene products and the suppliers of flour separately.

Suppliers of cleaning and hygiene products

With respect to the findings relating to the information exchange among suppliers of cleaning and hygiene products, the Board noted that the suppliers had obtained commercial information about their competitors from the downstream market, either by following the shelf prices through their employees or from certain retailers (ie, mostly the local retailers). The information obtained from the retailers had included data relating to sales values, sales amounts and sales prices. In the documents, the retailers had shared the relevant information with either one supplier or more than one supplier in the same message.

In its assessment, the Board found that:

- the investigated undertakings had a similar product portfolio and demand structure;
- the information obtained (eg, sales amount turnover and market share) exceeded the scope of the information that the suppliers could obtain through the visits of their sales employees to retailers – which would be solely the shelf prices. Therefore, the commercially sensitive information collected by the suppliers was "strategic" information;
- the suppliers that were party to the information exchange constituted an important part of the market, so it was possible for the suppliers to reach a common understanding and to target and punish deviators from the agreement;
- the collected information related to sales amounts, sales values and sales prices, specific to each supplier's products and even each packaging, and this could have facilitated reaching a common understanding among suppliers;
- in order to take competitive actions by comparing their situation regarding their competitors, the suppliers did not need to collect such detailed information. Aggregated information on a category basis would be sufficient for these purposes; and
- the suppliers had frequently received monthly and even current data when needed, which could have facilitated reaching and maintaining a common understanding.

On whether such information exchange could be exempted under article 5 of Law No. 4054, the Board noted that one of the conditions set out under article 5 is that efficiency gains stemming from such an exchange are reflected for consumers. The Board held that in order to deem that the efficiency gains would be reflected for consumers, the information exchange had to be indispensable. However, according to the Board, the suppliers did not need to collect such detailed information and individualised data to increase competition in the market.

Despite the above assessment, the Board concluded that the undertakings that were parties to the information exchange subject to investigation had not violated article 4 of Law No. 4054 through such information exchange. Accordingly, the Board decided that the exchange of information did not have an anti-competitive object in its current form. The Board also decided that the information exchange had not had a restrictive effect on competition either, since:

- the market share of the local retailers through which the information had been exchanged was very low, so such an exchange would be unlikely to have a significant impact on the market; and
- the documents showed that the suppliers had not always been able to acquire data within in the requested time and in a detailed manner, and there was no regular/long-term information exchange.

However, the Board noted that there was the possibility that the suppliers could increase the scale and scope of the information that they had obtained through retailers and, in this case, the exchange could cover a greater portion of the market. Since this could ease the reaching of a common understanding and punishing deviations, in order to prevent this, the Board decided that an opinion letter should be sent to the investigated undertakings, setting out the rules of information exchange based on the findings of the Board in the decision and the relevant guidelines.

Suppliers of flour

As to the exchange of information among the two suppliers of flour, the Board noted that even though one supplier received the other's price lists directly and/or through customers, all collected lists concerned past sales price data, except one list, which concerned the

price list for a close date. For this reason, according to the Board, the information exchange, which did not concern future data, could not be considered a restriction by object and the anti-competitive effect of such an exchange would be very low. However, since obtaining price lists regularly could eliminate strategic uncertainty relating to future prices, the Board decided to send an opinion letter to the suppliers of flour as well, with the content described above.

Comment

The decision has already triggered much discussion. One of the points that should be highlighted is that the Board did not explain in its decision how the criteria it referred to in its previous precedents about hub and spoke cartels had been met. With reference to Office of Fair Trading's (OFT's) *Tesco* decision,[(6)] the Board utilised the following criteria in its *LASID* and *Consumer Electronics* decisions[(7)] when analysing hub and spoke cartels:

- company A discloses the information about its future pricing behaviour to the common supplier/retailer, with the intention of influencing its competitor's (company B's) future behaviour;
- the common supplier/retailer shares this pricing information with company B; and
- company B determines its own future pricing behaviour by knowing that the information provided concerns the future pricing of company A.

Another discussion point is that the Board did not adequately explain why the *ne bis in idem* principle as set out in a recent decision of the 13th Chamber of the Council of State[(8)] does not apply to the case where the supplier is fined separately based on the allegations that it was the hub of the relevant cartel and at the same time engaged in resale price maintenance in the market. Rather, the Board stated that the two violations were different in terms of content as the former concerned a horizontal infringement while the latter concerned a vertical infringement.

All in all, the decision is remarkable since, among other things, it is one of the few decisions where the Board discussed a hub and spoke allegation. Also, although the opinion letters have not yet been issued, they are likely to have an important effect on information exchange in the FMCG sector given the Board's explanations in its decision and the wide range of markets in which the investigated undertakings are active.

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Endnotes

(1) The investigated undertakings are:

- A101;
- Şok;
- CarrefourSA;
- BİM;
- Migros;
- Savola;
- Çağrı Gıda Temizlik Maddeleri İnşaat Sanayi ve Ticaret AŞ;
- Metro Grosmarket Bakırköy Alışveriş Hizmetleri Tic Ltd Şti;
- Yeni Çağdaş İhtiyaç ve Gıda Maddeleri İnş Tic Ltd Şti;
- Yunus Market İşletmeleri Ticaret AŞ;
- Gratis İç ve Dış Tic AŞ;
- Beypi Beypazarı Tar Ür Paz San Tic AŞ;
- Colgate-Palmolive Temizlik Ürün San ve Tic AŞ;
- Dalan Kimya End AŞ;
- Dentavit Sağlık Ürünleri Tic Ltd Şti;
- Eczacıbaşı Tüketim Ürün San ve Tic AŞ;
- Evpaş Evyap Paz ve Tic AŞ;
- Johnson and Johnson Sıhhi Malzeme San ve Tic Ltd Şti;
- Karizma Beşler Et Gıda Sanayi Ve Tic AŞ;
- AS Watson Güzellik ve Bakım Ürünleri Tic AŞ;
- Banvit Bandırma Vitaminli Yem San AŞ;
- Katmer Un İrmik San ve Tic AŞ;
- Küçükbay Yağ ve Deterjan Sanayi AŞ;
- Nestle Türkiye Gıda Sanayi AŞ;
- Nivea Beiersdorf Kozmetik San ve Tic AŞ;
- Procter & Gamble Tüketim Malları San AŞ;
- Söke Değirmencilik San ve Tic AŞ
- Türk Henkel Kimya San ve Tic AŞ; and

- Unilever Sanayi ve Ticaret Türk AŞ.

(2) The Food Retailers' Association.

(3) Article 4 of Law No. 4054 prohibits agreements and concerted practices between different undertakings as well as the decisions of association of undertakings that have as their object, effect or potential effect of restricting competition.

(4) Board decision dated 28 October 2021, No. 21-53/747-360.

(5) See, for example, the Board's *BP/Opet/PO/Shell* decision dated 12 March 2020, No. 20-14/192-98. The administrative judicial process concerning this decision is still ongoing.

(6) OFT decision dated 26 July 2011, No. CA98/03/2011.

(7) The Board's *LASID* decision dated 16 December 2015, No. 15-44/731-266 and the Board's *Consumer Electronics* decision dated 07 November 2016, No. 16-37/628-279.

(8) Judgment of the 13th Chamber of the Council of State dated 4 March 2020, No. 2019/2944E, 2020/424K.