



## Turkish Competition Authority Publishes the Final Report on Fast Moving Consumer Goods Retailing Sector Inquiry

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### I. Introduction

The Turkish Competition Authority (“*Authority*”) has published its Final Report (“*Final Report*”) on fast moving consumer goods (“*FMCG*”) retailing sector inquiry (“*Sector Inquiry*”) <sup>1</sup> on March 30, 2021, two years after the release of its Preliminary Report <sup>2</sup>. This is the second sector inquiry report on FMCG retailing since the release of the 2012 Final Report on FMCG Retailing (“*2012 Report*”) <sup>3</sup>. The Sector Inquiry has been initiated with the Turkish Competition Board’s (“*Board*”) decision dated February 16, 2017 and numbered 17-07/73-M rendered upon an internal note prepared by the Authority within the scope of *Tesco Kipa/Migros Decision* <sup>4</sup>, reporting that there had been significant changes in terms of the market dynamics included in the 2012 Report.

The Final Report maintains the conclusion that was drawn within the Preliminary Report, that (i) FMCG retail chains hold significant buyer power; (ii) such buyer power allows FMCG retail chains to perform certain unfair commercial practices, such as charging fees to suppliers, long maturity terms for the payment of retailers and making unilateral amendments to the supply contracts. That being said, the Final Report builds upon the Preliminary Report in terms of the competitive concerns and identifies specific practices that might give rise to further concern in the market. The Final Report also puts forward concrete proposals for preventing the identified competitive concerns.

The Final Report explores the market structure and development, effects of digitalization process as well as COVID-19 pandemic on FMCG retailing, relevant product and geographical market definitions that are deemed significant in terms of the Board’s decisional practice, the buyer power that organised retailers hold vis-à-vis the suppliers, regulations to counter unfair commercial practices that are performed based on buyer power and agreements covering specific product weight.

This article provides the key takeaways from the Final Report.

### II. Concentration Levels in the Market and Assessment from a Merger Control Stand-Point

The Final Report notes that the concentration level in FMCG organized retailing sector has shown a rapid increase within the reference period of 2010 – 2021. In that context, the Final Report notes that the concentration level (CR4) based on the top four retailers has increased from 26% to 77% within

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<sup>1</sup> Please see: <https://www.rekabet.gov.tr/Dosya/htm-sektor-nihai-raporu.pdf>, last date of Access March 31, 2023.

<sup>2</sup> Preliminary Report on the Sector Inquiry has been published on the website of the Turkish Competition Authority on February 5, 2021. Please see: <https://www.rekabet.gov.tr/Dosya/geneldosya/htmperakendeciligisektorincelemesionraporu-pdf>, last date of Access March 31, 2023

<sup>3</sup> Please see: <https://www.rekabet.gov.tr/Dosya/sektor-raporlari/6-hizli-tuketim-mallari>, last date of Access March 31, 2023.

<sup>4</sup> Decision of the Board conditionally approving acquisition of majority shareholding of Tesco Kipa Kitle Pazarlama Ticaret Lojistik ve Gıda San. AŞ by Migros Ticaret A.Ş., dated February 9, 2017 and numbered 17-06/56-22.

2010-2021. As per the Authority's observations regarding the trend of market shares, market shares of the top four retailers has increased, while local and regional retailers has suffered market share losses.

The Final Report discusses whether high concentration level in the sector is a result of the consecutive, slow-paced and unnoticed mergers and acquisitions. In that context, the Final Report delves into the merger control legislation and notes that there are certain mechanisms that enable tackling market concentration by way of these transactions. Firstly, the Final Report notes that the amendments introduced to the Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("**Communiqué No. 2010/4**") in 2017<sup>5</sup> has enabled the Authority to consider multiple transactions that have been realized by the same persons or undertakings or within the same relevant market by the same undertaking within a three years period as a single transaction in terms of turnover calculation. The Final Report deems such mechanism beneficial in terms of catching the transactions realized in the retailing sector that are under turnover thresholds.

Secondly, the Final Report remarks that the changes introduced to Article 7 of Law No. 4054 on the Protection of Competition<sup>6</sup> ("**Law No. 4054**") has also contributed in tackling concentration in the retailing market. In that context, it is noted that introduction of the significant impediment of effective competition ("**SIEC**") test instead of dominance test has enabled the Authority to prohibit transactions that give rise to minimal level of concentrations. Lastly, the Final Reports notes that recent decisional practice of the Board adopts a narrower market definition, which enables a thorough review of the mergers and acquisitions in the sector<sup>7</sup>.

Against the foregoing, as initially set forth by the Preliminary Report, the Final Report remarks that the concentration levels (CR4 and CR10) in FMCG retail sector are high. Adding on that the Final Report concludes that the increasing concentration levels (CR4 and CR10) in FMCG retail sector have not originated from consecutive, slow-paced and unnoticed mergers and acquisitions. The Final Report adds that expansion within the sector by acquisitions is not alarming. In addition, the Final Report includes quantitative analysis on the number of new stores opened by the retailers and indicates that the underlying reason for the concentration in the market is the new store openings. Additionally, the Final Report remarks that decreasing the thresholds for merger control filings in the FMCG retailing sector is not necessary, given that such an action would decrease efficiency of the future mergers and acquisitions between small retailers and prevent such undertakings' growth.

### **III. Assessment on Buyer Power and Unfair Commercial Practices**

The Final Report remarks that the increasing concentration levels in the sector contribute to the buyer power of the retailers. The Final Report notes that buyer power of the FMCG retailers is influential over small scale and regional suppliers. On the other hand, buyer power of FMCG retailers vis-à-vis global suppliers or suppliers that enjoy market power is rather limited. Additionally, the Final Report indicates that the buyer power is more prominent in cases where the manufacturer supplies private branded products to the retailer.

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<sup>5</sup> This amendment was introduced by the Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board, promulgated on the Official Gazette of February 24, 2017.

<sup>6</sup> In 2020, the Competition Law was subject to essential amendments which passed through the Grand National Assembly of Turkey on 16 June 2020, and entered into force on 24 June 2020 ("**Amendment Law**") on the day of its publication in Official Gazette No. 31165.

<sup>7</sup> *Migros/Carrefoursa* decision of the Board dated 04.05.2021 and numbered 21-25/307-140; *Migros/Adese* decision of the Board dated 01.07.2021 and numbered 21-33/430-215.

The Final Report finds that increasing buyer power may give rise to unfair commercial practices, such as charging fees to suppliers, long maturity terms for the payment of retailers and making unilateral amendments to the supply contracts. The Final Report notes that such practices may obstruct the activities of small and medium scale suppliers and weaken their competitive strength. The Final Report stresses that such practices should be prevented given that these may reduce the incentives of small and medium scale suppliers to invest, enter into and introduce new products to the markets, emphasizing that small and medium scaled suppliers are the bedrock of the national economy.

The Final Report remarks that the European Commission’s Unfair Commercial Practices Directive<sup>8</sup> may be of guidance in the way to achieving a healthy market environment in terms of the entire agriculture – food supply chain in Turkey by way of protecting the farmers, farmers’ associations, agricultural product suppliers, suppliers that sell processed agricultural products against the high buyer power. Following that, the Final Report suggests that a set of rules similar to the Unfair Commercial Practices Directive must be adopted. In that context, the Final Report proposes the following rules to be introduced within Draft Bill on Amendment of the Law on Regulation of Retail Commerce (“**Draft Bill**”).

Prohibition of the following:

- Maturity terms that exceed 30 days for perishable agricultural products and food products,
- Maturity terms that exceed 60 days for other agricultural products and food products,
- Short notices of cancellation for perishable foods,
- Unilateral contract amendments of the buyer,
- Payment requests that are not related to the transaction,
- Transfer of the risk of lost and damaged goods to the supplier,
- Buyer’s failure to provide written approval to the supply agreement despite the request of the supplier,
- Abuse of trade secrets by the buyer,
- Trade retaliation by the buyer,
- Transfer of the costs for investigating consumer complaints to the supplier.

The Final Report further evaluates that the following subjects should be prohibited or a regulation must be enacted that states retailer’s request for cost would be only valid when it is included in the agreement signed between the parties with a clear clause:

- Return of the products that are not sold,
- The supplier’ payment of the costs of listing, shelf, and stock,
- The supplier’s payment for promotion,
- The supplier’s payment for marketing,
- The supplier’s payment for advertisement,
- The buyer’s request for a staff fee from the supplier in order to place staff that is used for selling supplier’s products.

Furthermore, the Authority presents its provisions that are as follows to ensure that these regulations are applied properly:

- Establishment of an administrative independent unit in order to conduct the follow-up and audit of these regulations,

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<sup>8</sup> Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

- Structuring the said administrative unit in a as task-specific manner and granting it with the authority to conduct investigations upon complaint or ex officio,
- Granting the said unit with the authority to conduct a dawn raid considering the possibility of the secret conduct of unfair trade practices,
- Granting the unit with the authorities such as imposing monetary fines, termination of the violation.

Lastly, the Final Report’s suggestions in terms of the administrative monetary fines are as following:

- The monetary fines that are aimed to prevent the unfair trade practices must be of a deterrent nature,
- Fines should accrue until the violation is terminated,
- The turnover of the undertaking (i.e. the entire single economic unit) should be taken into account in terms of calculation of the fine.
- Recidivism should be regarded as an aggravating factor.

The Authority then states its further opinions on the regulation as follows:

- The principle of economic unity should be introduced in a way that would include affiliated companies, to prevent circumvention of the said rules.
- The availability of using alternative dispute resolution procedures, such as settlement, mediation, and arbitration, for the resolution of potential disputes should not be established as a precondition of litigation, and the use of such procedures should not affect the right to file a complaint with the relevant unit.

Lastly, the Final Report suggests prohibition or regulation of the “price difference invoice” practices, along with other unfair commercial practices.

#### **IV. Assessment on Information Exchange and Chinese Wall**

Furthermore, the Final Report includes its assessment pertaining to the possible information exchange between the manufacturers of private label products and the retailers. The Final Report suggests adopting the practice that is referred to as the “Chinese Wall” in literature. “Chinese Wall” practice refers to the separation of communication channels of purchasing units of the undertakings. The Final Report evaluates that the necessity for such separation must be conducted on a case-by-case basis, rather than regulating the obligation to do the separation initially.

The Final Report defines the Chinese Wall as the practice of “*building a wall*” between undertakings’ purchasing units or sectors in order to limit or all together prevent the exchange of competitively sensitive information between private labelled product manufacturers and retailers. In the end, the Final Report states that evaluations must be made case-specific and the determination on which procedure to use for separation must be individually decided since each undertaking works with different business models and organizational structures in the FMCG retail sector in Turkey.

#### **V. Other Policy Suggestions**

- (i) **Practices related to Product Weight:** The Final Report identifies the agreements, where retail chains require their suppliers to manufacture products that fit into a specific product weight and ensure that these products under specific weight category are exclusively sold by their retail chain as a competitive concern. The Final Report notes that such agreements are

increasingly common in the sector and could give rise to exclusive supply of a particular type of product (i.e. products that have a certain weight or package type). The Final Report suggests that such arrangements should be prevented by way of legislation/regulation.

- (ii) **Store Opening Permission:** The Final Report notes that taking the population criteria into account in terms of new store opening permissions might have anti-competitive effects. That being said, the Final Report suggests introduction of a legislation/regulation that prohibit opening a second store within a certain diameter or acquisition of additional stores within a certain diameter would have pro-competitive effects in the market.
- (iii) **Availability of the Product During the Announced Discount Periods:** The Final Report notes that one of the main complaints of the consumers are availability of the products that are announced as discounted during the promoted discount periods. To that end, the Final Report proposes a legislation/regulation to ensure the availability of products at the price that is promoted by way of the announcement/commercial, during the period indicated in such announcement/commercial.
- (iv) **Change of Market Share Threshold Criteria in the Vertical Block Exemption Communiqué:** The Final Report proposes a dual market share threshold criteria for retail FMCG sector, where both the suppliers' and the retailers' market shares are taken into account in terms of Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("*Communiqué No. 2002/2*") due to the increasing buyer power of the retailers.
- (v) **Emphasis on Digitalization:** Lastly, the Final Report remarks that FMCG retailing market has digitalized due to COVID-19's impact. Accordingly, the Final Report suggests that the impact of digitalization must be taken into account in terms of competitive assessments as well as market definitions.

## VI. Conclusion

Overall, the Final Report covers the development, dynamics and competitive environment relating to the FMCG retailing sector for the period after the 2012 Report. The Final Report analyses the issues identified in the Preliminary Report and further proposes more concrete suggestions for solving the respective concerns. In this vein, the Final Report conducts detailed analysis on the issues that are deemed as most prominent and proposes policies to tackle such issues such as (i) concentration level in the FMCG retail sector and its repercussions, (ii) buyer power and unfair commercial practices arising from it, (iii) potential of anti-competitive information exchange between the suppliers of private label products and retailers, (iv) digitalization of the FMCG retail market.