

# e-Competitions

## Antitrust Case Laws e-Bulletin

### Bulletin

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## The Turkish Competition Authority imposes administrative monetary fines on two companies for customer allocation following a leniency application, despite two dissenting opinions underlining the necessity for an effects-based analysis (*Transorient / Tunaset*)

**ANTICOMPETITIVE PRACTICES, AGREEMENT (NOTION), CARTEL, INVESTIGATIONS / INQUIRIES, MARKET SHARING, HEALTHCARE, SANCTIONS / FINES / PENALTIES, LENIENCY, TURKEY, RULE OF REASON, EFFECT ON COMPETITION, ANTICOMPETITIVE OBJECT / EFFECT, TRANSPORT (ROAD)**

Turkish Competition Authority, *Transorient / Tunaset*, Case No. 22-24/390-161, Decision, 26, May 2022 (Turkish)

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The Turkish Competition Board (“**Board**”) imposed administrative monetary fines against Transorient Uluslararası Taşımacılık ve Ticaret A.Ş. (“**Transorient**”) and Tunaset Biofarmas Lojistik Hizmetleri A.Ş. (“**Tunaset**”) for engaging in anticompetitive customer allocation agreements, while Biopharma Logistika Uluslararası Taşımacılık Sanayi ve Ticaret Anonim Şirketi (“**Biopharma Logistika**”) received fully immunity following its leniency application. However, two members of the Board issued separate dissenting opinions where they argued that the agreements should have been subject to an effects-based analysis, and it should have been concluded that the agreements did not have any effects in the market.

### Background

The Turkish Competition Authority’s (“**Authority**”) investigation stemmed from a leniency application lodged by Biopharma Logistika where it was argued that certain undertakings active in the market for biopharma and clinical research logistics violated Article 4 of Law No. 4054 on the Protection of Competition (“**Law No. 4054**”) by way of engaging in customer allocation agreement and imposing indefinite non-compete obligations upon each other.

Within the scope of the leniency application, it was explained that (i) the founder and the chairman of the board of Biopharma Logistika had been working at Transorient for approximately 13 years between 2004 and 2016, (ii) he later incorporated Biopharma Logistika in 2016 which is active in the same industry with Transorient and Tunaset, (iii) when he was leaving Transorient, two separate non-compete agreements were imposed on him which prevented Biopharma Logistika to solicit or work with certain customers of Transorient and Tunaset, (iv) these agreements also

stipulated that Transorient and Tunaset would not provide services to certain customers of Biopharma Logistics. It is understood that the non-compete agreements led to a legal dispute between the parties, there was an ongoing judicial process on this front, and Biopharma Logistics resorted to the Authority during the judicial process.

Following its examination, the Authority initiated a full-fledged investigation against Biopharma Logistics, Transorient and Tunaset in order to determine whether the relevant undertakings violated Article 4 of Law No. 4054.

### **The Board's Assessment in terms of the Allegations Concerning the Market Allocation Agreements and Indefinite Non-Compete Obligations:**

Within the scope of the investigation, the Board assessed that there were agreements which explicitly displayed the existence of a customer allocation agreement between the parties as well as communications which support these agreements. Accordingly, the Board evaluated that the evidence in the case clearly and precisely demonstrated the practices that amounted to a cartel under Law No. 4054, the parties that engaged in these practices and the anticompetitive object of the parties.

Although the Board noted that it would not alter the analysis regarding the determination of the existence of an infringement, the Board still conducted an analysis regarding the impact of the relevant anticompetitive agreements on the market. In this respect, the Board examined whether the customer allocation agreement was enforced, the duration of its implementation, the parties' position in the market, bargaining power of the customers and market structure; and evaluated the extent/scope of the restriction of competition and competitive harm. As a result of its examination, the Board resolved that (i) limited number of players are active in biopharma logistics industry, (ii) most of the competitors' market shares are negligible, (iii) the market has an oligopolistic structure, and (iv) due to its relatively high market share and awareness, Transorient is among the strong players in the market. In addition, the Board remarked that the know-how, expertise, high investment costs required to operate in biopharma logistics industry as well as the fact that customers typically prefer to work for a long-term with the firms that they engage in commercial relations could constitute entry barriers. Considering the market structure and the lack of sufficient potential competition, the Board concluded that the agreements resulted in potential impact on the market and this impact could not be corrected by the market mechanism itself.

The Board also analyzed that the market allocation agreements between Biopharma Logistics and Transorient did not satisfy any of the conditions for an individual exemption. Furthermore, the Board dismissed the arguments of Transorient claiming the alleged customer allocation agreements should be considered as lawful non-compete obligations under competition law, on the grounds that there is no customer-supplier relation between the parties to the agreements, the alleged violation does not concern a merger or acquisition, and therefore they do not qualify as non-compete obligations that could be deemed ancillary restraints. The Board also did not take into account Transorient's argument that there is an ongoing legal dispute on this contentious matter and the Board should not interfere with this judicial process by way of adopting a decision to the detriment of Transorient.

As a result, the Board imposed an administrative monetary fine of TL 2,918,622.95 against Transorient and a separate administrative monetary fine of TL 242,136.45 against Tunaset for engaging in anticompetitive market allocation agreements, while it granted full immunity to Biopharma Logistics due to its leniency application.

### **The Dissenting Opinions of Two of the Members of the Board:**

While the Board decided that the investigated undertakings violated Article 4 of Law No. 4054 via anticompetitive market allocation agreements by majority vote, two members of the Board issued dissenting opinions essentially on the basis that the effects-based analysis was not properly conducted and the agreements did not have any effects in

the market.

In the first dissenting opinion, the Board member argued that (i) based on the information obtained from the competitors and customers, it could be said that there are no entry barriers and customers enjoy bargaining/buyer power, (ii) there is no economic rationale for undertakings that are service providers in biopharma logistics to engage in a customer allocation agreement, (iii) the actual objective of the agreement between Transorient and Biopharma Logistics, which is incorporated by a former Transorient employee, is to protect know-how regarding the customer portfolio and (iv) the buyer power in the market would prevent the realization of any anticompetitive intention/object. The relevant Board member also inferred that the information that the former Transorient employee possessed (e.g., customers, business model, trade secrets, profit margins etc.) are strategically important, the exchange of such information would normally be penalized/sanctioned under competition law, and therefore it could not be said that an agreement that prevents such exchange of information has a clear anticompetitive object. The Board member further argued that the individual exemption analysis in relation to the agreement was only conducted from a consumer benefit perspective, and it did not take into account whether such agreement contributed to the functioning of the market.

In the second dissenting opinion, the relevant Board member indicated that (i) the agreement is intended to prevent Biopharma Logistics from abusing the commercial know-how that it acquired from Transorient during the transition period, (ii) the object of the agreement is not to restrict competition in the market, and (iii) the agreement did not result in any structural restriction of competition in the market. In particular, the Board member remarked that (i) customers in this industry enjoy bargaining/buyer power and they are able to determine the main commercial conditions, and (ii) the asymmetry between the portion of the parties' customers discussed in the decision in proportion to the overall activities of each party was not taken into account. According to the second dissenting opinion, such asymmetry meant that after Biopharma Logistics spun-off from Transorient and entered the market, certain customers were allocated to Biopharma Logistics during the transition period, and Biopharma Logistics later gradually expanded its customer portfolio and increased its turnover. It is also inferred from this fact that in practice, the parties were able to include each other's customers to their portfolio rather than avoid soliciting them. The Board member also pointed out that the aim of the agreement is to resolve the conflict of interest between Transorient and Biopharma Logistics, which spun-off from Transorient, and a possible market allocation arrangement is not reasonable for the parties.

## Conclusion

Biopharma Logistics decision demonstrates the potential implications/consequences when undertakings strategically bring a contentious matter in a legal and/or commercial dispute to the attention of the Authority with the expectation of obtaining commercial benefits and leverage against other parties. One of the most notable aspects of this case is, as discussed by two of the Board members, the lack of an adequate effects-based analysis to determine whether there is an anticompetitive market allocation agreement which resulted in a restriction of competition in the market. If the discussions in the dissenting opinions were to be considered in point, Biopharma Logistics decision might be seen as a slight setback in the Board's highly praised approach in recent years to conduct meticulous economic analyses in determining competition law violations. (An example of this approach can be observed in the Board's Fertilizer decision dated 26.11.2020 and numbered 20-51/718-317).