



Turkish Competition Board Concluded the Investigation Against Gerçek Kozmetik by Applying Both the Settlement and Commitment Mechanisms Simultaneously

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This case summary includes an analysis of the Turkish Competition Board's ("**Board**") Gerçek Kozmetik Turizm San. ve Tic. Ltd. Şti. ("**Gerçek Kozmetik**") decision², where the Board concluded the investigation initiated upon Gerçek Kozmetik through utilization of both the settlement and the commitment mechanisms simultaneously³.

I. Background Information

a. Scope of the Investigation

With its decision dated 22.12.2022 and numbered 22-56/875-M(5) ("**Decision**"), the Turkish Competition Authority ("**Authority**") initiated an investigation upon Gerçek Kozmetik to determine whether it violated Article 4 of the Law No. 4054 on the Protection of Competition ("**Law No. 4054**")⁴ through resale price maintenance ("**RPM**") and restriction of online sales.

Gerçek Kozmetik's main sectors of activity include trading, manufacturing, importing, exporting, wholesale and retail purchase and sales of all kinds of cosmetics, perfumery, skin and body care products and all kinds of cleaning agents.

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² The Board's *Gerçek Kozmetik* decision dated 23.03.2023 and numbered 23-15/269-91.

³ Since then, the Board in its *Biota* decision (dated 06.04.2023 and numbered 23-17/314-104), concluded another investigation through utilization of both the settlement and the commitment mechanisms.

⁴ Article 4 of the 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 or effect or potential effect of restricting competition, whereas Article 6 of Law No. 4054 prohibits abuse of dominance.

Through the documents obtained during a dawn raid conducted in Likya Farma Emlak Gıda Kozmetik İthalat İhracat Turizm ve Ticaret Ltd. Şti.'s ("*Likya Farma*") premises (which is a reseller of Gerçek Kozmetik), the Board found that Gerçek Kozmetik requested Likya Farma to increase or fix the prices on its products to a certain level and Likya Farma obliged with such requests. Therefore, the Board resolved that Gerçek Kozmetik; (i) closely monitored the resale prices and conveyed its discomfort to the resellers in cases where the prices were below a certain desired level and (ii) directly interfered with the resale prices of its resellers. Alongside the RPM allegations, the Investigation Notice also included allegations that Gerçek Kozmetik prohibited online sales of its resellers.

The investigation was concluded upon Gerçek Kozmetik's settlement and commitment applications by utilization of both mechanisms simultaneously within a single final decision. Prior to the Decision, when multiple infringement allegations were present, the Board typically conducted separate review processes for settlement and commitment applications within the same case file. This resulted in the corresponding parts of the investigations being concluded through separate final decisions.⁵

That being said, regarding the approach taken by the Board, the following inference can be made: in cases involving simpler commitments, as a possible solution, such as the case at hand, there could be a tendency for settlement and commitment applications to be handled simultaneously and concluded within a single final decision. Conversely, in cases where the proposed commitments are more complex and the process more drawn-out, it is more likely that the two mechanisms would be subject to separate processes and final decisions.

Therefore, the approach taken by the Board in these most recent decisions may not always lead to the settlement and commitment mechanisms being handled and concluded simultaneously in cases where both are present.

Gerçek Kozmetik applied for both the settlement and the commitment mechanisms on 8 February 2023 and 15 February 2023 respectively. Based on the application of Gerçek Kozmetik, a settlement meeting was held on 22 February 2023, while on 23 February 2023 the commitment application of Gerçek Kozmetik was accepted by the Board. On 28 February 2023,

⁵ The Board's *Pierre Fabre* decision dated 23.02.2023 and numbered 23-10/175-43 and *Engingrup* decision dated 02.03.2023 and numbered 23-12/186-62. The Board's *Singer I and Singer II* decisions dated 09.09.2021 and 30.09.2021 and numbered 21-42/614-301 and 21-46/672-336 respectively.

the Board made its interim decision on the settlement application of Gerçek Kozmetik and settlement letter of the undertaking, along with its commitment package were submitted to the Authority on 17 March 2023. The settlement letter of Gerçek Kozmetik was also submitted to the Authority on 17 March 2023. The Board, based on the preceding proceedings, made the decision to end the investigation with respect to RPM practices based on the settlement application, while the allegations of restriction of online sales were separately addressed within the commitment package and were found suitable by the Board and thus were accepted. The commitment package involved including a statement within the contracts of Gerçek Kozmetik and its resellers a clause that specifically stated that online sales by resellers were allowed.

Although the settlement and the commitment mechanisms were utilized simultaneously and all allegations of infringement within the case were concluded within the same final decision, it is evident that RPM and online sales restrictions constituted separate conducts for Gerçek Kozmetik, as recognized by the Board. This recognition is apparent due to the utilization of two separate mechanisms, namely commitment and settlement. In this regard, while the Board did not consider Gerçek Kozmetik's online sales restrictions as a part of or intertwined with its RPM practices, there have been instances in the recent past where a different approach was taken, depending on the circumstances of the case. In its *Sunny* decision⁶, for instance, the Board evaluated allegations of RPM and online sales restrictions against Sunny and held that the online sales restriction is a part of the RPM conduct, and thereby concluding the investigation through settlement only. The Board determined that the online sales restrictions set out by Sunny were intended to intervene with the resale prices of its authorized resellers. As for the case at hand, the Board did not reach such a conclusion regarding Gerçek Kozmetik's RPM and online sales restriction practices. Instead, the Board treated the two types of conducts separately, subjecting them to different mechanisms.

II. Settlement Process

After approximately one and a half months following the initiation of the full-fledged investigation, Gerçek Kozmetik reached out to the Board and demonstrated its intent to apply for the settlement mechanism with regards the allegations directed through Investigation Notice

⁶ The Board's decision dated 05.01.2023 and numbered 23-01/12-7.

alleging that Gerçek Kozmetik determined resale prices of its resellers⁷. Upon Gerçek Kozmetik’s application, the Board decided to proceed with settlement discussions. Following such discussions, the Board and the investigated undertaking decided to conclude the investigation process by settling that; Gerçek Kozmetik have violated Article 4 of the Law No. 4054 by interfering with its resellers’ resale prices, and therefore, Gerçek Kozmetik will be sanctioned with an administrative monetary fine amounting to TRY 4.943.169,88 (approx. USD 259.893 or EUR 239.843) as per the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position (“**Regulation on Fines**”). In addition, as a result of the settlement procedure, the administrative monetary fine imposed on Gerçek Kozmetik was reduced by 25% as per Article 4 of the Settlement Regulation⁸ and accordingly, the final administrative monetary fine to be applied to Gerçek Kozmetik was reduced to TRY 3.707.377,41 (approx. USD 194.919 or EUR 179.882). As a result of the settlement process initiated by Gerçek Kozmetik, The Board concluded its full-fledged investigation with respect to the RPM practices committed by Gerçek Kozmetik.

In calculation of the administrative monetary fine, the Board took into consideration that Gerçek Kozmetik’s anti-competitive practices spanned a period of March 9, 2021 to October 26, 2022 and decided that the duration of the anti-competitive conduct amounting to one year and seven months should be taken into consideration while calculating the base monetary fine to be applied to Gerçek Kozmetik. Accordingly, the Board increased the base monetary fine by half, as the duration of Gerçek Kozmetik’s anti-competitive conducts lasted longer than one year but shorter than five years.

III. Commitment Process

After approximately two months following the initiation of the full-fledged investigation, and a week after its settlement application, Gerçek Kozmetik made a commitment application on February 15, 2023 and the Board accepted Gerçek Kozmetik’s commitment application on February 23, 2023 as the Communiqué on the Commitments to be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions

⁷ In accordance with the Regulation on the Settlement Procedure (“**Settlement Regulation**”), the parties to an investigation may settle with the Authority until the official service of the Investigation Report.

⁸ According to Article 4(4) of the Settlement Regulation, a reduction of 10% to 25% may be applied to the administrative fines as a result of the settlement procedure.

Restricting Competition, and Abuse of Dominant Position No. 2021/2 (“*Communiqué No. 2021/2*”) does not deem restriction of online sales as a “*hard-core violation*”, which are kept outside the scope of commitment applications.

Following the commitment discussions, Gerçek Kozmetik presented its commitment package to the Authority on March 17, 2023. The commitment package submitted by Gerçek Kozmetik was as follows:

- (i) Within the scope of the commitment negotiations, it was observed that the restriction/prohibition of online sales resulted in competition concerns.
- (ii) That Gerçek Kozmetik, in practice or through agreement, will not interfere with or restrict the resellers’ with whom Gerçek Kozmetik has a commercial relationship within the scope of the Gerçek Kozmetik’s distribution activities with from selling any brand or product through websites including the marketplaces and in this context, the following provision will be included in the agreements concluded by Gerçek Kozmetik and its resellers: “*It is possible to sell the products subject to the agreement through online marketplaces and through the internet*”.

The Board concluded that the commitment package submitted by Gerçek Kozmetik would alleviate the competitive concerns arising from practices concerning restriction of the resellers’ online sales. Therefore, the Board decided to conclude the investigation with respect to Gerçek Kozmetik’s online sales restriction practices and not to impose any monetary administrative fine against Gerçek Kozmetik on this front, on the grounds that the commitments offered were proportionate to the competitive concerns, sufficient to eliminate said concerns, could realistically be fulfilled in a short period of time and could be effectively implemented.

IV. Conclusion and Analysis

The Board’s Gerçek Kozmetik decision is one of the handful of examples in which an investigated undertaking applied for both settlement and commitment mechanism for two different types of infringement allegations directed against it by the Authority, since the introduction of the settlement and commitment mechanisms in the Turkish competition landscape a short few years ago. As a result, the portion of the investigation concerning RPM practices of the investigated undertaking was concluded through the settlement mechanism

while the portion of the investigation pertaining to allegations of restriction of passive sales were concluded through the commitment mechanism. Both mechanisms were applied simultaneously to resolve the ongoing investigation once and for all this time.

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