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Quarterly Competition Law Bulletin

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Annulment of the Board's Decision Due to Lack of Evidence

With its decision dated 30 December 2022 and numbered 2022/2912, the Ankara 13th Administrative Court ("**Administrative Court**") annulled the Turkish Competition Board's ("**Board**") decision dated 21 January 2021 and numbered 21-04/52-21 regarding its conclusion that two pharmaceutical undertakings were involved in a concerted practice to expand the use of a drug over its cheaper alternative, because of the Board's failure to demonstrate concrete findings of violation.

1) Italian Competition Authority announcement.

2) Belgian Competition Authority announcement.

The Board's assessment

A complaint was lodged with the Turkish Competition Authority ("**Authority**") on 22 January 2019, alleging that two pharmaceutical companies were engaged in an anticompetitive relationship to expand the use of an eye treatment drug, Lucentis, which is a more expensive option than its alternative, Altuzan, by spreading misleading information and increasing the doubts about the safety of using the latter for a specific eye disease, macular degeneration. In fact, two national authorities also previously investigated this conduct. While the Board mainly referenced the Italian Competition Authority’s conclusion that the two companies violated competition law,[1] just recently, the Belgian Competition Authority also took a parallel stance and imposed administrative fines accordingly.[2]

The Board initially reviewed the active ingredients of the two drugs and found that they are highly substitutable, in addition, it also found that the two companies hold a license-based relationship through their subsidiaries, whereby the company with the more expensive product would indirectly pay the other company's licensing fees from the sale of its drug. In its market assessment, the Board also noted that the companies had been applying to associations of undertakings or taking legal actions to obstruct the use of the cheaper alternative, that Altuzan's drug information in its certificate explanation based on a wrong translation was misleading, and that the undertaking with the higher-priced product was also defaming Altuzan to doctors to reduce its use. As a side note, the Board, during its on-site inspection at the competitor's premises, found an internal document — "Lucentis Value Proposition Campaign Plan" — that the other one should not have. This was later considered a supporting factor in the Board's cartel conclusion. By doing so, the Board took a parallel stance with the Italian Competition Authority and concluded that the two undertakings engaged in a concerted practice to favor the expensive option, Lucentis. The EU Court of Justice also concluded that the undertakings violated competition by object through their practice to spread misinformation.

In addition, the Board did not grant an individual exemption to such conduct as per Article 5 of Law No. 4054 on the Protection of Competition ("**Law No. 4054**"), by providing that such practice cannot create economic benefits. Such restriction led to significant increases in healthcare costs and damage to consumers, and, therefore, it failed to meet the exemption criteria. It also rejected the companies' defenses where they argued that the Board failed to provide any sufficient evidence to prove the concerted practice, the common will.

The Board concluded that the companies violated Article 4 of Law No. 4054 and aggravated the finest as the violation took place between 29 December 2011 and 2019, which is longer than five years. Therefore, a total fine of almost TRY 280 million (at the time, around EUR 30 million) was imposed on the undertakings.

Administrative Court's judgment

In its decision, the Administrative Court conducted a separate analysis for each argument on which the Board based its conclusion and provided the following:

- The start of the violation was not 29 December 2011, as the misleading product certification explanation was not announced until 30 May 2014; however, even then, as the reviewing authority (Turkish Medicines and Medical Devices Agency) had not raised any related claim, this concern was not applicable from the viewpoint of the Administrative Court.
- While spreading misleading information to the market through various channels is indeed an unfair competitive practice, the Administrative Court found no concrete proof to determine that the companies were involved in cartelistic behavior beyond a reasonable doubt.
- Although the Authority's officials did find the internal "Lucentis Value Proposition Campaign Plan" during the on-site inspection at the competitor's premises, the Board had not carefully assessed or explicitly provided whether the document was relevant to the activities in Turkey.
- In general, the Administrative Court explained that the Board's reasons to conclude that the companies were involved in cartelistic behavior were not sufficient to fulfill the standard of proof and, therefore, annulled the Board's decision conclusively.

Conclusion

Annulment of the Board's decision is a clear demonstration of the need for concrete findings in the Board's assessments. The annulment decision is an important example of the fact that the Board must exceed the level of reasonable doubt with concrete findings to prove the competition law concerns in concerted practices.

Blow the whistle and settle: the Board's Kınık and Beypazarı decisions

When the settlement mechanism came into force in June 2020, the amending law paved the way for a double reduction of fines for settlement and leniency mechanisms. The Board enforced this provision for the first time since the amending law was enacted, in its *Kınık* decision dated 14 April 2022 and numbered 22-17/283-128, and *Beypazarı* decision dated 18 May 2022 and numbered 22-23/379-158. The Board found that Beypazarı İçecek Pazarlama Ambalaj Turizm Petrol İnşaat Sanayi ve Ticaret A.Ş. ("**Beypazarı**") and Kınık Maden Suları A.Ş. ("**Kınık**") violated Article 4 of Law No. 4054 by exchanging competitively sensitive information regarding their current prices, price increases and price transition dates in the scope of a price fixing cartel in the market for natural mineral water. The cases closed with significant reductions of fines due to leniency (i.e., %30 reduction for Beypazarı and %35 for Kınık) and settlement (%25 reduction for both) mechanisms, as well as mitigating circumstances.

Is the exchange of information a cartel?

The Board found that Beypazarı and Kınık engaged in the exchange of future prices (e.g., increase in Kınık dealers' purchase and shelf prices) in addition to present shelf prices. The Authority's Horizontal Guidelines [1], explain that when competitors communicate about future prices, this conduct usually has the object of price fixing and, thus, the Board would treat this as a cartel under normal conditions. Following this guidance, the Board characterized Beypazarı and Kınık's behavior as a cartel offense. This is no mundane finding, but rather one that holds significant weight over fine calculation. As per the secondary legislation, the Board sets a base fine between 2% and 4% for cartels, and between 0.5% and 3% for non-cartel offenses. Hence, the Board subjected Beypazarı and Kınık to base fines in the upper range. Guidelines on Horizontal Cooperation Agreements.

Leniency applications

During the probe, both Kınık and Beypazarı applied for leniency. The two applications came after the launch of the full-fledged investigation, which was on 24 February 2022. Kınık was the first, with its application dated 16 March 2022, whereas Beypazarı filed on 11 April 2022.

The Board's leniency assessment focused on the applications' dates, and the inculpatory information and documents, which the parties handed over to the Authority.

For background, under the Leniency Regulation [2], the Board can grant a whistleblower either full immunity from or a reduction on the fine. Art. 4 of the Leniency Regulation paints two scenarios for full immunity:

1. The undertaking independently hands over sufficient information and documents, which meets the criteria in Art. 6 of the Leniency Regulation, before any other undertaking and prior to the preliminary investigation's launch. [3]

2. The undertaking independently provides the Authority, which does not have evidence apt to find an infringement, with sufficient information, before any other undertaking and prior to the investigation report's service. [4]

[1] Guidelines on Horizontal Cooperation Agreements.
[2] Regulation on Active Cooperation for Detecting Cartels.
[3] Art. 4(1) of the Leniency Regulation.
[4] Art. 4(2) of the Leniency Regulation.

If the undertaking does not qualify for the above, it can still aim for a fine reduction. According to Art. 5 of the Leniency Regulation, the Board would award a reduction to undertakings, which independently submit sufficient information and documents to the Authority before the investigation report's service. In this respect, the Board would favor firstcomers. Possible reduction ranges would change depending on the undertaking's place.

A note on the documents, which the Board would expect in return for rewarding the undertaking, should be complete, accurate, and up-to-date information on the cartel. Regulation on Active Cooperation for Detecting Cartels.

Kınık

Even though Kınık was the first and applied for leniency before the receipt of the investigation report, the Board did not grant full immunity as they made an application after the initiation of a pre-investigation. The Board then probed whether Kınık could benefit from a reduction.

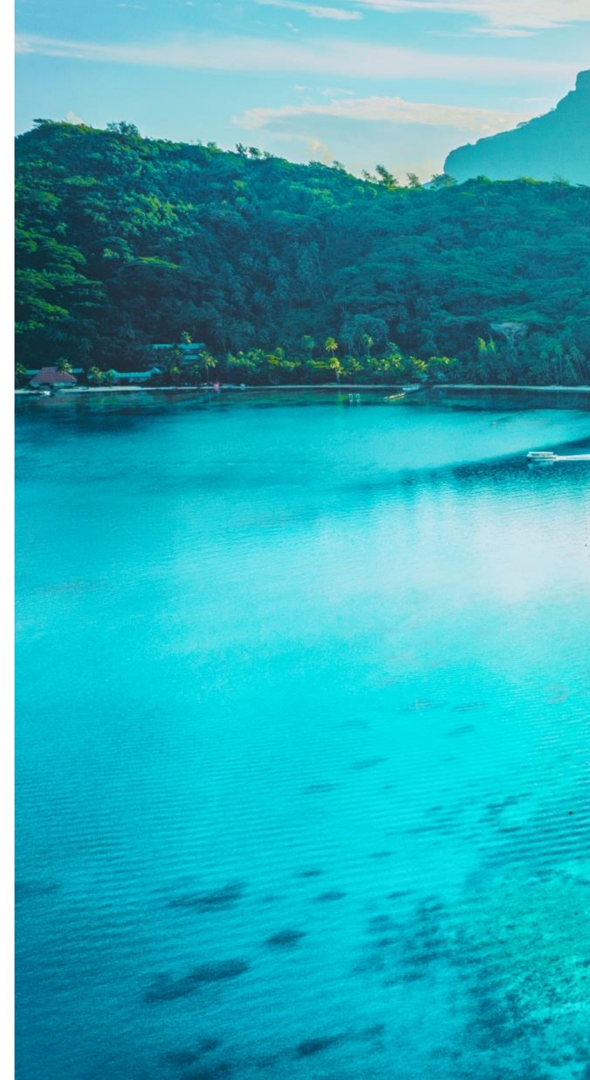
In this respect, Kınık submitted information that provides content for certain communication evidence already at the Authority's disposal. Importantly, Kınık explained that the parties engaged in continuous information exchange, and this eliminated competition in the market. Moreover, Kınık also submitted additional documents that can prove an exchange of competitively sensitive information.

TCA highlighted that even if the documents submitted by the applicants did not bring an added value to the pre-existing documents, the "*in favor of the applicant*" principle would apply as laid down in Paragraph 26 of the Guidelines On The Explanation Of The Regulation On Active Cooperation For Detecting Cartels. ("**Guideline**") Even when they lack value-added evidence, the Board must opt for an interpretation that favors the whistleblower, thereby encouraging cartelists to come forward.

In this respect, the information and documents submitted by the undertaking must be complete, accurate, and relevant to the subject matter of the investigation, as well as being the most up-to-date information of the undertaking at the time of the application. In parallel with this, the Board noted it was due to the information provided by Kınık that the Board was able to deem the relevant document, which otherwise would be hard to deploy as proof, as infringement evidence and fulfilling the terms of 6(a) of the Leniency Regulation. In the end, the Board reduced the fine by 35% (i.e., closer to the lower limit of one-third).

Beypazarı

As for Beypazarı, the Board noted that the application came after Kınık's application. For this reason, Beypazarı could not benefit from immunity. Having found that Beypazarı met the other conditions for the reduction, the Board probed whether the evidence provided by Beypazarı was sufficient to justify a reward. In this respect, the Board underscored that the secondary legislation on leniency does not require that the relevant information and documents add value to the already available information. In this respect, the Board followed the "in favor of the applicant" principle encouraging cartelists to come forward, and concluded that the information, which Beyzaparı provided on the cartel's period, products, parties, and communication related thereto, was sufficient. Against the foregoing, the Board accorded a reduction of 30% (i.e., closer to the upper limit of one-quarter).



Settlement applications

Both undertakings also settled the cartel allegations with the Board, thereby achieving an additional 25% reduction on the base fine.

At the end, the applications resulted in drastic reductions of administrative fines due to the concurrent application of settlement and leniency mechanisms. For completeness, the Board also reduced the base fines due to mitigating circumstances for both parties (e.g., small market share, the infringing activities account for a small portion of the total turnover).

Key take-aways

The Beypazarı and Kınık decisions constitute a great example of the Board's positive attitude toward the implementation of settlement and leniency mechanisms together.

Relying on the "in favor of the applicant" principle, the Board did not set the evidentiary threshold high for the leniency evidence, thereby granting fine reductions to both parties. In this respect, the Board did not require that the evidence should add value to the available information. Kınık's explanations, without which it would be hard to deploy certain documents as evidence, and Beypazarı's informatory submissions on the cartel sufficed.

Overall, although there was no doubt in this case as to the sufficiency of the parties' submissions, the Board remarked that it would act in favor of the applicant at any rate. In a nutshell, the decisions tell us that if the settlement and leniency mechanisms are put into good use, this may provide a considerable opportunity for the undertakings to achieve high rewards in terms of fines.

The Board is skeptical about the obstruction of on-site inspection: Naos Decision

The Authority is becoming increasingly cautious about on-site inspections. Meanwhile, the number of cases that end up with an administrative fines due to obstruction of on-site inspections is on the rise. In our previous legal alerts, which you can access here, we analyzed the current focus of the Authority, which is the deletion of digital data. However, within its decision numbered 22-45/659-283 dated 6 October 2022 against Naos İstanbul Kozmetik San. ve Tic. Ltd. Şti. ("**Naos**"), the Board clearly demonstrated the importance it attaches to the subject by taking its most skeptical approach yet.

Board's assessment

On 13 September 2022, the Authority visited Naos for an on-site inspection. As would be the case in an ordinary on-site inspection, the mobile phones declared for the relevant undertaking were registered through their IMEI numbers and examined. A Naos employee declared that the only phone he uses is the business phone belonging to the undertaking and that he does not use the WhatsApp messaging application. No such application, contact list, mobile call logs or correspondence was found on the examined mobile phone.

The fact that this situation did not comply with the usual flow of life aroused suspicion in the Authority, which led to another on-site inspection on 28 September 2022. Upon the detection of WhatsApp correspondences with the relevant person on other employees' mobile phones, another mobile phone synchronized with the same email address was detected. The Authority applied to the Information and Communication Technologies Authority ("**BTK**") to verify if the relevant SIM card was active on phones with two different IMEI numbers. BTK confirmed that the SIM card was used on a mobile phone with a different IMEI number before the first on-site inspection and 26 minutes after the on-site inspection.

Conclusion

After this double examination, the Authority concluded that the case handlers had been misled with the removal of the SIM card, which was inserted into an "empty" phone, and levied an administrative fine against Naos. The relevant file constitutes an important example that the Authority does not let go of cases when in doubt. Even if the undertakings bypass the first on-site inspection, those in charge of undertakings should keep their guard up and be prepared for unexpected visits from the Authority.

The Board accepted Tadım's commitments and terminated the investigation

With its decision dated 12 August 2021 and numbered 21-38/549-M, the Authority initiated an investigation to determine whether Tadım Gıda Maddeleri San. ve Tic. A.Ş. ("**Tadım**") abused its dominant position in the packaged dried nuts market with exclusionary practices, restricting the activities of its competitors and intervening in the resale prices of its dealers. Following Tadım's commitments submitted before Board on 30 November 2021, the Board, with its decision dated 7 July 2022 and numbered 22-32/505-202 ("**Decision**"), concluded that Tadım's comprehensive commitment package was sufficient to eliminate the competition law concerns and, thus, it terminated the investigation.

Competitive concerns about Tadım

Within the scope of the investigation, Tadım's practices that raised competition concerns were as follows:

- Ensuring the exclusion of competitors from outlets by setting up stands and providing sample products, rebates and prepayments,
- Entering the final sales outlets where Tadım is not present in such a way that these sales outlets could only work exclusively with Tadım,
- In cases where it is not possible for Tadım to enter to an outlet unaccompanied of competitors, trying to reduce the visibility of competing brands' products by not leaving enough space for the stands of competing products within the outlets,
- Maintaining its loyal customers by continuing its supports where it is presented as the only brand at the outlets.

Furthermore, Tadım's exclusionary behavior to become the only undertaking within outlets was also confirmed by the documents obtained during the on-site inspections. The Board concluded that Tadım's rebate and stand setup practices created de facto exclusivity at the outlets within the traditional sales channel, which led to the prevention of the sale of competing products and the exclusion of competitors from the market.

Commitments

To address the competitive concerns identified within the scope of the preliminary investigation, Tadım committed to the following:

- Tadım and its dealers shall not establish an exclusivity relationship directly or indirectly (with the benefits provided to the outlets) with retailers operating in the traditional trade channel in the packaged dried nuts market.
- Tadım and its dealers shall not engage in any behavior that would prevent outlets from determining the purchase quantities of packaged sunflower seeds, each packaged dried nut product and dried fruit and bar products independently from each other and shall not make anti-competitive tying.
- Each Tadım dealer will be able to determine its own fixed discount rate independently.
- Tadım will provide both competition law training and training on the relevant commitments to its own and its dealers' employees.
- Lastly, Tadım will sign an additional protocol with its dealers regarding the commitments and will submit a copy of the relevant protocol to the Authority, and fulfill the commitments within 4 months.

The Board's assessment

i. On the allegation that Tadım intervenes in the resale prices of its dealers

One of the allegations considered within the investigation was related to Tadım's resale price maintenance efforts. During the on-site inspections of the traditional sales channel, no evidence was found that Tadım intervenes in the resale prices of its dealers. During the interviews with Tadım customers, this allegation was reiterated, but it was stated that Tadım is only active in providing a recommended resale price. The Board also conducted a field study, interviewing 62 sales points in Ankara, Istanbul, Izmir and Muğla. As a result of the interviews, it was concluded that Tadım did not engage in any behavior to determine the resale prices of its dealers.

ii. On the allegation that Tadım abused its dominant position in the packaged dried nuts market through exclusionary practices

The Board consulted the opinions of third parties with respect to the proposed commitments. In an opinion submitted by third parties, it was stated that the practices that actually prevented the entry of competing brands by placing large stands at the outlets with limited sales area and/or shelf capacity should be terminated. In this context, the stands should be reduced and relocated in a way that allows the entry of competing brands; if this is not possible, 50% of the tasting stands should be provided to competing brand products. In that regard, practices that may create the perception of exclusive sales should be terminated. As a response, the Board rejected the proposed revision of the third parties and stated that packaged dried nuts do not have special storage conditions like other FMCG products such as cola, ice cream, beer, etc., thus, it is not an obligation to sell the packaged dried nuts on a stand.

However, the Board concluded the following:

- The commitments offered prevent the creation of de facto or contractual exclusivity in the traditional sales channel.
- Competitors would be more likely to have products available at the final sales outlets and consumers would have access to a wider range of products.
- Information to be provided by Tadım to the final sales outlets would increase awareness of the commitment to be implemented.
- The commitments offered would prevent anti-competitive tying.

In addition, the commitments would address competitive concerns arising from product portfolio strength.

Conclusion

The Board emphasized that the commitments presented to them enable the end of the anti-competitive practices. The Board also emphasized that the commitments are proportionate to the competition problems and are sufficient to address such problems. In this regard, the Board accepted Tadım's commitments and ended the investigation. The Decision is important as it contains evaluations in terms of the FMCG sector and stand exclusivity for products that do not have special storage conditions.

Allegation of payment agents concerning exclusionary actions: The Board's preliminary investigation decision regarding the major banks of Turkey

With its preliminary investigation decision dated 07.04.2022 and numbered 22-16/265-119, the Board concluded that a full-fledged investigation is not necessary against the 20 banks and 1 payment system company (altogether Banks) in Turkey based on the assessments that none of the banks subject to the preliminary investigation are in a dominant position and even if the banks were in a dominant position, there is no evidence of refusal to make an agreement or price squeezing.

In addition, since the relationship between banks and payment agents is a vertical relationship, the Board also made an assessment within the framework of Block Exemption Communiqué on Vertical Agreements No. 2002/2 ("**Communiqué No. 2002/2**"). Although the Board assessed that some of the banks' tying practices may constitute an infringement within the scope of the Article 4 of the Law No. 4054 on the Protection of Competition, the Board determined that relevant banks can benefit from the block exemption in the light of the banks' market shares that all below 30%.

Background of the decision

Payment agents filed complaints regarding to (i) refusal to deal, (ii) price squeezing and (iii) tying practices against the banks subject to the preliminary investigation and the scope of the relevant complaints is as follows:

- Not providing POS to payment agents,
- Closing the POS that provided to payment agents for foreign cards' transactions,
- Not designating some campaigns to POS that provided to payment agents,
- Not working with payment agents with a blocked or next day payment method,
- Working with payment agents with high commission rates,
- Creating additional costs to payment agents with different ways,
- Obliging single payments to be made from the same POS where instalment payments are made.

On-site inspections were conducted on 12 banks and 1 payment system company and accordingly, the preliminary investigation report was prepared by the case handlers and the opinion that there is no need to initiate a full-fledged investigation was submitted to the Board with this report.

The Board's assessment and conclusion

First, the Board examined the structure of the relevant product markets before assessing whether banks had engaged in the alleged actions to the payment agents. Hereunder, due to reasons such as (i) the oligopolistic nature of the relevant product markets, (ii) the fact that no undertaking has a market share of more than 30%, (iii) consumers can obtain cards from more than one bank/card program at the same time, it has been evaluated that any bank or card program operating in the market is not in a dominant position.

Accordingly, since the banks are not in a dominant position, the Board assessed that abuse of dominant position allegations such as refusal to deal and price squeezing cannot be qualified as a competition violation.

On the other hand, in order to eliminate all possible competition law concerns, it has been examined whether the alleged actions have taken place and if these actions have taken place, whether the banks have any grounds that justified their actions. Regarding the allegation of refusal to deal, it has been concluded that the allegations in question do not reflect the truth as there is no document showing the banks' intention to exclude the payment agents. As for the price squeezing allegation, due to the fact that payment agents are able to work with lower commission rates than the member merchants and the member merchant commission rates requested by the banks are generally significantly lower than the bound rate of the central bank of the Republic of Türkiye, it was concluded that these allegations were also unfounded.

Second, the Board, considering that payment agents do not have their own POS systems and can only make the transaction available from banks to the member merchants, stated that there was a vertical relationship between banks and payment agents in which banks were providers and payment agents were acquirers of the POS service. Within this context, the Board evaluated the allegation that single payments were directed to POS where installment payments were made within the scope of the Communiqué No. 2002/2. Although the Board assessed that some of the banks' tying practices may constitute an infringement within the scope of the Article 4 of the Law No. 4054, the Board determined that relevant banks can benefit from the block exemption in the light of the banks' market shares that all below 30%. In addition, even if the banks do not benefit from the block exemption, the Board concluded that there was no need to initiate a full-fledged investigation considering that the action of the banks in question created a positive externality for cardholders and was carried out due to the expected benefit from loyalty programs.

In conclusion, since there is no evidence that the banks have committed the alleged infringements and at the same time, relevant banks are not in a dominant position in the relevant product markets, the Board concluded that a full-fledged investigation was not necessary against the 20 banks and 1 payment system company of Turkey. This decision clearly reveals the importance of the (i) dynamics/structure of the relevant product market and (ii) the market shares of the players in the relevant product market about the assessment process of the abuse of dominant position allegations such as refusal to deal or price squeezing.

No permission to the restriction of online sales: the Board's Olka/Marlin decision

The Board's recent reasoned decision dated 30 June 2022 and numbered 22-29/488-197 regarding the restriction of online sales is based on the investigation initiated against Olka Spor Malzemeleri Ticaret A.Ş. ("**Olka**") and Marlin Spor Malzemeleri Ticaret A.Ş. ("**Marlin**") triggered by a complaint. According to the decision, the complainant mainly argued that Olka and Marlin violated Article 4 of the Law No. 4054 by restricting the online sales of dealers through e-marketplaces, both through contracts and practices. All in all, the Board's investigation was concluded with a settlement.

1. Background of the Board's Decision

A. The Board's evolution of resale price maintenance ("RPM").

Although, the complaint against Olka and Marlin was not alleging that these undertakings conducted RPM, the Authority's findings through the dawn-raids indicated that the undertakings also engaged RPM. In this context, the Board's findings regarding the RPM are as follows:

1. Olka and Marlin contacted their dealers to ask them to remove any discounts that had been applied on their stores, websites, or e-marketplaces and to change the prices to reflect the retail prices that Olka and Marlin had specified.
2. Olka and Marlin's employees actively tried to determine the prices of the dealers by asking them to remove the discounts that some dealers had applied to products. Dealers were also warned that the prices should be revised as per the suggested price list.
3. Olka and Marlin officials requested that the dealers who gave discounts should be warned about the removal of the discounts and stated that efforts would be made to sell the products at the same retail prices at all sale points.

To that end, the Board found that Olka and Marlin engaged in RPM.

B. The Board's evaluation of restricting the online sales of dealers

The Board provided a detailed summary of its previous decisions as well as other major jurisdictions regarding the restriction of online sales before moving on its assessment on the case at hand. All in all, the Board stated that decisive and general restriction of online sales constitute a hardcore restriction.

As per the documents obtained during the on-site inspection, the Board found out that Olka and Marlin actively intervened the dealers' online sales..

1. The Board found out that Olka and Marlin officials contacted the dealers, ordered them to stop selling on e-marketplaces and requested that the relevant products be removed from online sale.
2. The Board also found out that a dealer had inquired about the suitability of selling the relevant products on e-marketplaces and the dealer had been told by Olka and Marlin officials that such a sale was not approved. In parallel, the findings indicated that dealers were usually contacted by phone and the products were removed from the e-marketplaces by the dealers following the warnings.
3. According to the internal correspondence, the Board concluded that the undertaking's representatives asked to the dealers stop selling relevant products on the e-marketplace.
4. The Board discovered that representatives of Olka and Marlin issued a letter of information to the dealers. In this letter, Olka and Marin reminded the dealers that the framework agreement does not permit them to conduct business through e-marketplaces and that they were asked to terminate these actions accordingly.
5. According to the framework agreement, the dealers must obtain written approval of Olka and Marlin for the products to be offered for sale in a new store. The Board discovered that Olka and Marlin made statements that it would be a breach of the agreement for the dealers if they sell through e-marketplaces. Therefore, the Board concluded the agreement supports an online sales restriction.

The Board concluded that undertakings that prohibiting passive sales by restricting online sales of their dealers.

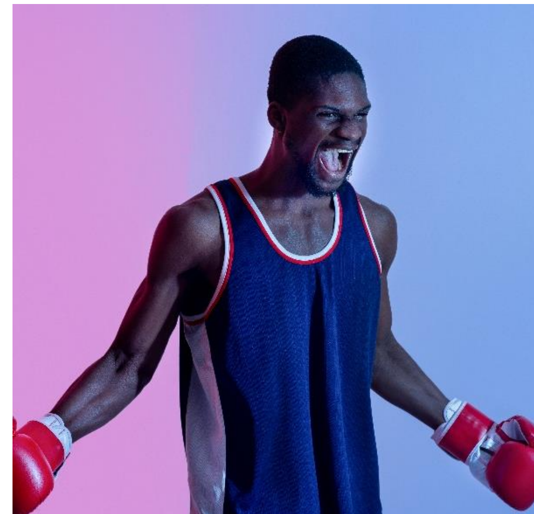
According to the Board, the agreements which are violating Article 4 of Law No. 4054 cannot benefit from block exemption under Communiqué No. 2002/2 as RPM and restriction of online sales are hardcore restrictions. The Board also concluded that the agreement does not satisfy any of the individual exemption conditions.

2. Settlement process and dissenting opinions

According to the investigation, the Board concluded that Olka and Marlin violated Competition Law through maintaining resale prices of its resellers and preventing their online sales through e-marketplaces.

During the investigation process, Olka and Marlin applied for settlement before the Board. The Board decided to apply a 25% discount on the administrative fines calculated over the gross revenues of the undertakings in the preceding year within the scope of the relevant regulation.

Three Board members had dissenting opinions in the decision. According to these board members, Olka and Marlin accepted the maximum administrative fine rate and amount stipulated in the Board's interim settlement decision, but the undertakings requested a reduction of the fine after the interim settlement decision, and the Board re-assessed the administrative fine at a lower level based on the said request. However, according to the dissenting opinions, this request means negotiation, and therefore, it is contrary to Article 7/4 of the Regulation on the Settlement Procedure for Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position ("**Settlement Regulation**"), which states that "items stipulated in the interim settlement decision cannot be made to the subject of negotiation by the settlement parties" and against the spirit of the settlement process.



3. Conclusion

The Board decided with majority vote to apply a reduction of the administrative fine rate and amount stipulated in the settlement interim decision.

Accordingly, following the Board's decision, it will be crucial to see how the dissenting opinions of the Board members that highlight the relevant Settlement Regulation provision — which is thought to forbid negotiation with the Board after the interim decision — will affect the Board's future settlement decisions.

Obstruction of on-site inspection by an undertaking which itself is not a party of the main investigation – the responsibility of IT companies in the eye of the Competition Board

The Board imposed a monetary fine on Akcom Bilişim ve Teknoloji Ltd. Şti ("**Akcom**") for obstructing an on-site inspection with its decision numbered 22-41/560-224 dated 8 September 2022. This decision highlights how far the Board can go regarding the obstruction of on-site inspections.

Summary of the events and the Board's evaluation

The Board launched a preliminary investigation against certain egg producers to find out whether these undertakings are violating Law No. 4054. The case handlers conducted on-site inspections during this preliminary investigation, and one of the undertakings stated that it did not have its own servers and it was outsourcing IT services from Akcom.

Based on this information, the Board decided to conduct an on-site inspection on Akcom as well. The case handlers visited Akcom's premises, however, they could not reach out any staff. The case handlers then reached the owner of Akcom through phone and informed the owner of the on-site inspection and the fine for obstructing an on-site inspection. However, the owner refrained from coming to the company's premises due to the scheduled meetings. To that end, the case handlers directed questions to the company's owner through the phone in relation to which kinds of services Akcom provides to the egg producer. Accordingly, Akcom provides hardware and consultancy to the egg producer and the owner is not able to log in to the egg producer's mail system since the owner is not currently authorized.

Although the case handlers invited the company owner to the company premises once again to sign the minutes of the on-site inspection, the owner refrained from coming. Afterwards, the case handlers tried to reach the company's owner three times by phone, but the owner did not respond. The case handlers then sent a message to the owner through WhatsApp and once again informed the owner of the monetary fine regarding the obstruction of an on-site inspection. As the case handlers were unable to reach the company's owner, they prepared and signed the on-site inspection's minutes.

Akcom submitted a petition to the authority to defend its position. According to the petition, the owner of Akcom explained to the case handlers that Akcom does not have access to the egg producer's mail servers, the egg producer's mails are retained by Microsoft Office 365's cloud system and Akcom does not have access to an admin password.

Akcom stated that it does not have any servers that contain company data or account information to access the data of the egg producer or any another company. Moreover, the owner stated that Akcom has only one employer (the owner of the company) and thus, there is no one usually at the company's premises at the time of the on-site inspection.

The Board evaluated that the case handlers waited for four hours at the company's premises and made warnings to the owner of Akcom. Accordingly, the Board decided that Akcom hindered the on-site inspection and imposed an administrative fine on Akcom.

Dissenting opinion of the chair

The chair of the Board had a dissenting opinion in this decision. In the dissenting opinion the chair explained that it is crucial for Akcom's executives to understand the scope of the investigation and the connection between the alleged violation and the undertaking, as it is rare for an on-site inspection of an IT firm to be carried out within the scope of an investigation concerning egg producers. To that end, the chair stated that the case handlers were unable to establish effective communication with the undertaking, since they only talked with the company's owner via phone. Moreover, the chair highlighted that it is natural for a small-sized company to be unable to cooperate since there are scheduled meetings.

Furthermore, the chair argued that Akcom is only an IT company that provides hardware and consultancy to the investigated party.

To that end, the chair explained that it is the egg producer's responsibility to submit document and information. Moreover, the chair highlighted that it would be undesirable if every investigated party tried to assign responsibility to the undertakings that are getting service. Accordingly, the chair expressed that it is inaccurate to hold the IT company responsible instead of the egg producer — the undertaking that is subject to the preliminary investigation.

Conclusion

The Board's fining decisions regarding the obstruction of an on-site inspection have increased lately. However, this decision slightly differs from other fining decisions. This decision demonstrates that the undertakings that are not party to the Board's main investigations can be subject to a fining decision for obstructing an on-site inspection. It would be interesting to see how administrative courts would approach this issue if Akcom appeals against the Board's decision.

Assertive jurisdiction saga continues in Turkish merger control practice

Technology undertaking definition

In March 2022, the Authority introduced a "technology undertaking" exception to the newly increased jurisdictional thresholds with the Authority's Communiqué No. 2022/2 on Amending Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Requiring the Approval of the Turkish Competition Board (“**Communiqué No. 2022/2**”). This exception provides that thresholds based on the target's Turkish turnover (i.e., TRY 250 million) would not be applicable in transactions concerning the acquisition of "technology undertakings" that are active in Türkiye or have research and development (R&D) activities in, or provide services to users in Türkiye.

The Authority defines technology undertakings as undertakings active in digital platforms, software and game software, financial technologies, biotechnology, pharmacology, agriculture chemicals and health technologies or assets related thereto. We have previously reported this development to you via our legal alert available at this link.

Technology undertaking does not need to have technology activities in Türkiye

With its decision dated 15 September 2022 and numbered 22-42/625-261, the Board clarified that an undertaking does not need to have technology activities in Türkiye in order to qualify as a technology undertaking under the Turkish merger control regime. In other words, the Board endorsed a broad interpretation of the relevant provision whereby the combination of: **(i)** the undertaking engaging in activities listed in the above paragraph or having assets related thereto; and **(ii)** it being active (in any product market) in Türkiye or having R&D activities in or providing services to users in Türkiye, is deemed sufficient to fall within the exception.

In the relevant decision, the Board cleared the acquisition of the sole control over the target by the acquirer. The Board noted that the target develops software to manage reassurance firms' systems and sells these products to third parties, thereby engaging in financial technologies. On this basis, the Board characterized the target as a technology undertaking. Subsequently, the Board underlined that the target generates turnover from Türkiye in product markets not related to financial technologies or any other technology undertaking activity. Adding up these two facts, the Board concluded that the target-based thresholds are not applicable to the relevant transaction since the target is a technology undertaking under the new exception.

Given the above, under the Board's broad reading of the exception, if:

1. the undertaking has activities that would qualify it as a "technology undertaking" in any geographic market in the world, and
2. the undertaking has activities in Türkiye, or engages in R&D activities in or provides services to users in Türkiye in any market in Türkiye,

then the relevant undertaking would be deemed as a "technology undertaking" and the TRY 250 million threshold for the target would not be applicable. This paves the way for acquisitions with minimal nexus in Türkiye to be potentially notifiable to the Board where the target in question pursues "technology undertaking" activities anywhere in the world.

After its competitive assessment, the Board granted unconditional approval to the transaction. This decision shows that the Board interprets the technology undertaking exception broadly in terms of geographical extent, and the technology related activities of the relevant undertaking does not need to be conducted in Turkey to be evaluated within this exception.

One day an employee, the next day a competitor cartelist?

Firms often have their employees sign non-compete agreements, which provide that the employee will not compete with its employer post-termination for a certain period of time. The Turkish Code of Obligations sanctions non-compete obligations and regulates the permissible framework for these arrangements. As such, they are typically not a subject matter for competition law cases. Yet, this does not mean that the factual circumstances around a non-compete agreement can never lead to a competition law concern. The Board's recent Biopharma decision confirmed this.

With its Biopharma decision dated 26 May 2022 and numbered 22-24/390-161, the Board found that two competing biopharma logistic service providers, **(i)** Biopharma Logistics Uluslararası Taşımacılık Sanayi ve Ticaret Anonim Şirketi ("**Biopharma**") and **(ii)** the economic unity of Transorient Uluslararası Taşımacılık ve Ticaret A.Ş. ("**Transorient**") and Tunaset Biofarma Lojistik Hizmetleri A.Ş. ("**Tunaset**", together referred to as "**Transorient/Tunaset**"), concluded a customer allocation agreement, thereby falling foul of Art. 4 of Law No. 4054. Biopharma came clean before the Board with a leniency application . At the time, the Board was not aware of such an arrangement, and there were no regulatory probes. Thus, the Board rewarded Biopharma with full immunity from the fine. On the other hand, it fined both Transorient (i.e., fine amount is TRY 2,918,622.95) and Tunaset (i.e., fine amount is TRY 242,136.45) with a considerable reduction of 60% due to certain mitigating circumstances.

Below are the **(I)** factual background of the cartel, **(II)** a summary of the Board findings, **(III)** the investigated undertakings' defensive arguments and the Board's rebuttals, and **(IV)** a note on the two dissenting opinions.

I. The cartel: 5W and 1H

For over 12 years, Mr. Cem Kolak worked for Transorient and advised Tunaset in relation to biopharma logistics services. In 2016, he founded and became the CEO of Biopharma and terminated its legal relationships with Transorient/Tunaset. Then, in the scope of the exit negotiations, Mr. Kolak signed two agreements with Transorient/Tunaset, which allocated certain customers to Mr. Kolak and some to Transorient/Tunaset. The agreements prevented each party from approaching, communicating with or responding to business proposals from any customer that the contracts allocated to the other party.

As to the "why" of this arrangement, the parties take different stands. Biopharma claims that Transorient/Tunaset exerted pressure to and threatened Mr. Kolak to sign the agreements. In this respect, Mr. Kolak was allegedly under duress when he signed the contracts to receive his severance package. Transorient/Tunaset asserts that the agreements were only a non-compete obligation within the meaning of the law of obligations (i.e., Turkish Code of Obligations). Accordingly, the parties drew up these documents to ensure the protection of Transorient/Tunaset's trade secrets, which Mr. Kolak became aware of during the term of his employment, and other reasonable business interests. On the other hand, the Board has a different view on the transactions' ratio contractus.

Two years into the cartel, in 2018, Biopharma's revenues began to significantly fall, which encouraged Biopharma to entice a customer originally allocated to Transorient/Tunaset. In turn, Transorient/Tunaset initiated private litigation against Biopharma on the alleged violation of the non-compete arrangement. Two years after, Biopharma blew the whistle and invited the Authority to intervene.

II. The Board finds that the agreements constitute customer allocation

The Board determined that the agreements constitute customer allocation, which is an exemplary infringement provided under Art. 4(II)(b) of Law No. 4054. The Board based this finding on primary evidence. It is worth noting that most of the time, the Board does not access primary evidence of competition law violations and has to resort to secondary evidence (i.e., communication evidence and economic evidence). However, in this case, the Board deemed the two written contracts , which Transorient/Tunaset handed over to the Authority during the on-site inspection, as primary evidence of the cartel. These demonstrate the cartel conduct, the cartelists and the anti-competitive object.

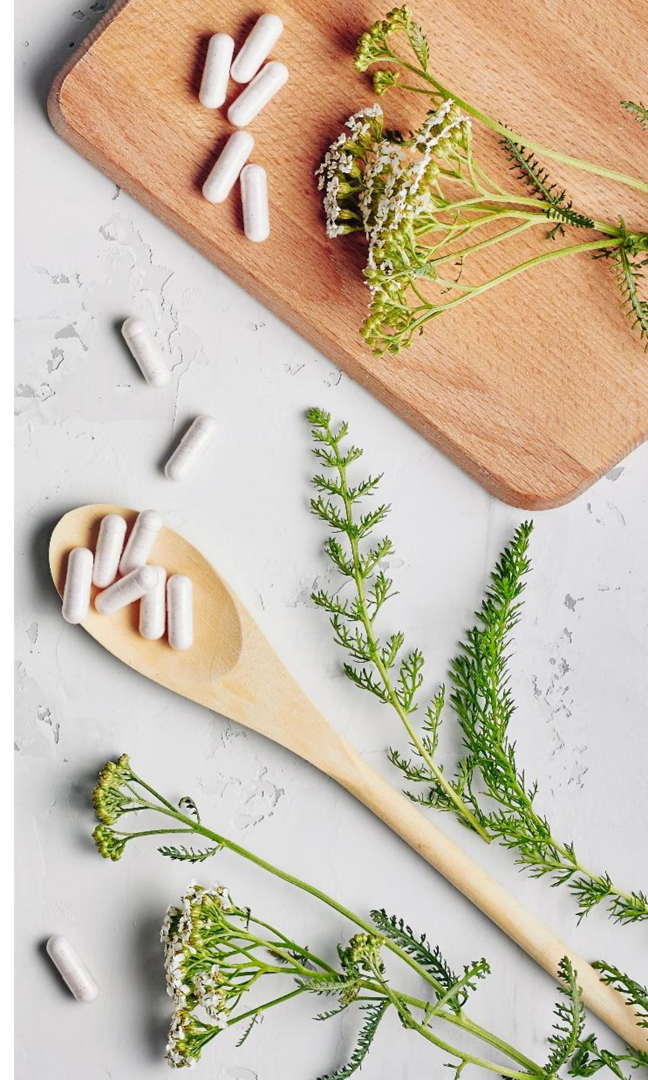
Having made this finding, the Board underscored that customer allocations are by-object violations and, thus, there is no need to demonstrate the present cartel agreement's anti-competitive effects on the market to establish an infringement. At any rate, the Board undertook a basic level of effects-based analysis to assess the extent to which the agreement has restrained competition and the scope of the resulting competitive harm.

In its analysis, the Board probed whether the parties actually enforced this agreement. It found the following:

- Transorient/Tunaset had business with customers allocated to Biopharma before 2017. Yet, it almost stopped working altogether with them after 2017. In fact, it generated no revenue from them in 2018.
- Transorient/Tunaset made most of its sales to customers that the cartel agreement allocated to Transorient/Tunaset.
- Biopharma generated most of its revenue from customers not allocated to either party. This is because the customers allocated to Biopharma were smaller local buyers as opposed to Transorient/Tunaset's customers, which were deeper accounts.
- In 2018, Biopharma serviced one customer allocated to Transorient/Tunaset.

In light of the above, the Board concluded that the parties enforced the agreement between 2017 and 2021.

Further, the Board underscored certain market dynamics to show that the cartel agreement is apt to produce adverse anti-competitive effects in the market. In this respect, **first**, the market for biopharma logistics is an oligopolistic market with 12 players. When the market is delineated to only include pure biopharma logistics players, Transorient/Tunaset is the market leader whereas Biopharma is among the top five players. On this basis, the Board holds that when strong firms in the market form a cartel, this may induce smaller players



to follow the lead, thereby resulting in fewer alternative suppliers for the customers and adverse effects on the consumers. **Second**, there are barriers to entry in the market (i.e., high investment costs, necessary knowhow, difficulty to establish a customer base, customers' tendency to single-home and work with a given supplier for a long period). Due to such barriers, customer allocation may further prevent new entries.

Last but not least, the Board noted that a cartel can, in theory, benefit from an individual exemption. However, it may be possible to accept, a priori, that a cartel agreement will not qualify for an individual exemption due to the economic inefficiencies and potential harm it results in. In consideration of potential adverse effects of the present agreement outlined above, the Board did not grant an individual exemption to the agreement.

III. What did not fly as a cartel defense?

Below are Biopharma's main lines of defense and the Board's assessment thereabouts.

"**Transorient/Tunaset is the primary actor in this violation**": This does elevate Biopharma's liability. This may only be relevant in terms of fine calculation (and application of mitigating/aggravating circumstances).

"**Biopharma was under duress when signing the agreements**": Duress is a matter of private law and does not affect competition law liability.

"**Mr. Kolak's intent was not to form a cartel but to receive his severance package**": The direct intent in agreeing to a cartel is not relevant. A cartel agreement may also have lawful objects in addition to an anti-competitive intent.

Below are Transorient/Tunaset's main defensive arguments and the Board's assessment thereabouts.

"**The agreement in question is purely a non-compete obligation within the meaning of law of obligations**": Biopharma's intent is not relevant. In addition, the agreement's restraint of competition is reciprocal and for an unlimited period, which differentiates the restraint from the non-compete obligation in the Turkish Code of Obligations.

"**Biopharma was not legally alive when the agreement was executed**": Indeed, an "undertaking" must have a continued economic activity. Yet, this activity need not be present at the time of the cartel agreement's conclusion. In addition, Biopharma can be considered as a potential competitor.

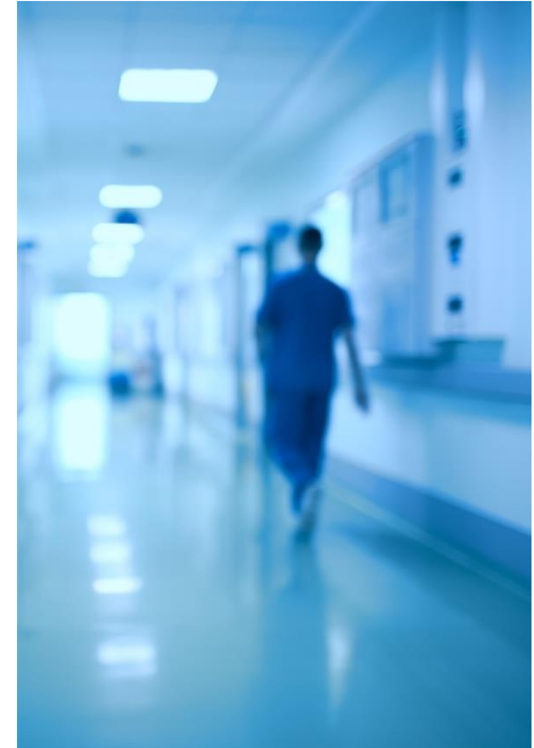
"**The non-compete obligation may qualify as an ancillary restraint**": There is no concentration.

Overall, the Board dismissed the parties' defenses and stuck to its findings.

IV. Not everyone agrees

The Board adopted this decision by majority and not unanimity. Two Board members were of the opinion that the parties did not form a cartel. This mainly rested on the understanding that the agreements were, in fact, non-compete obligations within the meaning of law of obligations. Accordingly, it did not have the object of restricting competition. Rather, its object was to protect Transorient/Tunaset's knowhow.

In conclusion, the Board's Biopharma decision confirms that firms need to pay extra caution when enacting legal transactions that restrict competition in any capacity. The fact that the restrained party is a former employee may not be sufficient to evade liability. One may be an employee one day, and a cartelist competitor the next.



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