

Quarterly Competition Law Bulletin – 2023 First Quarter

April 2023

The most significant development in the first quarter of 2023 was the Turkish Competition Authority's (the "TCA") publication of the Final Sector Inquiry Report on Fast-Moving Consumer Goods Retailing (the "FMCG Sector Report"). The Competition Board (the "Board") also rendered notable decisions in this period, consisting of (i) the decision imposing an administrative fine on Elon R. Musk for failing to notify the acquisition of Twitter Inc.'s sole control, (ii) the decision imposing an administrative fine on undertakings active in the biopharma logistics sector on the grounds of customer allocation, (iii) the reasoned decision regarding the preliminary investigation concerning certain banks' practices against payment system providers, and (iv) new decisions on the obstruction of on-site inspections. In addition, the Constitutional Court's reasoned decision concerning the annulment request of the Law No. 4054 on the Protection of Competition's ("Competition Law") certain provisions is another important development of this quarter.

1. Proposed Legislative Amendments in the FMCG Sector Report

The TCA, which had initiated the FMCG retailing sector inquiry in February 2017, published its final report on 30 March 2023. The FMCG Sector Report proposes several amendments to the Draft Proposal on Amendments to the Regulation of Retail Trade. The proposed amendments' main object is to prevent FMCG retailers from abusing their increased buying power through unfair commercial practices, such as charging suppliers for retailing costs or extending their payment periods against suppliers. The proposed amendments include the prohibition of (i) payment terms exceeding a certain period for certain food products, (ii) short notice cancellations for perishable goods, and (iii) unilateral amendments to the supply agreement by the retailer. The FMCG Sector Report also sets out that an independent body should be established to ensure effective enforcement, and should have certain powers such as to conduct inspections, request information, directly cease an established violation, and impose administrative fines.

In addition, the FMCG Sector Report states even though the concentration level in the FMCG sector has increased, there is currently no need to set a special threshold for mergers and acquisitions to be realized in this sector.

The FMCG Sectoral Report also proposes an amendment to the Block Exemption Communiqué for Vertical Agreements governing that in addition to the supplier's market share, the buyer's market share should also be evaluated when assessing whether a vertical agreement benefits from block exemption.

2. Administrative Fine for Failing to Notify the Acquisition of Twitter

The Board had *ex officio* reviewed the acquisition of Twitter Inc.'s sole control by Elon R. Musk. Subsequently, on 6 March 2023, the Board announced that it granted clearance to the transaction but imposed an administrative fine on Elon R. Musk amounting to 0.1% of his 2022 Turkey turnover on the grounds that the transaction was closed without notifying the Board.

Indeed, the Board can detect and *ex officio* review transactions subject to a mandatory filing but closed without its approval. The Board generally becomes aware of such transactions within the context of other transactions notified by the same parties. On the other hand, transactions which have a widespread media coverage, such as the acquisition of Twitter Inc.'s sole control by Elon R. Musk, also catches the Board's attention.

3. The Board's Assessment on Blocking Payment System Providers' Access to POS Services

The Board concluded its preliminary investigation initiated upon the allegations that 21 banks in Turkey infringed Article 4 and 6 of the Competition Law by engaging in exclusionary conducts against payment system providers. These allegations include refusing to supply POS machines, blocking POS machines to transact with foreign cards and price squeezing (e.g., imposing additional costs on payment system providers).¹

The Board determined that (i) although the payment system providers may have difficulty to compete due to banks denying their access to the payment infrastructure, this situation does not completely eliminate the effective competition, (ii) consumers' (end

¹ The Board's decision dated 7 April 2022 and numbered 22-16/265-119

member firms) access to the bank is not completely restricted since they can receive payment services directly from banks, **(iii)** the relevant practices were implemented due to difficulties to detect illegal payments made via payment system providers. Therefore, the Board established that banks had reasonable grounds for implementing these practices. Accordingly, the Board decided that the conditions for a refusal to supply violation were not met and there was no evidence of an intention to exclude payment institutions. In addition, the Board concluded that member firm commission rates charged to payment system providers were not sufficiently high and thus no price squeeze was implemented.

As a result of these assessments, the Board decided not to launch an investigation regarding the alleged practices. Notably, the decision helps to determine the conditions under which banks' practices may constitute an exclusionary infringement against payment system providers.

4. Non-Compete Obligations Established as Cartel Agreements: Transorient, Tunaset and Biopharma Decision

The Board ceased its investigation launched against the allegations that Transorient Uluslararası Taşımacılık ve Ticaret Anonim Şirketi ("**Transorient**"), Tunaset Biofarma Lojistik Hizmetleri Anonim Şirketi ("**Tunaset**") and Biopharma Lojistik Hizmetleri Anonim Şirketi ("**Biopharma**"), which are all active in the biopharma logistics sector, infringed Article 4 of the Competition Law by executing customer allocation agreements and imposing indefinite non-compete clauses upon customers².

In its review, the Board primarily analyzed the non-compete agreements signed by Biopharma's founding partner, who was previously a Transorient employee and provided consultancy services to Tunaset, which is currently in the same economic group with Transorient. The non-compete agreements were executed when Biopharma's founder ended his employment relationship with this economic group. The Board decided that the agreements indefinitely prohibited the parties from providing services to the other party's customers.

The Board initially emphasized that the relevant agreements establish a relationship between competitors that exceeds the boundaries of the employee-employer relationship and thus considered the non-compete arrangements as an explicit cartel agreement. The Board also concluded that market entry barriers are high since **(i)** the biopharma logistics sector has an oligopolistic structure, **(ii)** Transorient-Tunaset economic group is a significant market player, and **(iii)** customers enter into long term relationships with biopharma logistics firms. Therefore, the Board considered that the customer allocation would cause anticompetitive effects on the market. In addition, the Board rejected the investigated parties' claims that these non-compete clauses aimed to prevent any risks arising from a current employee having knowledge of his former employer's trade secrets and customer portfolio. Accordingly, the Board imposed administrative fines on Transorient and Tunaset, but did not impose an administrative fine on Biopharma since it applied for immunity under the Regulation on Active Cooperation for Detecting Cartels.

The decision demonstrates that mutual and indefinite non-compete agreements concluded between employees and their former

employers may be considered as cartel agreements aiming for customer allocation.

That said, the dissenting votes in the decision argued that **(i)** the purpose of the agreements is to protect the know-how and strategic information on customer portfolio, **(ii)** preventing such information exchange does not aim to restrict competition, and **(iii)** the Board should have considered the functioning of a free-market economy and should not limit its review to consumer protection.

5. New Decisions on Obstruction of On-Site Inspections

In 2023's first quarter, the Board published decisions where it imposed administrative fines on **(i)** medical device and consumables provider Disamed Sağlık Ürünleri Sanayi ve Ticaret Limited Şirketi, **(ii)** IT services provider Akcom Bilişim ve Teknoloji Hizmetleri Limited Şirketi ("**Akcom**"), **(iii)** software company Softtech Yazılım Teknolojileri Araştırma Geliştirme ve Pazarlama Ticaret Anonim Şirketi, **(iv)** IT services provider Vitelco Bilişim Hizmetleri Danışmanlık Limited Şirketi, and cosmetics and personal care products' providers **(v)** Loreal Türkiye Kozmetik Sanayi ve Ticaret Anonim Şirketi and **(vi)** Naos İstanbul Kozmetik Sanayi ve Ticaret Limited Şirketi, for obstructing on-site inspections.³

In each of these decisions, the Board imposed administrative fines on the grounds that the undertakings' employees deleted e-mails and WhatsApp correspondence after the on-site inspection and/or the on-site inspection was delayed.

The Board's decision on Akcom stood out due to the Board's chairman's dissenting vote. The dissenting vote states that **(i)** since it is not ordinary to conduct an on-site inspection in an undertaking active in the informatics sector within the framework of an investigation concerning the egg production and sales sector, Akcom should have been explained with the scope of the inspection, but **(ii)** no such effective communication was ensured by the case handlers and **(iii)** Akcom only provides hardware supply and consulting services to one of the investigated parties and presenting all information/documents to the case handlers is solely the investigated parties' responsibility.

6. Constitutional Court's Decision on Competition Law

The Constitutional Court's decision on the annulment request of certain provisions of Competition Law is published in the Official Gazette dated 30 March 2023. These consist of provisions **(i)** granting the TCA the right to take copies of the documents examined during on-site inspections, **(ii)** imposing structural remedies upon detecting an infringement and **(iii)** that concern the TCA's personnel organization.

The Constitutional Court ruled that the relevant sections of Articles 9 and 15 of the Competition Law, which respectively **(i)** authorizes the Board to impose "any structural remedies in the form of undertakings transferring certain businesses, shares or assets" and **(ii)** allows the Board to take physical samples of the data and documents examined during on-site inspections, was in compliance with the law.

The President of the Constitutional Court and four members had dissenting votes against the constitutionality of Article 15 of the Competition Law.

² The Board's decision dated 25 May 2022 and numbered 22-24/390-161

³ The Board's decisions (i) dated 8 September 2022 and numbered 22-41/573-234, (ii) dated 8 September 2022 and numbered 22-41/560-224, (i) dated 15 September 2022 and numbered 22-42/614-258, (v) dated 15 September 2022 and numbered 22-42/615-259, (v) dated 29 September 2022 and numbered 22-44/646-278 and (vi) dated 6 October 2022 and numbered 22-45/659-283.

The dissenting vote sets out that in accordance with the European Court of Human Rights and the Constitutional Court's case law, **(i)** undertakings' headquarters, branches and facilities, where they undertakings are managed, are also considered as "residences" and thus benefit from the "judicial decision" guarantee, **(ii)** therefore, the relevant regulation violates not only the right to protection of personal data but also the right to immunity of residence, **(iii)** issues such as how and for how long the collected data can be stored should be regulated by the Competition Law, and **(iv)** the expression "any kind of data" in the relevant provision enables personal data processing.

On the other hand, the Constitutional Court decided to annul **(i)** Article 34 of the Competition Law, which authorizes the Board to determine certain procedures and principles regarding the TCA's personnel organization, and **(ii)** the provisional Article 6 of the Competition Law, which stipulates that those who are part of certain personnel groups are deemed to be appointed as TCA personnel and these individuals will be appointed when the TCA needs. The

Constitutional Court justified the annulment decision on the grounds that the Competition Authority's personnel appointments should be regulated by the Competition Law and it is not obligatory to appoint certain personnel as researchers.

CONTACT



Competition Law Counsel
Neyzar Ünübol

nunubol@kolcuoglu.av.tr



Associate
Esen Çakır

ecakir@kolcuoglu.av.tr