# The Output®

QUARTERLY BULLETIN

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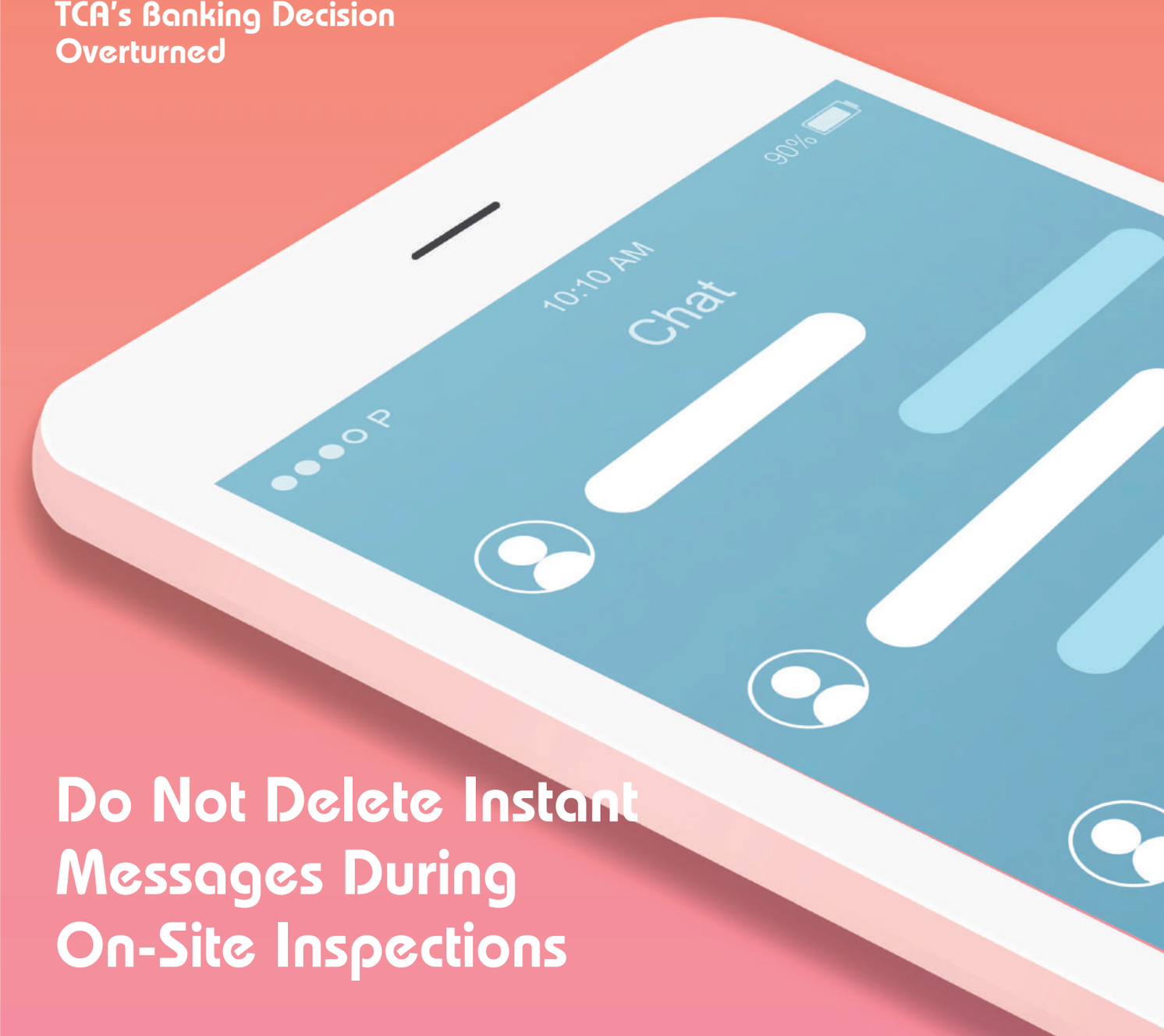


## Do Not Delete Instant Messages During On-Site Inspections

# FOREWORD

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Dear reader,

Another unusual year came to its end bringing us new COVID variant(s), experiences, clients, friends, law developments and interesting cases. While most of us have probably entered the new year with the list of optimistic and challenging 2022 resolutions, with this issue of the Output, we suggest travelling back in time to the 4th quarter of 2021.

The Vertical Block Exemption Communique in Turkey was amended introducing new (narrower) market share thresholds in line with the EU respective thresholds; the TCA experienced the termination of the preliminary investigation process due to successful commitment negotiations; several fines were imposed for hindering onsite inspections, including by way of deleting the Instant messages, and much more. We have also picked interesting cases delivered by the competition authorities of other jurisdictions, such as India, the Netherlands, Portugal, and the European Commission.

As regards the international trade issues, we draw your attention to the safeguard measures on the imports of "flat glasses" originating in Iran, as well as a requirement to register exports of all types of fertilizers – a measure that is aimed at ensuring the continuous supply of fertilizers in the agricultural sector in Turkey. Also, the dumping investigation into the imports of baby food with cereals originating in Croatia was concluded without any measures adopted, even though those had been dumped. According to the findings of the investigation, the dumping had not caused material injury or threat of material injury in the domestic industry.

The Data Protection Authority of Turkey published a very useful document clarifying how to proceed with PCR test and/or vaccine information requests within the framework of the Personal Data Protection Law. The main message here is that the personal data processing activities should not go outside of or exceed the purpose of protecting public security and public order.

The Special Focus of this issue is on ice-cream…with mixed "flavours", i.e., abuse of dominance, exclusionary practices, rebates, commitments, including commitments that were viewed by the TCA as the continuation of the infringement, etc.

We wish you and your beloved ones a very Happy 2022!

Kind regards,

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# In this issue:

# Amendments to Block Exemption Communiqué on Vertical Agreements

*On 5 November 2021 Block Exemption Communiqué No. 2002/2 on Vertical Agreements (**"Communiqué No. 2002/2"**) was amended with Communiqué No 2021/4, Amending the Block Exemption Communiqué on Vertical Agreements (**"Communiqué No. 2021/4"**), introducing new market share thresholds.*

As known, block exemption ensures that vertical restrictions which may constitute a violation of Article 4 of Law No. 4054 on the Protection of Competition (**"Turkish Competition Law"**) (such as non-compete obligation, or regional exclusivity) will not be regarded as a violation given that certain conditions are met, market share being a prominent one. According to the introduced amendments,

The market share threshold of the supplier with regards to the relevant market of the goods and services subject to the vertical agreement which the buyer purchases has been reduced from 40% to 30%,

- if the initial market share is less than 30% and then exceeds the threshold, but is still below 35%, the exemption will continue to be valid for the next two years following the year in which the market share threshold was first exceeded;
- if the initial market share is less than 30% but then exceeds 35%, the exemption will continue to be valid throughout the following year in which the market share threshold was first exceeded.
- These cannot be combined to exceed two calendar years.

A transition period has been set forth in order for undertakings to re-evaluate their practices that benefit from the block exemption. Accordingly, with Provisional Clause 3, agreements that currently benefit from block exemption but do not meet the new thresholds should be adjusted in compliance with the

legislation within six months from the enforcement date of the communiqué (i.e., until May 5, 2022).
The market share is calculated by utilizing the data of the previous year.

The market share includes all goods and services provided to the affiliated distributors for the purpose of sales.

While the new amendment is a step forward to align the Turkish competition law regime with the EU as the threshold stipulated within the EU's vertical block exemption regulation is also 30%, this also will narrow the scope in which Communiqué No. 2002/2 applies. It should be stated that undertakings falling out of scope with the new amendments may still apply for the individual exemption provided that they fulfil the criteria. Accordingly, as the scope of Communiqué No. 2002/2 narrows, this may lead to more individual exemption applications, causing the Turkish Competition Authority (**"TCA"**) to hold more decisive power over the market.

# The Person You are Trying to Reach is Unavailable, Please Try Again Later: Eti Fined Hindering On-Site Inspection

*On 8 November 2021 the TCA fined Eti Gıda San. ve Tic. A.Ş. (**"Eti"**) for hindering the on-site inspection conducted on their premises back in March 2021.*


During the on-site inspection conducted on Eti premises, the case handlers requested that Eti executives be interviewed prior to the initiation of the inspection, whereupon an Eti employee stated that no one else was present in the undertaking other than himself. Nevertheless, upon further inspection of the entry logs of the company, the Marketing Group Chair and Senior Category Manager had been present at the company from the start of the on-site inspection, but that information had been withheld from the case handlers. Eti stated that the respective entry logs solely show the time of "first" entry of an employee, and thus do not by themselves prove the absolute presence of the employee on the relevant premises.

However, the TCA concluded that entry logs were sufficient for establishing the standard of proof, thus the on-site inspection had been hindered/complicated by Eti. Accordingly, the TCA imposed on Eti an administrative fine of five per thousand of its 2020 turnover for hindering or complicating the on-site inspection.

# The Very First Decision to Terminate a Preliminary Investigation Process with Commitments is Up!

*While the preliminary investigation of the TCA conducted pursuant to Article 40 of the Turkish Competition Law concerning Türkiye Şişe ve Cam Fabrikaları A.Ş. ("Şişecam") and its subsidiary Şişecam Çevre Sistemleri A.Ş. ("Çevre Sistemleri") was ongoing, the undertakings applied to initiate the commitment process regarding the competitive concerns present in the case.*

A comprehensive commitment package was submitted following the commitment negotiations made upon the application of the relevant parties. The TCA unanimously decided that the commitment package provided was rendered binding as it would be sufficient in eliminating competitive concerns, and accordingly, the preliminary investigation was terminated without launching a full-fledged investigation. The commitment package is presented below:

During five years as of the service of the short decision of the TCA, purchase by Şişecam, Çevre Sistemleri, and other economic units under the body of Şişecam group (Şişecam Economic Unity) of unprocessed flat glass products (waste flat glass) used within the scope of the production of furnace ready cullet (FRC) from any undertaking which is established in Turkey but is outside the said economic unity (third parties operating in Turkey) will be terminated.

For two years as of the service of the short decision of the TCA, Şişecam Economic Unity will not purchase from any undertaking that is established in Turkey but outside the said economic unity (third parties operating in Turkey), unprocessed glass packaging products (waste glass package) used within the scope of the production of FRC. At the end of the two-year period, import being allowed, the purchase of waste glass package products will be limited to:

- 10,000 tons for the first year and 20,000 tons for the second year,
- 40,000 tons for the third year.

As of the service of the short decision of the TCA, Şişecam Economic Unity will terminate purchasing from undertakings that are established abroad and are outside the said economic unity (third parties operating abroad) of:

- waste flat glass products for five years,
- waste glass package products for two years.

During five years as of the service of the short decision of the TCA, the share of the amount of FRC purchased from a specific undertaking within the framework of Şişecam Economic Unity's FRC purchase from third parties will not exceed 35% in the total FRC purchased from third parties by Şişecam Economic Unity for each fiscal year.

The copies of notifications concerning the annulment of the supply contracts for waste glass made between Şişecam Economic Unity and third parties sent through a notary will be submitted to the TCA within 30 (thirty) days as of the service of the short decision of the TCA.

During five years as of the service of the short decision of the TCA, Şişecam Economic Unity will notify the TCA of the transactions to be realized concerning the main elements of recycling activities (facility, machinery and equipment, etc.), such as acquisition, and renting, so that the compliance of such transactions with the commitments are evaluated.

Independent audit reports related to compliance with the commitments will be submitted to the TCA every year regularly, starting one year after the reasoned decision of the TCA is notified.


# TCA's Banking Decision Overturned

*On 6 October 2021, the decision issued by the TCA regarding the allegation that 12 banks operating in Turkey had acted in violation of Article 4 of the Turkish Competition Law by agreeing and/or taking concerted practice to determine interest rates, fees, and commissions jointly for deposit, loan, and credit card services was overturned by the Council of State, Plenary Session of the Chambers for Administrative Cases (**"Plenary Session"**).*

In the TCA's infringement decision, it was concluded that the 12 banks had violated Article 4 of the Turkish Competition Law in their deposit, loan, and credit card services and imposed an administrative fine on them. Thereupon, the banks filed a lawsuit for the annulment of the decision, and the Ankara 2nd Administrative Court (first instance court) found the TCA's decision to be lawful and rejected the case. The 13th Chamber of the Council of State, which examined the file at the stage of rectification of the decision, stated that there was no demonstration by a sufficient standard of proof (beyond reasonable doubt) showing that all 12 banks operating in Turkey had acted in coordination within a single framework agreement or joint plan. Therefore, it reversed the decision of the first-instance court. The case came to the agenda of the Plenary Session after the first instance court resisted the reversal decision.

The Plenary Session examined whether a single ongoing violation had occurred as stated in the TCA's decision. Within this examination, it was stated that different banks agreed separately in different areas such as deposit services, housing, and vehicle loans, credit card services and public deposit services. It was stated that it could not be demonstrated that violations in these different areas had been carried out in line with a single framework agreement or joint plan within the scope of a single ongoing violation approach.

In this regard, it was concluded that some of the banks had participated only in the violation solely for a single service and that it was not lawful to hold all 12 banks responsible for all of the violations between the different banks regarding different sectors. For this reason, the decision of the TCA, which had been established within the scope of a single violation approach and which had not evaluated each service in which the relevant banks were involved in the violation separately, was overturned by a majority of votes.


# Do Not Delete Instant Messages During On-Site Inspections

*In this regard there are two similar decisions – Unmaş and İgsaş – that emphasize of the importance of not deleting the WhatsApp messages during the on-site inspections. The companies hindered the on-site inspection and accordingly the TCA imposed an administrative monetary fine of five per thousand of the 2020 turnover.*

In Unmaş, the case handlers found that certain WhatsApp messages had been deleted since these messages could not be accessed during the quick look procedure yet were found upon the use of forensic e-discovery tools. Unmaş argued that the legal advisors had been contacted upon the initiation of the on-site inspection and an informatory e-mail had been sent to the employees to not delete any messages or emails; however, minutes prior to sending of this very e-mail, unfortunately, the said employee had deleted the messages which were recovered thereafter. Nonetheless, the TCA dismissed this defence and concluded that the on-site inspection had been hindered/complicated and fined the company.

In Igsaş, upon the initiation of the on-site inspection, the case handlers informed İgsaş employees that no information, document, or correspondence should be deleted from the undertaking's computers, e-mails, or any fixed or portable devices containing data. İgsaş also was informed that deleting actions could be detected and that such actions could be considered as hindering or complicating the on-site inspection, regardless of the deleted content.

During the on-site inspection, however, when a sales and marketing specialist's phone was examined, it was discovered that the relevant employee has left the WhatsApp group chat related to business half an hour after the inspection and the screenshots proving the deletion of the relevant correspondences have been taken. Furthermore, it was revealed that 165 and 171 e-mails had been deleted from the e-mail accounts of two regional sales managers who were not present at the time of the inspection.

İgsaş claimed that they had assisted the case handlers throughout the inspection and the deleted e-mails had been related to general announcements such as the monthly meal menu or recruitment announcements and that when the relevant e-mails had been retrieved and examined, the correspondence was determined to have posed no concerns in terms of competition law. However, İgsaş's defences were dismissed, and it was concluded that access to potential evidence and findings had been complicated because of İgsaş employees' actions, and that attempts were made to hinder the on-site inspection. As a result, İgsaş received an administrative monetary fine of five per thousand of its 2020 turnover.

*1 Unmaş Unlu Mamuller Sanayi ve Ticaret A.Ş. (**"Unmaş"**), TCA's decision No 20-42/583-M*
*2 İstanbul Gübre Sanayi A.Ş (**"İgsaş"**), TCA's decision No 21-18/225-M*

## The Investigation Launched into Electronics Companies' Internet Sales Restrictions and RPMs

*On 27 September 2021 the TCA concluded its preliminary inquiry into Arçelik Pazarlama A.Ş. (**Arçelik**), BSH Ev Aletleri Sanayi ve Ticaret A.Ş. (**BSH**), Samsung Electronics İstanbul Pazarlama ve Ticaret Ltd. Sti. (**Samsung**), and LG Electronics Ticaret A.Ş. (**LG**) and the distributors of these undertakings, with respect to the allegation that they had violated Article 4 of the Turkish Competition Law by means of imposing a ban on internet sales to and/or determining the resale prices of authorized sellers.*

The TCA determined that the findings obtained as a result of the preliminary inquiry were serious and sufficient. Therefore, the TCA decided to initiate investigation against Arçelik, BSH, Samsung and LG as well as Gürses Kurumsal Tedarik ve Elektronik Tic. Paz. A.Ş. and SVS Dayanıklı Tük. Mall. Paz. ve Tic. Ltd. Şti.

The TCA›s stance on resale price maintenance (***RPM***) and restrictions on internet sales is that such practices constitute a per se violation of Article 4 of the Turkish Competition Law. Indeed, the TCA displays this approach in its recent decisions as well. In its decision No 21-11/154-116 dated 4 March 2021, the TCA evaluated the practices of Groupe SEB and İlk Adım in relation to resellers of small home appliances; and determined that restricting the internet sales of resellers constituted passive sales restriction, i.e., a violation under Article 4 of the Turkish Competition Law.

Likewise, the TCA maintained this approach in its decision No 21-22/266-116 dated 15.04.2021 in which it examined the practices of Hepsiburada.com and Anka Mobil in the context of most favored customer clause (***MFC***) and RPM practices. While the TCA did not impose any fine upon Hepsiburada.com, it determined that Anka Mobil was in violation of Article 4 of the Turkish Competition Law by way of RPM practices. The TCA evaluated that Anka Mobil put pressure on the companies to increase their prices by TRY 5 above the prices on Hepsiburada.com to keep the prices on Hepsiburada.com lower.

As it can be seen from the abovementioned decisions of the TCA, the RPM practices and restrictions on internet sales are considered as violations under Article 4 of the Turkish Competition Law. It is yet to be seen the outcome of the investigation initiated against electronics giants.


## Attorney-Client Privilege and In-House Counsels: The TCA's Approach

*On 30 November 2021 the TCA published its decision No 21-24/287-130 in which it clarified its approach towards the legal privilege. In particular, it confirms that e-mails of the in-house counsels do not benefit from the attorney-client privilege for they do not have the nature of correspondence with an independent lawyer and are deemed as conversations with the purpose of hiding current or future violations.*

In April 2021, the TCA conducted an on-site inspection at the premises of an e-commerce company DSM Grup Danışmanlık İletişim ve Satış Ticaret A.Ş.'de ("**Trendyol**"). During the inspection, the case handlers obtained 29 e-mails from the Compliance and Risk Director's computer despite the in-house counsels' protest stating that those documents benefitted from the attorney-client privilege. The case handlers also obtained documents from the computer of the assistant manager of Human Resources and the in-house counsel also argued that 25 pages of those documents should benefit from attorney-client privilege.

Normally, just as in other jurisdictions, the principle of confidentiality of information and documents arising from the lawyer's professional relationship with their client provides protection to undertakings and individuals by preventing the disclosure of their correspondence with their lawyers and the information they give to them. According to this principle, correspondence between the client and an independent lawyer who does not have an employee-employer relationship with the client, for the purpose of exercising the client's right of defence, benefits from such protection.

The TCA concluded that the contents of the obtained documents did not have the nature of correspondence with an independent lawyer for the purpose of exercising the right of defence. For that reason, the TCA rejected the undertaking's request for the return of the documents.

# Claim for Inability to Pay in Ethanol Cartel Settlement with the EC

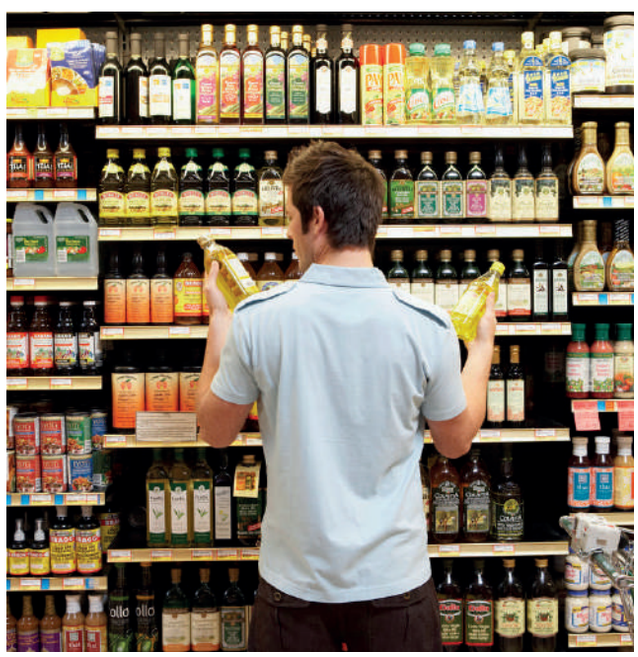

*On 10 December 2021 the EC delivered its decision in relation to the Spanish ethanol producer Abengoa imposing EUR 20 million fine on it for participation in the cartel in the European ethanol market. The amount of fine is a result of the company's settlement with the EC, as well as a claim for inability to pay.*

Ethanol market is relevant for the Green transition as it can be used as a biofuel for motor vehicles. During 2011- 2014 the cartel influenced ethanol benchmarks in the market as reference prices in the industry. By coordinating its trading behaviour with other companies on a regular basis, Abengoa could influence the revenues it received from ethanol sales. Abengoa's ethanol traders had illegal contacts in the form of chats with individuals at other companies.

In setting the level of the fine, the EC considered the Abengoa's sales value in the EEA, the nature of the infringement, its geographical scope, duration and Abendoa's claim for inability to pay (as envisaged by point 35 of the Guidelines on fines). Following a careful assessment of the financial situation of the company, including the restructuring plans, the EC granted a reduction of the fine. Additional 10% reduction was granted due to Abengoa's settlement with the EC via acknowledgement of its participation in and liability for the infringement.

# Portugal Fines Supermarkets and Drinks Supplier EUR 92.87 million for Hub-and-Spoke Cartel

*On 3 November 2021 the Portuguese Competition Authority (Autoridade da Concorrência - **"AdC"**) fined four supermarket chains, two individuals, and a common supplier more than EUR 92.87 million for a hub-and-spoke cartel.*



According to the AdC, the chain stores Modelo Continente, Pingo Doce, Auchan, Intermarché, two managers of Modelo Continente, and supplier Super Bock had engaged in a cartel for more than 12 years, between 2003 and 2016. It was stated that the undertakings had been able to align their prices without direct communication with the help of their common supplier, which had been proven with online conversations.

Previously in March 2019, the AdC had issued three chargesheets alleging hub-and-spoke cartel conduct between drinks suppliers and supermarket chains, and in December 2020, it had issued two decisions - in part concerning the same retailers - that had imposed a total monetary fine of EUR 303.7 million on six supermarket chains, two beverage suppliers, and two individuals for hub-and-spoke price-fixing.

# No Way Out for Google: EC's EUR 2.42 billion Fine Upheld by the General Court

*In June 2017, the European Commission (**"Commission"**) fined Google a then-record EUR 2.42 billion for abusing its dominant position as a search engine by giving an illegal advantage to its own comparison-shopping service. On 10 November 2021 the decision appealed by Google was upheld by the General Court of the EU (**"Court"**); it may still be appealed to the Court of Justice of the European Union.*


Within the scope of its evaluation, the Court determined that self-preferencing practices, which were described as "active favouring" and "active exclusionary practices," constitute an abuse of dominance. Furthermore, the Court reiterated that with respect to objective justifications for anticompetitive behaviour, the burden of proof rests on the undertaking relying on such justifications. However, it was concluded that Google had failed to show that its conduct had been objectively necessary or that it had genuinely improved Google's service to the benefit of users.

The Court confirmed the Commission's assessment that merchant platforms are not part of the market for comparison-shopping services and therefore endorsed the Commission's view that there is little competitive pressure on Google from merchant platforms. With regards to the market for general search services, the Court considered that the Commission had not established that Google's conduct had any anticompetitive effects and therefore, annulled the finding of an infringement in respect of that market alone. As this annulment had no impact on the total amount of the fine, there was no need to modify the fine.

## Samsung Fined for Price "Recommendations" in the Netherlands

*On 29 September 2021 the Netherlands Authority for Consumers and Markets Authority (**"ACM"**) fined electronics company Samsung EUR 40 million for influencing the online prices of television sets from January 2013 to December 2018. Samsung's "price recommendations" undermined competition at the retail level and resulted in higher prices for consumers.*

Calling them "price recommendations," Samsung increased the prices of retailers. Samsung monitored retailers' online prices and approached retailers who were selling at lower prices than Samsung wanted, asking them to increase their prices. Findings from on-site inspections also showed that Samsung requested retailers increase their prices while saying that it had issued similar warnings to other retailers. Among the findings were documents showing that the retailers had complained about their low-priced competitors to Samsung and that Samsung had acted by taking these complaints into account. In this context, it was underlined that the retailers knew that if they followed Samsung's recommendations, they would not remain in a position with high prices in the market. Accordingly, it was concluded that Samsung had a direct impact on competition among competitors.

In coordination with retailers in television prices, Samsung prevented the prices of the new television models from falling rapidly after their introduction to the market. In this way, while Samsung and retailers maintained their profit margins, consumers had to buy products at high prices. Such anti-competitive price coordination resulted in a fine of EUR 40 million for Samsung.

## Beer Cartel Uncovered in India

*On 24 September 2021 the Competition Commission of India ("CCI") imposed a fine of USD 102 million on United Breweries, which is controlled by Heineken, and USD 16 million on Carlsberg's local unit for cartelization of beer prices in India. The All-India Brewer's Association (**"AIBA"**) also was penalized for facilitating the cartel.*

The decision was taken after a long investigation initiated in 2018 by CCI's on-site inspections in the offices of the brewers. The inspections took place after rival Anheuser Busch InBev (**"AB InBev"**) informed the watchdog that it had discovered an industry cartel in India after acquiring SABMiller Plc's business.

According to the investigation, key management personnel emailed competitors about price hikes they planned to propose to state authorities in various states and attempted to coordinate price spikes. Representatives from the beer companies met with excise authorities under the umbrella of the AIBA to discuss potential quotes and the way forward with state excise departments. This gave them a better chance of having their suggested price hikes approved. The AIBA also was penalized for facilitating discussions between breweries on a variety of topics, including pricing.

United Breweries, Carlsberg, and AB InBev all requested a penalty reduction. Since AB InBev explained the nature of the cartel and supplied proof of email conversations between senior executive staff at an early stage in the investigation, it was offered a penalty reduction of 100%. United Breweries' final penalty of USD 102 million and Carlsberg's penalty of USD 16 million each included penalty reductions of 40% and 20%, respectively, for cooperating with the CCI's investigation. Last, some of the key management personnel also were fined individually.

# Exclusionary Practice as Abuse of Dominance: The AG's Opinion in Servizio Elettrico Nazionale

*On 9 December 2021, the Advocate General's Opinion in Case C-377/20 Servizio Elettrico Nazionale and Others was published. It sets out the criteria for classifying an exclusionary practice as an abuse of a dominant position[1]. The guidance provided may prove useful in assessing conduct relating to the use of data under Article 102 TFEU.*

The Autorità Garante della Concorrenza e del Mercato ("**AGCM**") conducted an investigation into ENEL SpA, ("**Enel Group**"), which holds a monopoly in energy production in Italy, on the grounds that three companies of the Enel group schemed, in essence, to make it more difficult for competitors to enter the liberalised market. After deciding that those companies had abused their dominant position and imposing a EUR 27,529,786.46 of administrative fine on the companies, the Enel Group brought an appeal before the Consiglio di Stato (Council of State, Italy), which referred the case to the CJEU for a preliminary ruling clarifying the interpretation and application of Article 102 TFEU in relation to exclusionary practices.

According to the Advocate General in this case, the concept of abuse is found on the objective assessment of the capacity of conduct to restrict competition. Furthermore, with regards to the classification of a conduct to be abusive, alongside it being capable of having a restrictive effect on the relevant market, demonstrating that a dominant undertaking has used methods other than those that are part of 'normal' competition is not an 'additional element of illegality' over and above the requirement to demonstrate an anticompetitive exclusionary effect. The two requirements create part of a single assessment.

The Advocate General also provides a detailed answer to the question of whether an exclusionary practice consistent with "competition on the merits" is linked to its factual, legal, and economic context. He suggests the classification as follows:

- The 'special responsibility' applies to all dominant undertakings, including incumbent operators that previously held a monopoly.
- Conduct that clearly departs from normal market practice may be regarded as a relevant factor to be considered in the assessment of whether there is an abuse.
- Without any intention to be exhaustive, conduct that does not fall within the concept of 'competition on the merits' is characterized generally by the fact that it is not based on obvious economic or objective reasons.
- This concept refers, generally, to a competitive situation in which consumers benefit through lower prices, better quality, and a wider choice of new or improved goods and services.

The Advocate General also states that Article 102 TFEU must be interpreted as being intended to prohibit not only exclusionary practices that may cause direct damage to consumers, which is the ultimate objective of that provision, but also conduct that may adversely affect consumers indirectly because of its effect on the structure of the market. It is for the competition authorities to show that such an exclusionary practice undermines the effective competition structure, while at the same time verifying that it is also liable to cause actual or potential harm to those consumers.

Now it is up to the CJEU to decide of the case. It will be interesting to see follow and see to which extend the CJEU would follow the Advocate General's Opinion on this important issue.

*1 Advocate General Rantos sets out the criteria for classifying an exclusionary practice as an abuse of a dominant position, Press release No 220/21 Luxembourg, 9 December 202, CJEU, https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-12/cp210220en.pdf*

# Expiry Review Investigation into the Imports of Glass Fibre Reinforcement Materials

*On 30 October 2021 the Ministry of Trade (**"Ministry"**) initiated an expiry review investigation concerning the anti-dumping duties on imports of "glass fibre reinforcement materials"[1] (**"concerned products"**) originating in the People's Republic of China (**"China"**) through Communiqué No. 2021/49 on the Prevention of Unfair Competition in Imports.*

The original investigation that constituted the basis of the expiry review investigation regarding the imports of the concerned products originating in China was initiated on 22 January 2010 through Communiqué No. 2011/1 on the Prevention of Unfair Competition in Imports. Within the scope of the original investigation, the Ministry calculated dumping margins ranging between 24.5% and 53.6%. Additionally, during the original investigation, the argument of one of the interested parties that it should be subject to market economy treatment was rejected by the Ministry on the following grounds:

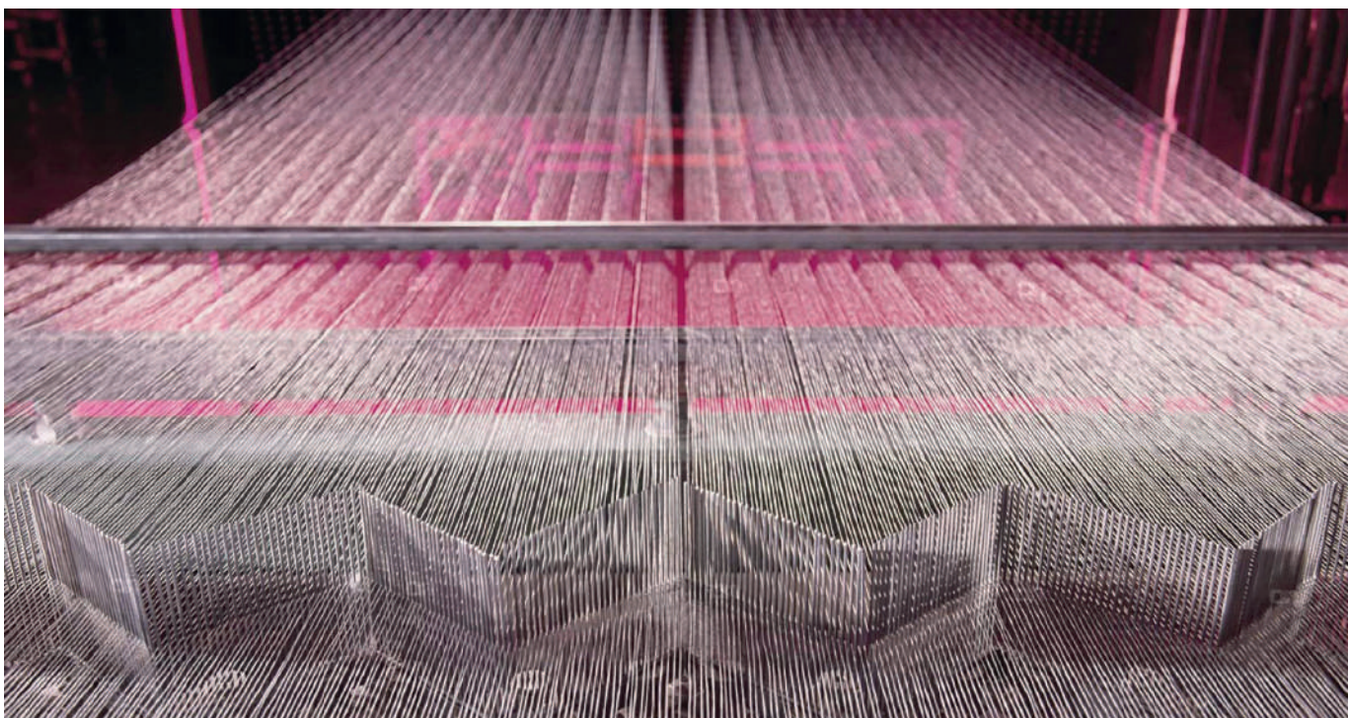
- The hukou system restricts the free movement of workers, which is one of the main inputs in the production of the concerned product, and prevents the formation of workers' fees in the market conditions.
- There is no privately-owned land in the area where the concerned product is produced. As the land allocation is made temporarily by the government authorities, the concerned companies do not own the land; rather, they have the right to use the land.
- The majority of the concerned company's shares are owned by the state, the majority of the board of directors consists of government representatives, and the state's approval is required to make decisions.

The Ministry observed that the domestic industry's economic indicators such as production, capacity utilization rate, sales, employment and cash flow had deteriorated. The Ministry applied the "lesser duty rule" and imposed anti-dumping duties at a level lower than the margin of dumping since this level was adequate to remove injury before the domestic industry. As a result of the original investigation, anti-dumping duties varying between 20.20% and 23.75% were imposed on the imports of the concerned product.

Upon the complainant's application for an interim review claiming that the existing measure was no longer sufficient to counteract the dumping, which was causing injury, the Ministry initiated an interim review investigation on 25 April 2014 through Communiqué No. 2014/13 on the Prevention of Unfair Competition in Imports. As a result of the interim review investigation concluded through Communiqué No. 2015/5 on the Prevention of Unfair Competition in Imports, the Ministry decided to increase the applicable anti-dumping duties from 20.20%-23.75% to 24.50%-35.75%.

Furthermore, in the subsequent expiry review investigation, which was concluded on 3 November 2016 through Communiqué No. 2016/48 on the Prevention of Unfair Competition in Imports, the Ministry held that the expiry of the measures likely would result in a continuation or recurrence of dumping and injury and decided the continuation of the applicable measures at the same rates for another five years. It is also important to note that there were two instances concerning this case where the Ministry decided to exclude certain types of the concerned product from the scope of the measure, (i) in 2015, "the ones used as insulators for tubes and pipes" and (ii) in 2017 "the ones glass wools in the type of perforated disc used for the grinding and cutting discs." Within the scope of the expiry review investigation at hand, the Ministry will examine whether the expiry of the measures would be likely to result in a continuation or recurrence of dumping or subsidy and injury.

1 Classified under the CN Codes 7019.11.00.00.00, 7019.12.00.00.00, 7019.19.10.00.00, 7019.19.90.00.00, 7019.31.00.00.00, 7019.90.00.10.00 and 7019.90.00.30.00.



# New Safeguard Measures into Imports of Flat Glasses

*On 20 November 2021 a Presidential Decree was promulgated which foresees the imposition of safeguard measures on the imports of "flat glasses"[2] (**"concerned products"**) originating in Iran.*

The safeguard measure imposed on the imports of concerned products originating in Iran, which currently is implemented in the form of an additional financial obligation of USD 44/ton in the last year of the first extension period, will expire on 11 December 2021. Within this framework, the Ministry of Trade initiated a safeguard investigation concerning the imports of the concerned products through Communiqué No. 2021/5 on the Safeguard Measures for Imports on 26 June 2021. The investigation was initiated pursuant to an application by domestic producers demanding an extension of the duration of the safeguard measures.

It was seen that (i) imports originating from Iran increased significantly in the last period after the implementation of the current safeguard measures, (ii) a slight deterioration had occurred in the economic indicators of domestic producers in the last year of the review period, and (iii) the share of Iran's exports to Turkey within the total exports had increased.

Accordingly, the following additional financial obligations were approved by the Turkish Presidency with Presidential Decision No. 4824:

Within the scope of its assessment, the Ministry observed that (i) the unit prices of the imports originating in Iran were much lower than the average unit prices; (ii) no price undercutting had been observed in 2020 whereas imports originating in Iran had caused price undercutting in the 2017-2020 period; (iii) imports from Iran had caused price underselling in 2017 and 2019 but no price underselling had occurred in 2018 and 2020; (iv) there was a slight increase in domestic sales in 2020 where domestic production and export sales had decreased significantly; and (v) a decrease in stocks and production capacity had been observed in 2020. Domestic producers had remarked that during the application period of the safeguard measures, they had increased their product diversity and had made significant progress in adjusting to the competition; thus, an increase in the total domestic production capacity was expected by 2021.

2 Classified under CN Codes 70.04, 70.05 and 70.06.

| CN Code | Additional financial obligations | | |
|---|---|---|---|
| | First Period 12.12.2021-11.12.2022 | Second Period 12.12.2022-11.12.2023 | Third Period 12.12.2023-11.12.2024 |
| 70.04 | 42 USD/Ton | 40 USD/Ton | 38 USD/Ton |
| 70.05 | | | |
| 70.06 | | | |

# No Injury, No Duty: Dumping Investigation into the Imports of Baby Food with Cereals Terminated with No Measures

*The Ministry decided to terminate the dumping investigation concerning the imports of "baby food with cereals"[1] (**"concerned product"**) originating in the Republic of Croatia ("**Croatia**") without any measures through the Communiqué No. 2021/45 on the Prevention of Unfair Competition in Imports. The investigation was initiated through Communiqué No. 2020/7 on the Prevention of Unfair Competition in Imports on 14 April 2020.*

As a result of the examination, it was concluded that while imports from Croatia had not resulted in price undercutting and price underselling, price depression had been observed from 2017 to 2019. It was determined that the domestic sales, production capacity, and production employment of the domestic industry had experienced a decrease in the mentioned period. The evaluation of the economic indicators of the domestic industry indicated that while domestic sales and production capacity of the domestic industry had decreased, an increase in production, export sales, product cash flow, efficiency and capacity utilization rate had occurred. In addition, it was observed that profitability from domestic sales and total sales had increased, and stocks decreased during the examined period. Consequently, the Ministry concluded that no deterioration had occurred in the economic indicators in general. On the other hand, consequent to the evaluations within the scope of dumping, a dumping margin of 36.82% of the CIF price was observed.

It was determined that overall imports had decreased while imports originating in Croatia showed an increase from 2017 to 2019. On the other hand, the Ministry concluded that imports originating in other countries had decreased as well, whereas, in terms of the unit price, an increase in the imports originating in other countries and a decrease in the imports originating in Croatia had occurred. In terms of the evaluation regarding the threat of material injury, the Ministry observed a decrease in the quantity of imports and an increase in the import unit prices in 2020. In this regard, it was evaluated that the imports of the concerned product had not caused material injury or threat of material injury in the examined period.

As a result, the Ministry concluded that the import of the concerned product originating in Croatia had been dumped but had not caused material injury or threat of material injury in the domestic industry. Therefore, the dumping investigation was concluded without any measures.

Furthermore, in the subsequent expiry review investigation, which was concluded on 3 November 2016 through Communiqué No. 2016/48 on the Prevention of Unfair Competition in Imports, the Ministry held that the expiry of the measures likely would result in a continuation or recurrence of dumping and injury and decided the continuation of the applicable measures at the same rates for another five years. It is also important to note that there were two instances concerning this case where the Ministry decided to exclude certain types of the concerned product from the scope of the measure, (i) in 2015, "the ones used as insulators for tubes and pipes" and (ii) in 2017 "the ones glass wools in the type of perforated disc used for the grinding and cutting discs." Within the scope of the expiry review investigation at hand, the Ministry will examine whether the expiry of the measures would be likely to result in a continuation or recurrence of dumping or subsidy and injury.

1 Classified under CN code 1901.10.00.19.00.

# Export of Fertilizers Now Subject to Registration

*Exports of certain types of fertilizers became subject to registration on 4 September 2021 through Communiqué No. 2021/7 Amending Communiqué No. 2006/7 on Exported Products Subject to Registration. As of 12 October 2021, exports of all types of fertilizers became subject to registration as per Communiqué No. 2021/8 Amending the Communiqué No. 2006/7 on Exported Products Subject to Registration.*

In this context, it should be remembered that on 4 September 2021 the Ministry announced its decision to subject the exports of certain types of fertilizers, namely DAP, NP (20-20-0), and NPK (15-15-15)), to registration with the consideration of ensuring the continuous supply in the agriculture sector in Turkey. Through a Communiqué dated 12 October 2021 and numbered 2021/7 Amending Communiqué No. 2006/7 on Exported Products Subject to Registration, the Ministry decided to include "fertilizers" classified under CN Codes 3101, 3102, 3103, 3104, and 3105 on the List of Exported Products Subject to Registration. In this regard, it should be noted that

before exporting the fertilizers, exporters are required to register their customs declarations to the General Secretariat of the relevant Exporters' Associations. As a rule, customs declarations registered by the General Secretariat of Exporters' Association must be submitted to the customs authorities within 30 days from the date of the Exporters' Association's approval.

# PCR Testing Results and Vaccine Information Inquiries in Light of Data Protection in Turkey

*On 28 September 2021 the Turkish Data Protection Agency ("**DPA**") published a public announcement on how to proceed within the framework of the Personal Data Protection Law ("**Law**") No. 6698 with PCR test and/or vaccine information requests.*

Due to the Covid-19 virus and to protect public health, it has become obligatory in many countries to process Covid-19 vaccine information and/or PCR test results in areas where people will be held collectively, including workplaces.

In Turkey, the Ministry of Interior also has ordered people who want to attend activities such as concerts, cinemas, theatres, and take public transportation to provide Covid-19 vaccine information and/or a PCR test with negative results to minimize the risk posed by the epidemic in terms of public health and public order. A letter sent by the Ministry of Labor and Social Security stated that within the scope of protective and preventive measures for health and safety risks that may be encountered in workplaces, workers who are not vaccinated against Covid-19 may be required by the workplace/employer to have a mandatory PCR test once a week and that the test results will be recorded to take the necessary actions.

The DPA noted that information about an individual's health status, such as analysis, imaging, test, report, and vaccination status has the quality of personal health data and falls under the category of sensitive personal data as defined by Article 6 of the Law. As a result, such information should be processed in line with Article 6 of the Law's processing conditions. However, it was underlined that due to the Covid-19 pandemic, it is necessary to process the data for the protection of public health, public security, and public order. According to Article 28, the provisions of the Law will not be applied in case of processing personal data within the scope of preventive, protective, and intelligence activities carried out by public institutions and organizations that have been authorized by the law to ensure national defence, national security, public safety, public order, or economic security.

The DPA concluded that the processing of personal data within the scope of activities carried out by public institutions and organizations authorized by law to prevent the contagiousness of the pandemic, which threatens public security and public order, should be considered within the scope of Article 28 of the Law. However, personal data processing activities should not go outside of or exceed the purpose of protecting public security and public order.

1 Maykim Yağ ve Kimya Sanayi Ticaret A.Ş., Maysa Yağ Sanayi A.Ş., Intertank Lojistik Sanayi ve Ticaret A.Ş., Maypa İç ve Dış Ticaret A.Ş., Oleo Yağ ve Kimya Sanayi Ticaret A.Ş., Unimar Pazarlama Ticaret A.Ş. and Enviro Yağ ve Enerji Sanayi Ticaret A.Ş.

# Data Infringement Notices of the Turkish Data Protection Authority

***DPA** published the data infringement notices of four companies in relation to the data breaches of approximately 16,000 related persons, excluding the data breaches in which no estimates as to the number of affected related persons had been stated (covering 26 October – 11 November 2021).*

As per Article 12(5) of the Personal Data Protection Law ("**KVKK**"), the data controller has the obligation to notify the DPA and data subjects in case the processed personal data unlawfully obtained by third parties. Accordingly, (i) May Group , (ii) Media Markt Turkey Ticaret Limited Şirketi, (iii) Hedefevim Gayrimenkul ve Otomotiv Tic. A.Ş., and (iv) İzmir Bakırçay University notified the DPA as to the detected data breaches, which also include cyber-attacks.

Further to the relevant notices, the relevant breaches are being investigated and published on the DPA's official website. Consequently, the companies may be subject to administrative fines ranging between TRY 29,503 and 1,966,862 in case the DPA decides that the relevant companies caused data breaches due to their failure to fulfil the obligations regarding data security in accordance with Article 12 of the KVKK.

# The Right to be Forgotten in Turkey

*In October 2021, the Turkish DPA published Guidelines on the Right to be Forgotten ("**Guidelines**"). The right to be forgotten concerns the right to request the removal of access to personal data. In fact, the right to be forgotten is associated with the right to protect the honour of an individual by restraining access to the personal data of an individual by third parties.*

The Guidelines evaluates the right to be forgotten specifically in terms of the results on the search engines. The right to be forgotten is evaluated under Law No. 6698 on Protection of Personal Data ("**DP Law**") and the Personal Data Protection Board's ("**Board**") decision No 2020/481 dated 23 June 2020 ("**Decision**") on several applications submitted before the DPA regarding the requests of removal of results containing individuals' personal data from search engines.

Data subjects should initially apply to the relevant search engine for their requests of removal of search results from index, and in the event that the data controller declines or fails to respond the request, data subjects can apply to the Board along with the judicial bodies.

The Guidelines further notes that the right to be forgotten is not an absolute right, accordingly it can be requested by the data subjects under certain conditions where the relevant data is inaccurate, unsuitable, irrelevant or disproportionate for the purposes of relevant data processing. The Guidelines provide the following criteria determined within the Decision which should be initially considered by the search engines in case data subjects request the removal of certain results from search index:

- Whether the data subject plays an important role in public life: Any request pertaining to right to be forgotten raised by individuals playing a role in public life (i.e. politicians, businesspeople, famous artists and athletes, etc.) would be less likely to be accepted. However, removal requests for data pertaining to private life would be more likely to be removed from search results.
- Whether the subject of the search result is a child: In case the data subject is underage at the time of publication of relevant data, the principle of "best interest of the child" should be considered.
- The accuracy of the content of the information: It should be evaluated whether the published information reflects the truth or creates an inaccurate and misleading impression about the data subject. It is noted also that the burden of proof lies on the data subject in case of any dispute on the accuracy of the information.
- Whether the information pertains to one's business life: The data regarding a data subject's business life would be less likely to be removed from search engines.
- Whether the information is of insulting, derogatory, slanderous nature regarding the data subject: In case the data controller rejects a data subject's request of removal of the links containing insulting, derogatory or slanderous statements, it would be more appropriate to resolve this issue through the courts instead of submitting a complaint to the Board.
- Whether the information is of the nature of sensitive personal data: Such requests are more likely to be accepted. With regards to the sensitive personal data of public figures, the public interest in disclosure of such data might also be evaluated.
- Whether the information is up to date: The elapsed time may decrease the relevancy of the content and its up-to-date nature.
- Whether the information poses a risk for the data subject: In case the relevant information lead to risks such as identity theft or being tracked, the information would be more likely to be removed from the search results.
- Whether the original content covers data processed within the scope of journalism: A balance between the constitutional right to request the protection of honour and reputation and the freedom of press as a reflection of freedom of speech should be pursued.
- Whether the information relates to a criminal offense: Parameters such as the date of the relevant crime and gravity of the crime should be evaluated on the basis of each concrete case.

To sum up, data subjects may request from the search engines for the removal of the relevant results from the index in line with the procedures and principles set forth under Article 13 of the DP Law and Communiqué on the Principles and Procedures for the Request to Data Controller. Data subjects may also address their complaints to the Board in case the data controller rejects the data subject's request, provides unsatisfactory response or does not provide any response in certain period in accordance with the Article 14 of the DP Law.

# Phone Calls about Digiturk Campaigns as a Form of Illegal Personal Data Processing

*The DPA detected a violation with its decision No 2021/1210 dated 2 December 2021 regarding the processing of a mobile phone number, which is a form of personal data, by calling and sending messages to inform consumers about Digiturk campaigns.*

The complainant was called from three different numbers with information purposes about Digiturk campaigns. A message was also sent to the complainant from another number for the purpose of advertising and marketing Digiturk services. The complainant claimed that he/she had not given his/her explicit consent for the processing of his contact information by sending commercial electronic messages, and hence the personal data had been processed unlawfully.

Within the scope of the investigation, it was concluded that Digiturk had not played a role in obtaining the complainant's phone number. It was understood that one of the phone numbers that had made a call to the complainant belonged to a Digiturk dealer, and the other two belonged to M.D. (person's censored name), who operated as a subcontractor call center of this dealer. M.D. stated that the complainant's telephone number had been obtained by the method of number derivation before the effective date of Law No. 6563 on the Regulation of Electronic Commerce and that it should be evaluated within the scope of this law. This argument was not accepted because the communication channels used for sending commercial electronic messages are in the nature of personal data and therefore must also comply with the Turkish Data Protection Law.

It also was determined that the phone that sent the message to the complainant belonged to M.A. (person's censored name). On the other hand, he claimed that in response to an advertisement on his social media accounts, the complainant had filled out a form voluntarily and therefore he had given explicit consent for the processing of his/her personal data. However, DPA concluded that there was not sufficient evidence that the form submitted by the M.A. had been filled in by the complainant, hence it could not be accepted as an explicit consent in accordance with the Data Protection Law.

The DPA emphasized that M.A. and MD were considered as data controllers; Digiturk and its dealer were not. Hence, it was decided to impose administrative sanctions on M.D. and M.A., together with an obligation to destroy the complainant's personal data.

# A Closer Look on Exclusivity Practices in Ice Cream Market in Turkey

*by Caner CESIT, Bahadır ASLAN, Mehmet Taha COSKUN*

## 1.Introduction

The *Unilever / Algida* case is a good example of the Turkish Competition Authority's approach to the abuse of dominance through the use of the exclusionary practices. The case of significance due to its evaluations as to competition compliance, commercial strategy, and commitment procedures. It reiterates that dominant undertakings should be extremely careful when determining their commercial strategies. According to the TCA's analysis of rebate systems, even a limited effect is sufficient to find an abuse of a dominant position. The case also emphasizes how skillfully the commitment process should be carried out. As sometimes (just like in case with the Unilever's commitment to change its rebate system) the commitments may be viewed as the continuation of the competition law violation.

Below we analyze in detail the Turkish Competition Authority's (**"TCA"**) reasoned decision imposing an administrative fine of TRY 480,217,217 (EUR 77,624,758) on Unilever Sanayi ve Ticaret Türk A.Ş. (**"Unilever"**) for violation of Article 4 and Article 6 of the Law No. 4054 of Turkey on the Protection of Competition (**"Competition Law"**) . Unilever was found to be in violation due to abuse of its dominant position in the industrial ice cream market by exclusionary practices and the non-compete obligation imposed on Getir Perakende Lojistik A.Ş. (**"Getir"**), an e-commerce customer of Unilever.

## 2. Background

Before delving into the details of the TCA's infringement decision, the TCA's decision dated 15.05.2008 and numbered 08-33/421-147 (**"2008 Decision"**) should be analyzed in general due to its link with the infringement decision. In the 2008 Decision, the TCA examined whether agreements with non-compete obligations between undertakings operating in the industrial ice cream market and stores should benefit from the Communiqué No. 2002/2 on Block Exemption on Vertical Agreements (**"Vertical Block Exemption Communiqué"**).

Accordingly, it was found that effective competition in the industrial ice cream market was prevented by the exclusivity clauses in the agreements Algida and/or its distributors signed with the stores as well as their practices that led to *de facto* exclusivity. To establish effective competition in the industrial ice cream market, Algida was prohibited from signing agreements including non-compete obligations with stores, except Algida Shops, or from engaging in activities leading to *de facto* exclusivity.

### *2.1. Evaluations within the Scope of the Investigation*

2.1.1. Non-compete Obligation Imposed on Getir

Within the scope of its investigation the TCA has reviewed the *"E-Commerce Cooperation Agreement"* (**"Agreement"**) between Unilever and Getir. Getir provides a type of online supermarket service through its website and mobile application used by customers to purchase fast moving consumer goods. Getir also serves as a store that signs agreements with restaurants to market and sell their products.

The TCA paid special attention to the non-compete obligation and duration provisions (implicit renewal) included in the Agreement as the 2008 Decision banned all agreements with non-compete obligations Unilever and/or its distributors signed with final stores. The non-compete obligation included in the Agreement is as follows:

> *"For the duration of the agreement, Algida brand ice cream products or other products explicitly authorized in writing by Unilever shall exclusively be sold within the area of the business."*

Although both Unilever and Getir stated that the phrase "within the area of the business" indicated "inside Algida cabinets", considering (**i**) that chain stores agreements signed between Unilever and chain stores explicitly include the phrase "inside Algida cabinets" without any ambiguity, (**ii**) that Panda, a competitor of Algida, expressed that Getir refused to work with Panda stating it worked exclusively with one of the actors in the market, and (**iii**) that Getir did not sell Algida's competitors' products before the Agreement was amended on November 25, 2019 and started working with Golf on July 2020, the TCA has determined that "within the area of the business" can in no way be understood to refer to "ice cream cabinets".

It is seen from the duration provision below that the non-compete obligation in the Agreement signed with Getir does not fall under the scope of the Vertical Block Exemption Communiqué as it can be implicitly renewed:

> *"The Contract herein shall become effective on the date of signature, and shall automatically renew under the same terms and conditions for one-year periods unless otherwise notified in writing by the Parties 15 days in advance."*

In its assessment of the alleged violation of Article 4 of the Competition Law, referring to its 2008 Decision, the TCA reminded that Unilever's exclusivity requirements and practices thereof, i.e., due to the agreements it signed with the stores, were prohibited under this decision given that these practices constituted an infringement of effective competition in the industrial ice cream market.

Subsequently, the TCA concluded that with the Agreement signed between Unilever and Getir executed on June 29,

1 In the calculation of the fines in terms of EUR, the average buying rate of exchange of the Central Bank of Turkey for the financial year is taken into consideration as the rate of exchange. For 2019, this rate was EUR 1 = TRY 6.35.

2 It was published on the TCA's website on May 20, 2021 https://www.rekabet.gov.tr/Karar?kararId=88304185-0aa9-4758-b654-09ebd5fd24a0

2015, which had been in force for 4 years and 5 months until it was amended via an additional protocol (on November 25, 2019), Unilever imposed a non-compete obligation, and thus, prevented the sale of its competitors ice cream products through the Getir platform. Therefore, Unilever constituted a violation of the TCA's 2008 Decision as well as Article 4 of the Competition Law.

2.1.2. Dominant Position Analysis

To determine whether Algida holds a dominant position in the industrial ice cream market and its sub-categories, the TCA has considered three criteria: (**i**) market positions of Algida and its competitors, (**ii**) barriers to entry and expansion in the market, and (**iii**) bargaining power of the buyers.

It is first evaluated that Algida's market share is providing a strong presumption that Algida is holding a dominant position in the industrial ice cream market and also, Algida has maintained its current high market share for nearly 20 years.

As to barriers to entry and expansion in the market, it is determined that there were no successful entrants into the market except Golf, and many smaller-scale firms left the market in the past 20 years. It is also stated that the existence of barriers to growth in the market is indicated by the unchanging market position of the competitors throughout the years and the increase in Algida's market share.

Regarding the buyer power, it is evaluated that a level of buyer power that could create sufficient amount of competitive pressure against Algida does not exist and taking into account Algida's brand recognition, it would be impossible for stores to remove Algida's products from their inventory due to consumers' strong demand for them. Consequently, it was decided that Algida held dominant position in the industrial ice cream market, as well as its sub-categories the impulse ice cream and take-home ice cream markets.

2.1.3. Assessment of Cabinet Exclusivity Stemming from Borrowing and Use Agreements with Stores

In its decision, the TCA has determined that the coolers at the stores installed through distributors belonged to Unilever and they were delivered to the stores/customers within the scope of a borrowing and use agreement. In its assessment of the alleged violation of Article 4 of the Competition Law, the TCA has evaluated whether cooler exclusivity provisioned in these "Borrowing and Use Agreements" leads to store exclusivity. The cooler exclusivity provision in the relevant agreements is as follows: "The seller shall accept and undertake to use the cabinet solely and exclusively for the sale and storage of Unilever's varieties of ice cream..."

It is stated that the coolers provided to the stores under borrowing and use agreements have an important function due to their effect of causing *de facto* exclusivity, that this exclusivity effect is emerged for retail stores smaller than 100 m² as these sales points have no space to place another cooler in order to sell competing products, and that the main factor in turning cooler exclusivity into *de facto* exclusivity is the available space of the store concerned. The reason for such scope of application is the TCA's desire to establish intra-store competition in the market especially in the context of sales points where the number of cabinets cannot be increased due to area shortage.

Finally, the TCA concluded that competition was restricted in the industrial ice cream market due to the agreements signed between Unilever and stores with 100 m² or less sales area as the prevention of storage of competing products in the coolers also prevents the store from working with another undertaking. Therefore, it is assessed that the relevant loan agreements constitute a violation of Article 4 of the Competition Law. Subsequently, the TCA evaluated whether these agreements are eligible to benefit from the exemption as per Article 5 of the Competition Law.

Initially, the TCA stated that cooler exclusivity allows Unilever to maintain and reinforce its own position while significantly restricting rivals' ability to compete and preventing new entries. Accordingly, it is determined that a practice that does not provide efficiencies and improvements in production or method

distribution does not meet the condition of Article 5(a) of the Competition Law.

As to consumer benefit, it is stated that the consumer cannot access different product varieties due to lack of inter-brand competition and the prices the consumer faces are formed as a result of weaker price competition, which causes the exclusivity provision in the relevant agreements to not meet the condition of Article 5(b) of the Competition Law.

As cooler exclusivity does significantly restrict competition in the market by reinforcing Unilever's dominant position, the TCA determined that exclusivity provision in the relevant agreements fail to meet the condition of Article 5(c) of the Competition Law, which stipulates not eliminating competition in a significant part of the relevant market as a condition of individual exemption.

With regards the condition of not limiting competition more than necessary for achieving the goals set out in sub-paragraphs (a) and (b), it is stated that the relevant sub-paragraphs are failed to be fulfilled and thus, the condition of Article 5(d) of the Competition law is also not met.

Moreover, it is concluded that for stores with a closed sales area of 100 m² or less, Unilever and/or its distributors must allow the storage of competing products in 30% of the visible area of the cooler and of the total cooler volume at the store, provided there are no coolers directly accessible by the consumer other than those owned by Unilever.

2.1.4. Assessment of Creating *De Facto* Exclusivity by means of Rebate Systems

It is determined in the decision that the stores where Unilever may try to exclude its competitors by using rebate systems will be stores where the volume or the number of coolers can be increased as it already maintains its presence through cabinet exclusivity in most of the stores that only have space for one cooler. Additionally, it is determined that 85% of the total coolers in traditional channel stores with more than one cooler belongs to Unilever.

The TCA has determined that increasing discounts were given to some stores where the number or volume of coolers increased but turnover or sales amount decreased. It is evaluated that discounts given to mentioned stores are not commercially reasonable and increasing the volume or the number of coolers will prevent competitors' entry to stores by affecting stores' incentive to get products from competitors even for the part open to competition and thus, the increase in discounts given to mentioned stores aim to exclude competitors from those stores. Indeed, analysis of Algida's competitors' presence in traditional channel stores throughout 2016-2019 demonstrated that the discounts granted to exclude competitors showed the intended effect and competitors lost most of the few stores they could enter.

Subsequently, it is stated with reference to the 2008 Decision that Algida was banned from practices creating *de facto* exclusivity such as free products, discounts, and quota requirements in the relevant market. Finally, it was concluded that the discounts Unilever gave to its traditional channel customers had the object and effect of complicating its competitors' activities and thus, Unilever abused its dominant position by means of the mentioned discounts and violated Article 6 of the Competition Law.

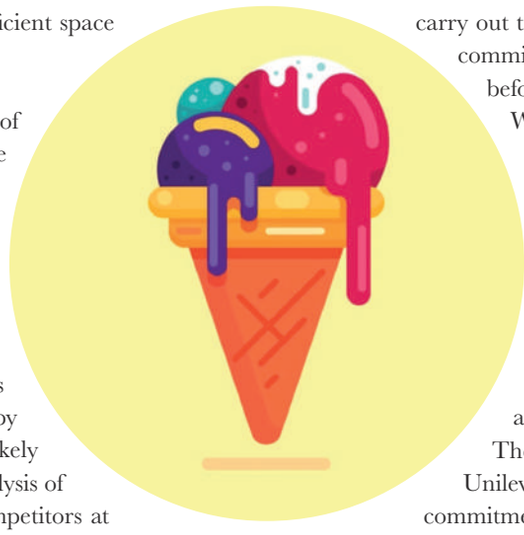
## 3. Unilever's Commitment Applications

### *3.1. First Commitment Application*

With its first commitment application on 27.10.2020, Unilever committed to replace horizontal cabinets with vertical cabinets and thereby to make room for competitors if a store with an Algida cabinet wants to sell competing products but does not have sufficient area; or to replace present cabinets with different types of cabinets in Unilever's portfolio in case there is one Algida cabinet in a store and the store informs Unilever that it wants to sell competitors' products but does not have room for additional cabinets.

Unilever further stated in its first commitment application that stores with a single Algida cabinet proven to have sufficient space for placing more than one ice cream cabinet shall not be considered under the scope of the commitments and the

of determining whether a store has sufficient space shall be determined by Unilever.



The TCA first evaluated that the timing of Unilever's commitments was not suitable for obtaining the expected benefits (i.e., preventing possible anticompetitive losses by solving current competitive problems in early stages of an investigation) as they were submitted when the additional opinion stage (one of the last phases of an investigation) was about to end. As to prerequisite stated by Unilever, the TCA decided that it is unlikely that Unilever will make an objective analysis of whether there is sufficient space for competitors at stores.

Finally, the first commitment package was rejected as Unilever's cooler exclusivity leads to weakening competitors and strengthening Unilever's dominant position and commitments submitted intend to maintain cooler exclusivity and not to open coolers to competitors.

3.2. Second Commitment Application

With its second commitment application dated 15.01.2021, Unilever submitted commitments related to three issues determined as violation of the Competition Law (i.e., cabinet exclusivity, rebate systems and the Agreement with Getir).
With regards to cabinet exclusivity, Unilever submitted a set of actions on the basis of stores with an area under 100m2 with one and more than one Unilever cabinets in the traditional channel. According to the second commitment package, in stores with one Unilever cabinet, the existing Unilever cabinet will be opened to competitors' use or an additional cabinet will be placed so that competitors can reach the store; and in stores with more than one Unilever cabinet, competitors will be allowed to reach the store by sparing an area in the smaller cabinet or in both cabinets in case the smaller cabinet does not have enough area.

As to rebate system which is determined by the TCA to be causing exclusionary effects via cabinet investments made to stores whose turnover has decreased, Unilever committed to not increasing the number of cabinets in stores where the turnover in the previous period decreased.

Regarding the Agreement with Getir, Unilever committed to put into effect a specific written internal policy that requires all contracts to be made with customers in the future will be approved by the legal department to prevent misunderstanding or incompleteness and uncertainty causing competition law concerns.

In its assessment of the second commitment package, the TCA first stated that the timing of Unilever's commitment application was not acceptable as the aim of the commitment mechanism is to eliminate the concerns without the burden to carry out the investigation process and the relevant commitments were only submitted three days before the end of the investigation.
With regards to content of the commitment application, it is stated that Unilever did not take any actions to end the cabinet exclusivity practices, but argued that they were not anticompetitive. Additionally, commitments related to rebate systems and the Agreement with Getir are evaluated to be related to terminating the practices regarded as anticompetitive in the investigation report. Therefore, it is stated that actions that Unilever is obliged to carry out are presented as commitments and thus, relevant commitments are not acceptable in terms of content either.

**3. Conclusion**

In line with the above assessments, the Board decided that (i) Unilever holds a dominant position in the industrial ice cream market and its sub-categories impulse ice cream market and take-home ice cream market, (ii) Unilever violated Article 6 of the Competition Law by abusing its dominant position with the discounts it gave and shall be imposed a fine of TRY 274,409,838 (EUR 43,214,147) for this violation, (iii) Unilever violated Article 4 of the Competition Law and the 2008 Decision by imposing a non-compete obligation on Getir and shall be imposed a fine of TRY 205,807,378 (EUR 32,410,610) for this violation, and (iv) Unilever violated Article 4 of the Competition Law via the exclusivity clause in the borrowing and use agreements that regulate the use of cooler cabinets belonging to Unilever and the relevant agreements shall be granted individual exemption in case the exclusivity clause will be removed from the agreements. In this scope, the TCA ordered that Unilever and/or its distributors must allow stores to use 30% of the visible part and total cooler volume at stores with net 100 m2 or below closed sales areas to place competitors products in case there is no cooler other than Unilever's cooler that could be directly accessible for consumers.

This decision is of significance, especially in terms of its evaluations as to competition compliance, commercial strategy, and commitment procedures. The decision shows how important it is to comply with the prior decisions of the TCA. It also reiterates the fact that dominant undertakings should be extremely careful when determining their commercial strategies. The reason being is that the TCA's analysis of rebate systems considers that even a limited effect that is enough to find an abuse of a dominant position. The case also emphasizes how skillfully the commitment process should be carried out. As a matter of fact, commitments submitted by Unilever were found to be insufficient to eliminate competition concerns and had not been accepted by the TCA; on the contrary, Unilever's commitment to change its rebate system had been considered as the continuation of the abusive rebate system during the investigation process.

3 In the calculation of the turnovers in terms of EUR, average buying rate of exchange of the Central Bank of Turkey for the financial year the turnover is generated is taken into consideration as the rate of exchange. For 2019, this rate was EUR 1 = TRY 6.35.
4 In the calculation of the turnovers in terms of EUR, average buying rate of exchange of the Central Bank of Turkey for the financial year the turnover is generated is taken into consideration as the rate of exchange. For 2019, this rate was EUR 1 = TRY 6.35.

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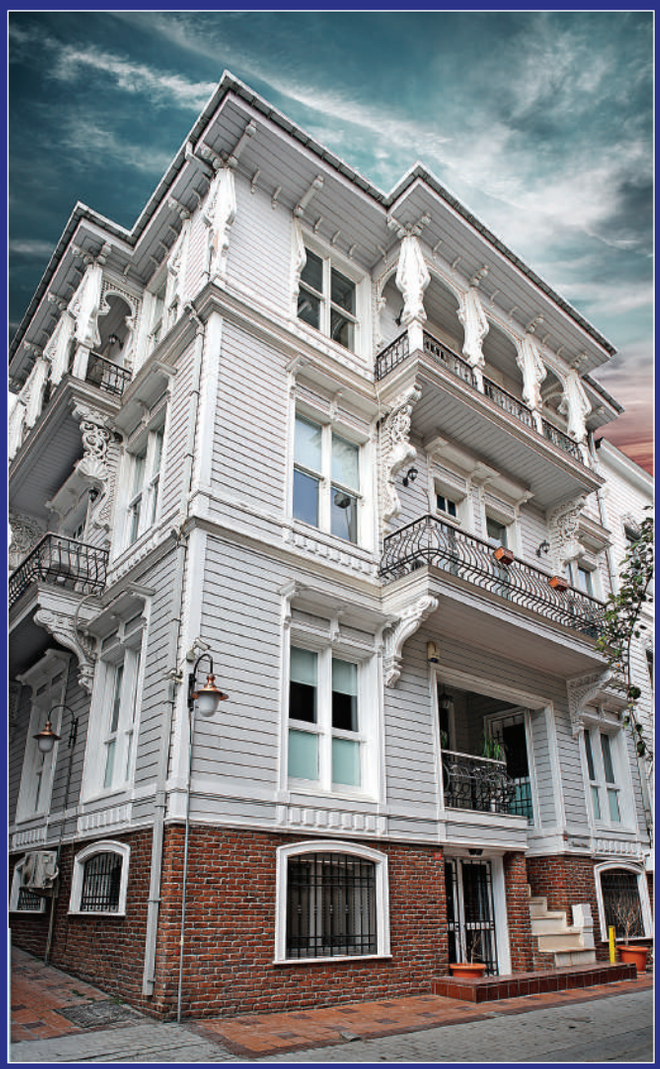

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