
The Turkish Competition Authority Fines Ice Cream Supplier for Exclusivity Practices (Unilever/Algida)

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Introduction

The Turkish Competition Authority's ("TCA") reasoned decision dated 18.03.2021 and numbered 21-15/190-80, whereby it has decided to impose an administrative fine amounting to TRY 480,217,217 (EUR 77,624,758)[\[1\]](#) on Unilever Sanayi ve Ticaret Türk A.Ş. ("Unilever") for violation of Article 4 and Article 6 of the Law No. 4054 on the Protection of Competition ("Competition Law") was published on the TCA's website on May 20, 2021[\[2\]](#). 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.

Background on the Investigation

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. In order 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.

Evaluations within the Scope of the Investigation

1. Non-compete Obligation Imposed against 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, 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. 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.

3. Assessment on 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 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.

4. Assessment on 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.

Unilever's Commitment Applications

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
- 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 method 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.

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.

Conclusion

In line with the above assessments, the Board decided (i) that 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) that 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)[\[3\]](#) for this violation, (iii) that 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)[\[4\]](#) for this violation, and (iv) that 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 paramount significance, especially in terms of its evaluations as to competition compliance, commercial strategy, and commitment procedures. In particular, the decision;

- shows how important to comply with the prior decisions of the TCA;
- 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 even a limited effect is enough to find an abuse of a dominant position;
- 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 have not been accepted by the TCA; on the contrary, Unilever's commitment to change its rebate system has been considered as the continuation of the abusive rebate system during the investigation process.

[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] <https://www.rekabet.gov.tr/Karar?kararId=88304185-0aa9-4758-b654-09ebd5fd24a0>

[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.