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The Turkish Competition Authority fines major food companies for price-related information sharing in the fast moving sector (*Nestle / Danone*)

ANTICOMPETITIVE PRACTICES, DISTRIBUTION/RETAIL, EXCHANGE OF INFORMATION, INVESTIGATIONS / INQUIRIES, PRICES, UNDERTAKING (NOTION), AGRICULTURE / FOOD PRODUCTS , GEOGRAPHIC MARKET, MARKET DEFINITION, TURKEY

Turkish Competition Authority, *Nestle / Danon*, Decision No. 23-61/1205-429, Judgment, 28 December 2023 (Turkish)

Gönenç Gürkaynak | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

Dilara Yesilyaprak Akay | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

Beyza Nur Adıgüzel | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

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Introduction

This case summary aims to offer insight regarding the Turkish Competition Board's ("Board") Nestle - Danone Decision [1] ("Decision") where the Board assessed whether investigated undertakings that are active as producers/suppliers/retailers in the fast-moving consumer goods ("FMCG") market have violated Article 4 of Law No. 4054 on the Protection of Competition ("Law No. 4054") by way of exchanging competitively sensitive information. As understood from the decision, the Board initiated this investigation ("Investigation") *ex officio*, without any complaints, and against Eti Gıda San. ve Tic. AŞ ("Eti"), Danone Tikveşli Gıda ve İçecek San. ve Tic. AŞ ("Danone"), Nestle Türkiye Gıda Sanayi AŞ ("Nestle"), Horizon Hızlı Tüketim Ürünleri Üretim Pazarlama Satış ve Ticaret AŞ ("Horizon").

Overall, the Investigation ended for Eti and Horizon upon the Board's decision to accept their respective requests for settlement pursuant to Article 43 of Law No. 4054 yet it continued for Danone and Nestle. Moreover, within scope of the Investigation, Nestle and Danone applied for commitment mechanism pursuant to Article 43 of the Law No. 4054 and Article 5 of the Communiqué on The Commitments to Be Offered in Preliminary Inquiries and Investigations Concerning

Agreements, Concerted Practices and Decisions Restricting Competition, and Abuse of Dominant Position (“**Communiqué No. 2021/2**”). The Board rejected Nestle’s and Danone’s request for offering commitments since it was evaluated that the investigated actions amounted to naked and hard-core infringement.

Information about the Sector, the Relevant Product and Geographic Market, and the Parties

Regarding the sector information, the Decision identifies that FMCG supply market is for products supplied by manufacturers/suppliers, predominantly in the main categories of food and cleaning/hygiene, which are delivered to final consumers through various means and that the main elements of organized FMCG are retail services and retail chains. Considering the lack of single supply market in the sector, as a natural consequence of the limited ability of producers/suppliers to switch to the production of alternative products and their inability to produce all of the products sold in retail side, the decision categorizes the supply markets into food and cleaning/hygiene based on supplied products.

The Decision finds that:

- The investigated undertakings’ lines of products are in the food category and primarily consist of biscuit, cake, chocolate, chocolate-coated products, sweets, milky products, yogurt and fruit yogurt;
- These products groups are often defined as “*macro-snack*” for being consumed between meals which often also are “*impulse food*”, meaning that such products usually are not in the shopping list of the consumer and purchased instantly upon seeing them in the sales points; and
- Those undertakings in the certain submarkets [2] seek to diversify the product range vertically by creating brands that appeal to different income levels as well as horizontally.

Overall, the Decision detects that undertakings with advertising advantage and strong distribution networks possibly have significant market share and 4-5 players, including the investigated parties, hold approximately 80% of the market share in the snack market.

Regarding the market definition, although the product market can be defined either as “*supply of food products*” or separately as each abovementioned submarket and the geographic market can be defined as “*Türkiye*”, the Board defined neither the relevant product nor the geographic market since such definition would not affect the conclusion reached.

As to the parties, the Board identified that Danone is active in the production and sale of milk products, milky snacks, fruit yogurt, and other yogurt-based products in Türkiye and mainly operates in manufacturing of processed, pasteurized, sterilized, homogenized, and high temperature exposed milk; whereas the Board noted that Nestle is active in the production, marketing, and sale of various food and beverage products including sweets, coffee products, baby nutrition products, pet food, breakfast cereals, milky beverages, and healthy nutrition products.

The Board’s Assessment of Danone and Nestle under Article 4 of the Law No. 4054

Upon reviewing the documents seized from Eti, Danone, and Nestle and the information obtained from the parties to the Investigation as well as other third parties, the Board noted that the market of the investigated undertakings recently demonstrated frequent price increases due to change in raw material costs, price changes were announced to

distributors and sale points via price lists, competitors' pricing behaviors were closely monitored, information was exchanged between the investigated undertakings. Accordingly, the Board provided a theoretical assessment focused on information exchange and distinguished those that restrict competition by object and effect.

Regarding the assessment about Danone, the Board took into consideration two documents and found that:

- One of internal the documents related to "*flavored milk*" product group that only Danone, as the investigated undertaking, is active in and none of the other investigated undertakings are active in; and
- The other document is a communication between Eti and Danone about milky snacks which both undertakings are active in but they have different product portfolios and these do not overlap.

In the latter, Danone representative asks Eti representative when the price increase will take place without specifying any product or product category and Eti representative replies that the price increases had been announced two months ago but had not been yet applied.

Therefore, referring also to the statements of Eti and Horizon during the settlement negotiations stating that Eti and Danone are in different markets with non-substitutable products and the parties to the violation should be presumed as Eti, Horizon, and Nestle, the Board concluded that:

- Danone does not compete with any of the investigated parties;
- No finding shows communication between Danone and Nestle or Horizon;
- The finding containing of communication between Danone and Eti is limited in context without referring to any products or brands and thus, unable to reduce strategic uncertainty and motivation for independent decision making and therefore; and
- There is no need to impose administrative monetary fine on Danone since no finding indicates a violation of Law No.4054.

Regarding the assessment about Nestle, the Board, upon reviewing communications between Nestle and Eti, detected information exchange regarding future price increases, price lists which are planned to be implemented, refund and increase ratios as well as maturities and discounts to distributors about many products in milky snacks, coated/non-coated chocolate, and coffee categories. The Board determined that information exchanged was strategically important, referring to Guidelines on Horizontal Cooperation Agreements ("**Horizontal Guidelines**"), which establish that price or price-related information, especially when about future, is the most strategic and considering the importance of the positions of the parties to the communication, the period of the communication, and small number of players in the market. Accordingly, the Board concluded that communication between the undertakings restricts competition.

In connection with Nestle's defense, the Board recognized the common practice of sharing price lists with sales team of the supplier undertakings, distributors, and customers approximately 15 days before updating price lists and analyzed whether such information can be regarded as publicly available due to such practice. Referring to the Horizontal Guidelines, for information to be publicly available, undertakings and customers that are not parties to such exchange should not endure more access costs to the information than the parties. The Board found that in this case the information cannot be deemed publicly available because:

- Price lists, discounts and increase ratios were shared between the parties with a direct communication channel (WhatsApp); and
- The investigation documents and the fact that the investigated undertakings have over 50 distributors indicate that

receiving such future-related information from the market and customers require additional effort and cost.

In response to Nestle's defense that certain price movements in the findings did not actually take place in the stated price increase periods, the Board found that these communications still amounted to elimination of strategic uncertainty by object or effect. Also, despite the defense that Nestle has low market share, the Board highlighted that effect analysis is not necessary when the information exchange restricts competition by object.

Conclusion

The Board determined that Nestle's violation of Article 4 is subject to administrative fine pursuant to subparagraph (b) of the first paragraph of Article 5 of the Regulation on Fines under "other violations" category. The base fine was increased by half since the violation lasted between one to five years pursuant to subparagraph (a) of the third paragraph of the same law. Accordingly, the Board imposed an administrative fine of TL 260,183, 629.08 against Nestle and decided not to impose an administrative monetary fine against Danone since there is no finding proving violation. The decision remarks the Board's diligent approach to information exchange cases and emphasizes a stringent approach towards information exchange especially when related to future price information.

[1] Board's decision dated 28.12.2023 and numbered 23-61/1205-429.

[2] The decision notes such markets as: "biscuit, cake, chocolate, chocolate covered products, milky snacks, and sweets".