

FMCG Retailers under the TCA's Microscope

On February 5, 2021, Turkish Competition Authority (“the **TCA**”) published a preliminary report (“**Preliminary Report**”) regarding a sector inquiry it has initiated in the fast moving consumer goods (“**FMCG**”) retail market. The Preliminary Report contains quite remarkable evaluations that can form a basis for important regulations and consequences regarding the industry in the future¹.

In the evaluations made within the scope of the Preliminary Report, the emphasis was mostly placed on discount stores and the effects of the buyer power of these stores on the sector. The Preliminary Report states that there are three sub-markets present in the FMCG retail market, mainly as ‘retail, discount and wholesale’, however, it found that three of the top four undertakings in Turkey are ‘*discount stores*’. It further explains that the majority of private label products in the product portfolios of these discount stores is higher compared to the other stores, and the development of private label products over time is the source of the increase in the buyer power of the retailers.

With the effect of their power at the retail level, discount stores have a significant buyer power against the sellers such as small and medium-sized producers or farmers. The Preliminary Report significantly emphasizes that this buyer power might be abused. It underlines that (i) various prices under many different names such as shelf price, product listing price, insert price, display price, year-end discount, campaign price, turnover premium, and etc. are collected from suppliers, and these are independent of the cost, (ii) the risk of damage is transferred to the supplier even for the products delivered to the retailer, (iii) the payment collection periods are too long, (iv) some retailers restructures the financing after they sold the products in their stocks, and transfers the financial burden to their suppliers, and (v) they receive product refunds with a high value.

The Preliminary Report also underlines the importance of the role of farmers and small and medium-sized enterprises in the country's economy, and concludes that the establishment of an independent administrative authority is essential to ensure that the buyer power is not abused. At this point, the Preliminary Report remarks that the following matters should be prohibited: (i) payment terms exceeding 30 days for perishable agricultural and food products, (ii) payment terms exceeding 60 days for other agricultural foods, (iii) notice of cancellation made in a short period for perishable foods, (iv) unilateral amendments on the contract terms, (v) non-transaction related payment requests, (vi) transfer of risk of the lost and damaged goods to the supplier, (vii) the transfer of the cost to the supplier regarding investigation of the consumer complaints, and (viii) other similar matters. Additionally, the Preliminary Report concludes that it is necessary to regulate (i) return of unsold products, (ii) listing, shelf and stock prices payment made by the supplier, (iii) payment made by the supplier for promotion, marketing and advertising matters (v) the personnel fee received from the supplier by the seller in exchange for placing the supplier's goods in the areas used to sell.

In addition to the regulatory requirements with respect to the necessities mentioned above, in terms of the implementation of Law No. 4054 on the Protection of Competition (“the **Law No. 4054**”), the Preliminary Report evaluated that (i) the presumption of concerted practice could be used more effectively in the sector related investigations conducted within the scope of Article 4 of the Law No.4054, (ii) the concept of the collective dominance position might be taken into consideration in the potential investigations conducted within the scope of Article 6 of the Law No. 4054, (iii) a more stringent examination may be conducted in the merger and acquisition transactions made within the sector, (iv) narrower geographical market definitions such as quarter, neighborhood, etc. could be adopted by going beyond the geographical market definitions defined in the Board precedents, (v) the thresholds for mergers and acquisitions specific to the sector could be determined.

¹ “Preliminary Report for Sector Inquiry on Turkey Fast Moving Consumer Goods Retail”, <https://www.rekabet.gov.tr/tr/Guncel/hizli-tuketim-mallari-perakendeciligi-se-72b0f28cc267eb11812a00505694b4c6>

A separate assessment regarding the buyer power has been made in the Preliminary Report and it has been evaluated that (i) within the scope of the Block Exemption Communiqué on Vertical Agreements No. 2002/2 (“**Communiqué No. 2002/2**”), a relatively low threshold might be determined for the buyer power or only a threshold specific to the sector may be determined (ii) exclusive agreements concluded in the sector, which put other competitors at a competitive disadvantage, might be reassessed; (iii) considering that the stores gain some advantages resulting from being both a manufacturer and a seller by producing private label products, which allow the producers have access to some commercially sensitive information, a strict establishment and follow-up of the practice known as the ‘Chinese Wall’ in the literature might be brought to the agenda in order to ensure that the purchasing units of the private label brands and manufacturer brands are completely differentiated from each other.

Finally, the Preliminary Report underlines that it examines and evaluates the following matters in order to ensure that small or local retailers could compete with the large chain stores in a more effective way: (i) the purchase associations, which might ensure that the small/local retailers purchase products at more affordable prices, could be encouraged, (ii) an exemption might be granted to the agreements and decisions establishing these associations under Article 5 of the Law No.4054, and (iii) similarly, local retailers might be encouraged to produce private label products through various associations, and these agreements might be granted with exemption within the scope of Article 5 of the Law No. 4054.

In conclusion, the Preliminary Report that emerged following the sector inquiry signals that, in the FMCG retail market, quite significant examinations and evaluations in respect of both legal and competitive aspects might be carried out in the future. In this context, it seems possible that new regulations that have a nature of ‘a hand brake for chain stores’ would come up, especially in order to ensure the economic security of small and local retailers and farmers. As a further step, establishment of an independent administrative authority specific to the sector would not be a surprise. Considering that the evaluations in the Preliminary Report call for serious measures, following the completion of the final report, competition compliance would become the most important priority for the sector players in terms of mergers & acquisitions and potential investigations conducted in the FMCG retail market.

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