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Contributors to this Volume

Osman Tan ÇATALCALI

Esma TEMEL

Beyza ERBAYAT

Ömer Faruk ÇELİK

Tuba YEŞİL

Bilge TANRISEVEN

Betül GÜLSERDİ

Derya ERFİDAN

Dr. Mehmet ÖZKUL

Contact

bulten@rekabet.gov.tr

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CONTENTS

Turkish Competition Authority
REKABET KURUMU

INTRODUCTION

Turkish Competition Authority
REKABET KURUMU

We are proud to present to you the Competition Bulletin for the second quarter of 2019, which includes news on developments in competition law, industrial organization and competition policy.

In the "Selected Reasoned Decisions" section of this issue, we included two investigation decisions, one exemption decision and three Board decisions regarding various issues.

The "News around the World" section of the Competition Bulletin includes news from France, USA, Brazil and European Union.

"Selected Decisions under Administrative Law" section contains Council of State and Administrative Court of Ankara rulings concerning some decisions of the Competition Board.

"Economic Studies" section includes a summary of an aricle published by Journal of Competition Law & Economics titled "*A Structural Break Cartel Screen for Dating and Detecting Collusion*" and another article published by the RAND Journal of Economics titled "*When is upstream collusion profitable?*".

Last of all, we would like to remind you that you can always forward your opinions and recommendations on the Competition Bulletin to us, through bulten@rekabet.gov.tr

With our best regards.

External Relations, Training and Competition Advocacy Department

- **Investigation Concerning the Claim that Sony Eurasia Pazarlama A.Ş. Fixed Resale Prices of the Products Sold by its Dealers**

Decision Date:	Decision No:	Type:
27.08.2018	**18-44/703-345**	**Investigation**

The relevant decision is taken as a result of the investigation conducted in response to the claim that Sony Eurasia Pazarlama A.Ş. (SONY) pressured its dealers to fix resale prices as well as purchase and sale conditions for the products sold by the dealers to customer. The decision does not include a definitive relevant product market definition in line with the Competition Board (the Board) case-law on the subject, since this would not affect the analysis of the actions under investigation. On the other hand, it is explained that the assessments take the "consumer electronics market" into account. In light of the fact that market entry, access to supply, production, distribution, marketing and sales terms for the products in question do not differ between regions, the relevant geographical market was defined as "Turkey".

The decision mainly outlines SONY's sales and pricing strategy for the online channel and for the third-party (n11.com, hepsiburada.com, etc.) stores of its dealers, and evaluates SONY's practices within the framework of the concrete information and evidence gathered during the investigation. Accordingly, the decision focuses on the implementation announcements concerning dealers' sales on third-party internet platforms based on the documents found at SONY's Istanbul Headquarters and SONY dealers during the preliminary inquiry and investigation periods. The statements in the documents concerned show that SONY monitored the prices implemented by the dealers in the online channel and especially for the third-party internet platforms, with an emphasis on television products. SONY expected the dealers to comply with the resale prices announced and threatened to withhold implementation support/implementation cost payments otherwise. The decision also observed that pricing policies in online stores brought low price competition, particularly in the dealer channel, and the discomfort caused by this pricing was communicated to SONY in various complaints.

The decision remarked that online sales means easily-accessible, published price lists for the consumers and can be more easily monitored than store sales. Therefore online sales increases price transparency to a significant level, which can facilitate competition restricting practices. As a matter of fact, it is easier for manufacturers to force recommended prices into fixed

prices in e-commerce markets. In an environment where prices can be effortlessly monitored and reported, dealers may feel the need to comply with the price recommendations of manufacturers, making it harder for them to take initiative on end-user sales prices, which can have a negative impact on consumer welfare.

As a result, in light of the explanations above and the documents included in the file, the decision concludes that SONY placed restrictions on the parties to the vertical agreement, namely the dealers, with regard to setting their own prices for internet sales, and therefore SONY violated Article 4.1(a) of the Act no 4054 on the Protection of Competition (Act no 4054). The decision also states that SONY's practices under examination cannot receive exemption under Article 5 of the same Act, since fixing prices, one of the most important factors of competition, via resale price maintenance generally constitutes a restriction of competition by object. The decision explains the reason as the fact that fixing the prices would not lead to any innovations and improvements in the distribution of SONY products as well as the products and services offered by the dealers, that resale price maintenance would result in higher prices for consumers wishing to buy SONY products due to limited intra-brand competition, and that the elimination of intra-brand competition could negatively affect consumer welfare. As such, the decision concludes that the case in question did not meet the conditions listed in Article 5.1(a) and (b) of the Act.

The decision also includes an impact analysis for those practices of SONY comprising the subject matter of the investigation and mentions the undertaking's pricing policy and actual prices. Within the framework of the impact analysis, it is concluded that SONY's various interventions including implementation announcements aimed at fixing the resale prices of dealers suggested the establishment of a price monitoring mechanism for online prices by SONY. In line of the fact that this mechanism was primarily aimed at the online channel and at the dealers' stores on third-party internet platforms, that SONY did not have market power for the relevant products, that dealer prices reported and intervened by SONY employees were actually below the prices set by SONY and could be different than those prices, and that there was no concrete evidence showing that sanctions were imposed on those dealers which did not comply with the prices determined, it was concluded that these actions had only a limited effect on the market.

In the final analysis, the decision imposes an administrative fine on SONY under Article 4 of the Act no 4054 due to its practices aimed at resale price maintenance, found to be restricting competition by object.

- **Investigation Conducted on Association of Turkish Travel Agencies (TÜRSAB)**

Decision Date:	Decision No:	Type:
17.10.2018	**18-39/631-306**	**Investigation**

The relevant decision aims to determine whether the Act no 4054 on the Protection of Competition (Act no 4054) was violated within the framework of the claim that Association of Turkish Travel Agencies (TÜRSAB) forced organizers of hajj and umrah visits to buy the required package tour insurance policy from one of its subsidiary undertakings, that it caused discrimination by not collecting the payment known as service costs from some agencies, and that it required the organizers to purchase transportation and catering in Saudi Arabia from undertakings it chose. Since TÜRSAB had the nature of an association of undertakings and the issues in the application could have the restriction of competition as their object or effect, the actions under examination were assessed under separate categories in accordance with Article 4 of the Act no 4054.

Within the framework of the claims related to catering, the decision examined whether TÜRSAB forced travel agencies to buy mass catering services for pilgrims from companies determined by TÜRSAB, which would override travel agencies' right to choose the service they would pay for. An examination of other documents/information in the file showed that the practice related to the catering services during hajj and umrah visits was conducted in line with the Inter-Ministerial Hajj and Umrah Council (BHUK) decisions, to ensure that travelers could receive a certain quality of services, to prevent some problems encountered previously, and to keep the pilgrims healthy, etc. The agencies were not forced to buy the services of catering firms chosen by TÜRSAB; they could buy the service from other firms and their hajj/umrah organizations were not prevented if they refused to purchase service from the firms chosen. Accordingly, it was decided that the claims concerning catering services did not reflect the truth of the matter.

With regard to the claim that TÜRSAB forced agencies to purchase mass transportation services from undertakings it chose, the decision made the following observations: the principles and procedures for mass transportation during hajj and umrah visits were also determined and mandated in accordance with BHUK decisions. The agencies were completely free to choose from which firms they would purchase mass transportation services and TÜRSAB intervened as an association only when

requested by agencies. During hajj organizations, an exclusive system was organized by TÜRSAB, which aimed to ensure certain standards in the quality of the services prospective pilgrims received in Saudi Arabia. As a result, it was decided that the claims concerning mass transportation services did not reflect the truth of the matter.

In relation to the claim that TÜRSAB engaged in discriminatory activities by not collecting the service fee for hajj and umrah visits it set from certain travel agencies, the decision made the following observations: in accordance with BHUK decisions, TÜRSAB collected a service fee from travel agencies in line with the authorization it received to cover certain services provided and costs incurred. However, in order to prevent aggravating hajj and umrah visitors, those agencies who refuse to pay the service fee were not prevented from carrying out their organizations are allowed to take their pilgrims to complete their hajj and/or umrah visits. Accordingly, it was decided that the practice in question did not constitute a violation.

Lastly, the decision examined the claim that TÜRSAB forced agencies organizing hajj and umrah visits to purchase the required insurance for pilgrims from Turins Sigorta A.Ş. (TURİNS), a TÜRSAB subsidiary, and prevented agencies from taking out a policy from other insurance companies. The decision stated that the insurance policy that the agencies are forced to take out for pilgrims for hajj and umrah visits was mandated by the provision of the Act no 1618 and BHUK decisions, that TÜRSAB tried to provide this service in line with its duties and powers as an association in order to help its member agencies. However, the assessment was mainly concerned with whether TÜRSAB directed its member agencies to the insurance company it chose or whether it forced them to take out the policy from a chosen insurance company.

Accordingly, the market effects of an announcement made by TÜRSAB to its members were taken into consideration. The announcement encouraged agencies to take out insurance policies from its own subsidiary, TURİNS – and following the acquisition of TURİNS by Gulf Sigorta A.Ş. (GULF SİGORTA), from Turser-Tursav Servis Sigorta Acenteliği Ltd. Şti. (TURSER) – by providing certain advantages and forced them to take out policies from TURİNS to be able to benefit from those advantages. In practice, the aforementioned announcement was found to have an anti-competitive effect by causing travel agencies to mostly choose the TÜRSAB agency for insuring their travelers. On the other hand, insurance companies were unwilling to insure hajj and umrah visitors since they found the risk too high. Consequently, TÜRSAB filled the void in this area to prevent causing problems for these visitors. The decision stated that, even if TÜRSAB was

thus considered to have fulfilled the exemption provisions of Article 5(a) and (b) of the Act no 4054, the announcement under examination forced agencies to take out policies from a single undertaking, which was unnecessary to achieve the goals listed in the aforementioned paragraphs and therefore did not meet the requirement of paragraph (d). Thus, the TÜRSAB announcement in question could not benefit from individual exemption.

As a result of the assessment conducted, it was found that the practices of TÜRSAB related to insurance services were in violation of Article 4 of the Act no 4054 and an administrative fine was imposed on the association. The decision also examined the failure to notify the acquisition of TURİNS by GULF SİGORTA to the Competition Authority (Authority). In that context, it was decided that the acquisition concerned was not subject to Board authorization since the transaction did not exceed the turnover thresholds regulated in the Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board, no 2010/4 (Communiqué no 2010/14). Lastly, the decision included an assessment of the share acquisition agreement, exclusive distribution agreement and agency agreement signed between TÜRSAB, TURİNS, TURSER and GULF SİGORTA. It was found that the aforementioned agreements fell under Article 4 of the Act no 4054 since it granted an exclusive right to market, sell and distribute all GULF SİGORTA's insurance products except life insurance through TURSER. However, it was decided that this agreement benefited from block exemption under the Block Exemption Communiqué on Vertical Agreements, no 2002/2.

- **Decision Concerning the Request for the Acquisition of the "Tekel Birası" Brand of Mey Alkollü İçkiler San. ve Tic. A.Ş. by Anadolu Efes Biracılık ve Malt Sanayii A.Ş. and the Provision of False and Misleading Information under the Notification**

Decision Date:	Decision No:	Type:
07.02.2019	**19-06/54-20**	**-**

The relevant decision concerns the assessment of the application made by Anadolu Efes Biracılık ve Malt Sanayii A.Ş. (EFES) for the acquisition of "Tekel Birası" brand and the copyrighted figure, previously owned by Mey Alkollü İçkiler San. ve Tic. A.Ş. (MEY İÇKİ) and registered under the number 76736 in class 32 for beers only. The transaction was previously granted conditional authorization with the Board decision dated 25.08.2009 and

numbered 09-38/925-218, subject to the fulfillment of the relevant commitments. However, that decision was annulled with a court order finalized on 28.06.2018.

The decision states that the 13th Chamber of the Council of State decision dated 25.01.2010 stayed the execution of the Board decision authorizing EFES's acquisition of the Tekel Birası brand. The parties were notified of the fact that the brand acquisition transaction was null and void with the Board decision dated 11.03.2010 and numbered 10-22/306-M, and the parties replied that all actions concerning the brand transfer were suspended. At this stage, the main issue the decision aims to solve is to clarify how to handle the brand transfer transaction from a competition perspective during the eleven year period until the court decision fully nullifying the Board decision in question. The decision states that two different methods may be followed: The first method is to assess the current application made by one of the parties (EFES) in light of the changes in the market conditions during the long judiciary process until the nullity decision was finalized. Accordingly, the transaction concerned may be authorized in line with up-to-date legislation and market conditions, or the application may be rejected on the grounds of ongoing competitive concerns. The second method concerns the situation where the brand was transferred to EFES following the first authorization granted by the Board, but where the parties do not renew their application after the Board decision is annulled by the court or where the an application is made but is rejected. In that case, the merger/acquisition would become anti-competitive and unauthorized, and would need to be dissolved by the Board as per Article 11 of the Act no 4054. Since EFES did make a new application after the finalization of the annulment of the relevant Board decision, the current decision chose the first method and the application was assessed in line with the amended legislation and changed market conditions.

The decision notes that the merger and acquisition legislation was amended while the judicial proceedings against the authorization decision were ongoing, as a result of which the Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Authority, no 1997/1 was repealed. The Communiqué no 2010/4, unlike the repealed Communiqué, eliminates the "market share" threshold for merger and acquisition examinations and uses the turnover threshold exclusively. The analysis considers the last generated turnover of Tekel Birası for the year 2010 and concludes that the turnover thresholds of Article 7.1 of the Communiqué 2010/4 were not exceeded and therefore the transaction did not call for authorization.

Following the competition law evaluation of the brand transfer concerned, the decision examines another issue concerning whether EFES provided false or misleading information in its current application. The application submitted by EFES stated that it was made with the joint will and approval of both MEY and EFES; however, MEY notified the Authority that its approval was not taken for this application. Consequently, decision analyzes the statements in the application form from this perspective. When the statements in the notification are taken as a whole, the decision found that MEY did not clearly state that it would not submit the documents/information related to the application, which suggested that the parties may have agreed on notification to the Authority. In addition, it was not possible to show which piece of information was false or misleading. As a result, it was impossible to conclude that EFES provided false or misleading information.

- **Decision Concerning Anı Turizm Yatırım Ticaret ve Sanayi A.Ş.'s Prevention of On-Site Inspections and Failure to Submit the Requested Information to the Competition Authority**

Decision Date:	Decision No:	Type:
13.02.2019	**19-07/86-36**	**-**

The decision concerns the prevention of the on-site inspection on 17.09.2018, conducted within the scope of the preliminary inquiry launched with the Competition Board decision dated 18.07.2018 and numbered 18-23/414-M, by Anı Turizm Yatırım Ticaret ve Sanayi A.Ş. (ANITUR) and its failure to submit the answers of the questions in the Information Form delivered during the inspection.

On the aforementioned date, rapporteurs from the Authority visited the premises of ANITUR but they were prevented from conducting the inspection through various means. In addition, the undertaking did not respond to the information requested with the Information Request Form drawn by the rapporteurs during the inspection within the time limits.

In response to the prevention of on-site inspection, the above-mentioned undertaking was imposed an administrative fine in accordance with Article 16.1(d) of the Act no 4054, at 0.5% of its gross income generated as of the end of the financial year 2017. Additionally, in accordance with Article 16(c) of the Act no 4054, which specifies administrative sanctions if information or documents requested in the implementation of Articles 14 and 15 of the Act no 4054 are not provided within due time or at all, ANITUR was imposed

an administrative fine at 0.1% of its gross income for 2017 for failing to respond to the information request.

- **Assessment of the Request for the Return of Some of the Documents Collected During the On-Site Inspection at Warner Bros Turkey Film Ltd.Şti. due to Attorney-Client Privilege**

Decision Date:	Decision No:	Type:
17.01.2019	**19-12/146-67**	**-**

The subject of the decision is the request for the return of sixteen pages of documents collected during the on-site inspection conducted at the premises of the Warner Bros. Turkey Film Ltd.Şti. (WARNET BROS) on 19.12.2018, as part of the preliminary inquiry launched in accordance with the Board decision dated 06.12.2018 and numbered 18-46/721-M, on the grounds that these documents comprised a report received within the framework of legal consultancy services provided by persons with no employee relationship with the undertakings and were therefore under client-attorney privilege.

The decision states that the principle of the privilege of information and documents stemming from the professional relationship between an attorney and his/her client (Legal Professional Privilege) aims to protect the communication between undertakings or individuals and their attorneys by preventing the mandatory disclosure of the correspondence made and the information provided during the provision of legal consultancy services. The decision notes that ensuring effective use of the right to defense by those procuring the consultancy services is one of the functions of the principle of privilege. On the other hand, it was emphasized that the principle did not offer unlimited protection, since it could conflict with the goal of uncovering the truth; it must be implemented in proportion within the goals it is intended to protect.

In addition to the goal, function and limits of the principle of privilege, the decision also includes fundamental criteria to take into consideration during classification. Accordingly, any correspondence between the client and an independent attorney with no employee-employer relationship to the former is considered to belong to the professional relationship and does enjoy the protection of the principle, provided they are related to the exercise of the right to defense. The aforementioned protection covers the correspondence with the independent attorney intended for the exercise of the right to defense as well as any documents prepared for the procurement of legal

consultancy from the independent attorney. However, correspondence with no direct relevance to the exercise of the right to defense, which are intended to assist a current or to conceal a future infringement may not benefit from the protection, even if they are related to the subject of the preliminary inquiry, investigation or inspection.

In light of the theoretical framework established above, WARNER BROS' request for return of documents comprising the subject matter of the current case was examined. As a result of the assessment, it was decided that the relevant sixteen pieces of document were dated before the start date of the preliminary inquiry under the scope of which the on-site inspection was conducted and were therefore not directly relevant to the exercise of the right to defense. Accordingly, it was found that the relevant documents could not be considered to fall under the principle of privilege and could not be returned.

- **Assessment Concerning the Insurance Association of Turkey Executive Board Decision**

Decision Date:	Decision No:	Type:
20.12.2018	**18-48/751-364**	**Exemption**

The relevant decision concerns the exemption request for the Insurance Association of Turkey (TSB) Executive Board decision, which mandates all service points working in contract with the TSB member insurance companies to have, at minimum, OSEM S 10001 or similar quality standard certificates. In light of the fact that the practice notified concerns the certification of damage repair points serving the insurance sector, examinations were conducted for three separate sections, namely insurance services, damage repair services and certification services. Accordingly, relevant product markets were defined as "traffic and car insurance services for motor vehicles," "damage repair services for motor vehicles," and "standard setting and certification services for motor vehicle damage repair points."

The decision first tries to establish whether the decision of the TSB, which is a professional association with the nature of a public institution with legal entity status according to the Insurance Act of 5684, can be accepted as an association of undertakings decision under the Act no 4054. In light of the case-law of the Board and the Council of State on the subject, the criteria used aimed to determine whether the association of undertakings took decisions concerning the economic life outside of the powers granted with

the regulations. In this context, it was concluded that the TSB executive board decision did have the nature of an association of undertakings decision calling for evaluation under the Act no 4054.

When assessing the effect of the relevant TSB decision on the competition in the relevant markets, it was observed that the decision prevented member insurance companies from independently taking their commercial decisions, that it was impossible to work under contract with those undertakings who do not meet the condition, and that as such there was direct impact on competition in the damage repair services market. In addition, the aforementioned association decision would be implemented through a company to be established under the TSB umbrella, which would impact competition in standard setting and certification markets. Based on the grounds explained above, it was concluded that the TSB executive board decision in question fell under Article 4 of the Act no 4054.

Afterwards, the decision starts the exemption analysis for the TSB decision determined to have a restricting effect on competition. This analysis first examines whether the decision falls under the Block Exemption Communiqué on the Insurance Sector, no 2008/3 (Communiqué no 2008/3). It was found that the TSB decision did not fall under the Communiqué no 2008/3, which provides block exemption protection to agreements concerning joint transactions for certain risk calculations, and certain specifications and rules for security devices. Thereupon, the Board looked at the applicability of the standardization agreements regulated under the Guidelines on Horizontal Cooperation Agreements (Guidelines) to the relevant transaction. In line with the statements of the Guidelines on standard setting, the relevant TSB decision was found to have the nature of a standardization agreement. The decision notes that standardization agreements which do not ensure significant efficiency gains and which cover more than is required for the level of quality intended with the agreement may be restrictive of competition by effect. In light of the fact that TSB is active in neighboring markets to those where its member insurance companies operate, that TSB members are the largest buyers in the market for damage repair services, and that the project in question placed the insurance companies under an obligation to meet the minimum standards to be adopted, it was found that the TSB decision would need to be subject to individual exemption analysis under Article 5 of the Act no 4054.

The decision makes exemption assessment for each of the relevant product markets identified in the file separately. Within the framework of the first exemption requirement, it was determined for all three markets that the OSEM certification project was prepared in line with the needs of the sector

after an examination of the best practices of international organizations, that taken together with spare parts certification, it would prevent harm stemming from consumers having no information on the quality of the service provided, that increasing competition in the damage repair market would force undertakings to be more efficient which would reflect on costs, and that the project would thus contribute to economic development. As such, it was concluded that the first requirement was fulfilled.

The second exemption requirement stipulates that the efficiency gains must be passed on to the consumer. Regarding this requirement, the decision made the following assessments: in terms of the insurance services market for motor vehicles, cost increases in damage repair services were likely to be reflected on the policies as additional increases; in terms of the damage repair services for motor vehicles, certification requirement would likely decrease the number of undertakings that could provide services in the relevant market if some of the service points working under contract with insurance companies did not have the certification standards or were unable to make the investment to achieve those standards; in terms of the standard setting and certification services for motor vehicles damage repair points, TSB's relevant decision to look for OSEM standards would complicate new entries into the market. As a result, it was decided that the second requirement of exemption was not fulfilled in the current case.

The analysis intended to establish whether the agreement led to a restriction of competition in a significant portion of the market showed that the introduction of a certification requirement in the insurance services market would limit the service area of the insurance sector in those provinces where the number of service points is low and their ability to meet the certificate requirements is restricted. In the damage repair services market for motor vehicles, certification would restrict the service area of the insurance sector as well as consumer choice, especially in those regions with less population density and/or where it would be relatively harder to meet the service standards. As a result, repair processes would slow down and consumer satisfaction would drop. In light of these concerns and the possibility that damage repair points might reflect their increasing certification costs on their prices, it was decided that competition would be eliminated from a significant portion of the market in question. Lastly, in the standard setting and certification services market, the decision states that the impartiality of TSB and damage repair points towards certification companies other than OSEM was disputable, since TSB's deputy general secretary was one of the Board Members of OSEM. Behavioral remedies presented by TSB were found to be insufficient to eliminate this concern

and therefore it was decided that competition would be eliminated from a significant portion of this market as well.

The decision examined the necessity and inevitability of the competition restrictions included in the notified agreement for each market and concluded that the fourth exemption requirement was not fulfilled since the TSB restrictions to make the standard binding and mandatory for the sector could not be deemed necessary in principle. As a result, it was decided that an individual exemption could not be granted to the TSB executive board decision under the Article 5(a) of the Act no 4054.

- **French Competition Authority published its pharmacy sector inquiry report**

French Competition Authority (FCA) concluded its inquiry into the pharmacy sector that it launched in 2017. In its report, FCA approved the continuing sale of drugs under pharmacy monopoly while making the following suggestions in order to increase competition among the pharmacies and decrease the prices of over-the-counter drugs, self-care and beauty products:

- Facilitating online sale of over-the-counter drugs, self-care and beauty products,
- Granting pharmacies the authority to advertise, promote and offer discounts for self-care and beauty products,
- Allowing the retailers other than pharmacies to distribute some medical products such as over-the-counter drugs and in vitro diagnosis tools, subject to certain (displaying the products on different shelves, having an authorized pharmacist, refraining from setting sales targets for the pharmacist),
- Reinforcing the provision of some healthcare services by the pharmacist (such as vaccination, basic healthcare suggestions, diagnosis of simple diseases).

The report also makes note of the income of wholesale drug suppliers, emphasizing that current drug prices and margins were insufficient to cover logistic and other costs on the wholesalers arising from the public service obligations and that the current method of determination of margins can be changed.

FCA also suggested that biomedical laboratories could unite under larger groups to expand their geographical areas of access to offer discounts to other laboratories and public hospitals.

Source:

http://www.mondaq.com/article.asp?articleid=803762

- **US Federal Trade Commission (FTC) won the case it filed against Qualcomm**

In December 2017, the US Federal Trade Commission (FTC) filed a case with the Northern California District Court, claiming that Qualcomm illegally retained its monopoly on the market for processors for mobile device

communication, under the section 2 of Sherman Act. FTC argued that Qualcomm, which manufactures various processors for communication on mobile devices, did not set fair, reasonable and non-discriminatory terms for the royalties paid by the device manufacturers for patented chips and foreclosed the market with exclusivity agreements. During the trial in January 2019, device manufacturers Apple and Huawei as well as Qualcomm's rival Intel submitted their statements, emphasizing that Qualcomm's behavior increased competitors' costs and consumer prices.

The decision taken in May 2019, stated that the Qualcomm's requirement that device manufacturer sign a separate license agreement instead of selling chips with all their rights and threatening to terminate chip supply if this agreement was not signed constituted a violation of the Sherman Act. In the decision, Judge Koh imposed some sanctions, stating that if the violation continued, it would risk Qualcomm maintaining its dominance for 5G and that Qualcomm's failure to change its behavior in spite of the investigations and sanctions imposed by foreign states showed that the violation could be repeated.

According to the decision Qualcomm will;

- re-negotiate existing license agreements and cease threatening its customers with cutting supplies,
- refrain from signing exclusive supply agreement such as those it concluded with Apple, LGE, Blackberry, Samsung and VIVO,
- not intervene in the communication between its customers and public authorities concerning the customers' claim that Qualcomm behaved in violation of the law,
- submit an annual report to FTC for seven years to show compliance with these sanctions and remain under the supervision of FTC.

Qualcomm is expected to appeal the decision.

Sources:

https://globalcompetitionreview.com/article/1193288/us-ftc-wins-monopolisation-claim-against-qualcomm

https://res.cloudinary.com/gcr-usa/image/upload/v1558526615/NDCalQualcommruling_pl3ldn.pdf

- **Brazilian Competition Authority (CADE) has permitted the merger of Pfizer and GlaxoSmithKlein (GSK) on the condition that Pfizer unbundles its antacid tablet business**

In December, Pfizer and GlaxoSmithKlein (GSK) had announced the decision to merge their consumer healthcare businesses, which include brands such as Advil and Exedrin. The Brazilian Competition Authority (CADE) defined five relevant product markets for the transaction: (i) calcium products, (ii) topical anti-fungal products, (iii) non-narcotic analgesics, (iv) topical analgesics, and (v) antipyretics. As a result of the examination, CADE found that GSK had 68% and Pfizer had 32% of the market share in Brazil for over-the-counter antacid products and expressed its concerns that the merger will cause an increase in prices. The parties to the transaction presented a commitment to unbundle Pfizer's antacid business.

The merger has been approved by Australia and New Zealand, but the process is ongoing in US and China. The EU recently approved the transaction with a commitment for unbundling in the topical analgesics market.

Source:

https://globalcompetitionreview.com/article/1194043/brazil-orders-divestiture-for-gsk-pfizer

- **EU Commission imposed interim measures on Broadcom**

The EU Commission has announced that it launched an investigation concerning the claim that Broadcom abused its dominant position by contractual exclusivity practices, tying, abusive strategies concerning intellectual property and intentionally reducing interoperability. In the announcement, it is stated that Broadcom is the largest undertaking in the world in the field of designing, developing and producing integrated circuits for the cable telecommunication devices and it is the market leader for system-on-a-chip (chipset and circuit combination that serve as the brains of a modem or TV-box), front-end chips (devices that convert analog input into digital output), wi-fi chipsets and central office/head end equipment that provide high data rate.

The interesting part of the decision to launch an investigation is the fact that it marks the first time the Commission imposed interim measures in 18 years. Thus, after the adoption of the Regulation no. 2003/1 explicitly

granting the power to impose interim measures, the Commission has imposed an interim measure for the first time.

The announcement explains that the Commission considers the allegations serious, that Broadcom's behavior could result in rivals being excluded from the market and marginalized before the conclusion of the investigation, and therefore interim measures would be imposed until the substantive assessment is concluded within the scope of the investigation to be conducted with priority.

The announcement also notes that Broadcom is likely to be dominant in many markets, that it signed exclusive contracts with the 7 largest buyers for the sale of the related products, and that the conduct under investigation would prevent innovation.

Source:

http://europa.eu/rapid/press-release_IP-19-3410_en.htm

- **9th Administrative Court of Ankara's Stay of Execution Decision no E: 2018/2277**

Behavioral commitments in the enforcement of competition law may be accepted where they can achieve a level of effectiveness comparable to structural remedies in eliminating competitive issues and where a structural remedy with the same effect could not be found.

The decision was taken in the suit filed by Kumport Liman Hizmetleri Lojistik San. ve Tic. A.Ş., for the annulment and stay of execution of the Competition Board Decision dated 08.05.2018 and numbered 18-14/267-129, which concerned the authorization of the acquisition of Mardaş Marmara Deniz İşletmeciliği A.Ş., operating in the Ambarlı Port, by Limar Liman ve Gemi İşletmeleri A.Ş. which operates in the maritime sector and is controlled by the Arkas Holding.

The relevant section of the decision is as follows:

"*When examining the relevant commitments within the framework of eliminating competitive concerns and the context of the specific case, the commitments should be categorized as structural and behavioral commitments. As a matter of fact, as expressed in paragraph 19 of the Guidelines, behavioral remedies may be adopted where they can achieve a level of effectiveness comparable to structural remedies in eliminating competitive issues and where a structural remedy with the same effect could not be found.*

An examination of the commitments in question revealed that all commitments were behavioral. In light of the above-mentioned fact that behavioral remedies may be adopted where they can achieve a level of effectiveness comparable to structural remedies in eliminating competitive issues and where a structural remedy with the same effect could not be found, it was observed that the Competition Board decision failed to sufficiently explain the positive impact of the commitments presented in the acquisitions comprising the subject matter of the case on the concerns of vertical restriction of competition in the transaction. It was decided that the commitments presented did not eliminate competitive concerns and neither was there an effective implementation and supervision system for these commitments.

As such, in light of the data collected during the period in which the Board decision was taken, it was concluded that the existing commitments

package was insufficient to eliminate the competitive concerns in the market, and the Competition Board decision accepting the commitments package in their existing form and authorizing the notified acquisition was found to be unlawful."

Source:

https://www.rekabet.gov.tr/Safahat?safahatId=7a10893f-0615-4831-ad9c-85030afddf16

- **13th Chamber of the Council of State's Appeal Approval Decision no E: 2019/669, K: 2019/1107**

  Filing a suit against a Board decision requires that the decision is of legitimate, current and tangible interest to the plaintiff Being a citizen and consumer on their own are not found to be sufficient for filing a suit.

The decision was taken in response to the District Administrative Court decision approving the ruling of the first instance court, which had previously rejected the suit filed by Resul MARAŞLIOĞLU, requesting the annulment of the Competition Board decision dated 09.02.2017 and numbered 17-06-56-22, concerning the authorization of the acquisition, by Migros Ticaret A.Ş., of 95.495% of the shares of Tesco Kipa Kitle Pazarlama Ticaret Lojistik ve Gida Sanayi A.Ş. The plaintiff's statement that some supermarkets in Ankara he shopped at fell under Migros Ticaret A.Ş. monopoly after the transaction comprising the subject matter of the case, creating problems for him as a consumer, was not taken into account. The justification of the first instance court, which rejected the suit on the grounds of non-competence, was approved by the District Administrative Court and the 13th Chamber of the Council of State, and it is as follows:

"...*despite the fact that the transaction under consideration may have public aspects, the transaction comprising the subject matter of the case must be of legitimate, current and tangible interest to the plaintiff. Adopting a different perspective would allow all citizens to file suits on every subject thought to be to the benefit of the public, which is in violation of the goal of the legal regulation concerning the capacity to sue. Therefore, it was concluded that the plaintiff does not have the capacity to file this suit.*"

Source:

https://www.rekabet.gov.tr/Safahat?safahatId=902c5404-79f8-4adb-b111-249478d4853e

- **6th Administrative Court of Ankara Approval Decision numbered E: 2017/717 K: 2018/2508**

Final examination of acquisition transactions requires a sufficient and effective market analysis and their authorization must be legally and technically justified

The decision was taken in the suit filed by Türk Tuborg Bira ve Malt Sanayi A.Ş. against the Competition Board decision dated 01.06.2016 and numbered 16-19/311-140, concerning the authorization of the acquisition of control over SABMiller plc by Anheuser-Busch InBev (ABI). As a result of the final examination process conducted, it was concluded that the acquisition would not result in the creation or strengthening of a dominant position, thus significantly decreasing competition. The Board decision was annulled by the first instance court on the following grounds:

"... it was concluded that the authorization of the acquisition of control over SAB Miller plc by Anheuser-Busch InBev was not supported by sufficient and effective analysis of the market conditions and market assessments, and that the finalization of the acquisition process by the defendant authority without any conditions was not justified on any legal and technical arguments, that the subject was not scrutinized in an integrated manner taking the effects of the plaintiff company, intervening company and the other related market players on the acquisition process into consideration. Therefore, the transaction comprising the subject matter of the case was found to be unlawful in the aforementioned respects. In line with the grounds of the decision herein, it is clear that the defendant authority must re-assess the transaction process concerned and come to a decision accordingly."

Source:

https://www.rekabet.gov.tr/Safahat?safahatId=169b1650-912b-4dc3-8324-237c402d3629

- **12th Administrative Court of Ankara dismissal decision numbered E: 2018/1145 K: 2019/475**

Where more than one conduct independent of each other in terms of nature, market and chronologic process requiring imposing separate fines does not exist, the conduct violating the legislative provision must be considered to be a single instance and should

not be fined repeatedly, even if the conduct in question related to the period was carried out in separate markets and separate investigations were launched in each of those markets

The decision was taken in the suit filed by Efe Alkollü İçecekler Ticaret A.Ş. Against the Competition Board decision dated 25.10.2017 and numbered 17-34/537-228, which examined the claim that Mey İçki San. ve Tic. A.Ş. abused its dominant position in the vodka and gin market by engaging in conduct aimed at preventing the operations of its competitors. The relevant section of the decision is as follows:

"*… the plaintiff company claims that the previous conduct concerning the raki market was fined but the conducts comprising the subject matter of the investigation was unpenalized, that the case in question was not comprised of a single legal act, therefore a separate fine should have been imposed for the violation found in the vodka and gin markets. However, both the Board Decision dated 16.02.2017 and numbered 17-07/84-34, which was the subject matter of this Court's decision numbered E:2017/2489, and the Board Decision dated 25.10.2017 and numbered 17-34/537-228, which constitutes the subject matter of the current suit, determined that Mey İçki abused its dominant position in the raki, vodka and gin markets of the sector it operates in through its discount practices as well as related practices aimed at complicating the operations of its competitors in the market. In other words, both of the investigations based on the same practice show that Article 6 of the Act no 4054 was violated and that the act identified for the three categories of raki, vodka and gin was carried out within the same period. Therefore, the aforementioned company must be considered to have engaged in a single infringing act.*

The fact that a separate investigation was conducted for the vodka and gin markets does not necessitate the existence of two different facts, the adoption of such a stance would lead to repeated penalization for a single act. The case in question does not concern more than one conduct independent of each other in terms of nature, market and chronologic process requiring imposing separate fines. The conduct violating the legislative provision is a single one. In other words, the act comprising the subject matter of the administrative fine in the form of abuse of dominant position through discount practices constitutes a single instance, without a distinction of vodka, gin and raki markets. Therefore, it was concluded that the outcome of the two separate investigations conducted for each market for the same period of time cannot constitute separate violations. Consequently, paragraph 3 of the Competition Board decision dated 25.10.2017 and numbered 17-34/537-228, stating that imposing a

separate administrative fine for the vodka and gin market as a result of the investigation conducted on Mey İçki, was found to be in compliance with the law."

Source:

https://www.rekabet.gov.tr/Safahat?safahatId=a679d17f-6cd7-4f82-8baf-22a5b505c4f6

- **13th Chamber of the Council of State's revising decision numbered E: 2016/4017 K: 2019/1779**

  Where the participation of all of the undertakings in all agreements in the different markets cannot be shown with a standard of proof beyond reasonable doubt, it is not possible to find all undertakings in violation within the framework of a single continuing infringement. An agreement in terms of the parties, markets and chronologic processes must be identified in order to determine the scope of the collusion, and infringement must be established accordingly.

The decision concerns the reversal of the 13th Chamber of the Council of State decision dated 6.12.2015 and numbered E:2015/2974, K:2015/4612 concerning the reasoned approval decision of the 2nd Administrative Court of Ankara decision dated 05.12.2014 and numbered E:2014/137, K:2014/1393, dismissing the suit filed by AKBANK T.A.Ş. against the Competition Board decision dated 08.03.2013 and numbered 13-13/198-100 related to the establishment of whether Article 4 of the Act no 4054 was violated by 12 banks operating in Turkey by engaging in concerted practices in the fields of deposits, loans and credit cards. The relevant section of the decision is as follows:

Based on the first four documents stated to show the common plan, the Board decision concerned concludes that the seven market-maker banks engaged in price fixing with relation to deposit and loan services. The decision also finds that five more banks participated in the violation in later dates and the common plan was extended to include credit card services. In addition certain practices of public banks related to public deposit services were evaluated as a part of the collusion joined by all banks.

An examination of the information and documents of the file lead to the following conclusions: Document 2, Document 3 and Document 4 show that YKB, AKBANK, GARANTİ, İŞ BANKASI, VAKIFBANK, HALKBANK and ZIRAAT were in a collusion concerning deposit services; Document 6 shows that

YKB, AKBANK, GARANTİ, FİNANSBANK and İŞ BANKASI were in a collusion concerning housing and installment loans; Documents 10, 12, 17, 25, 26 and 27 show that YKB, AKBANK, GARANTİ, FiNANSBANK and HSBC acted in collusion concerning credit card services, and Documents 14, 16, 19, 20 and 21 show that VAKIFBANK, HALKBANK and ZlRAAT acted in collusion concerning public deposit services. However, the defendant authority was unable to show that the various violations concerning deposit, loan, credit card and public deposit services were committed within a single framework agreement or common plan under a single continuing violation. The decision considers the first four documents to clearly prove the common plan do not actually go beyond proving a collusion on deposits. This is because the collusion concerning deposits was first shown in Document 2, with the older Document 1 showing an information exchange between just two banks related to mortgage loan interests. This document cannot be taken to mean that loan services were included in a collusion related to deposits, committed at a later date. In addition, the decision was unable to show that various violations between different undertakings concerning deposit, loan, credit card and public deposits services were committed through a certain level of coordination - or, at least, in was unable to show the connection between the aforementioned violations. The decision also found evidence about some undertakings only for one or two services and was unable to show that these undertakings (especially those which participated in the violation later) were aware of a general framework agreement or common plan covering deposit, loan, credit card and public deposit services.

Under the circumstances, it was decided that the defendant authority failed to show, with a sufficient standard of proof (beyond reasonable doubt), that all of the 12 banks operating in Turkey acted in coordination under a single framework agreement concerning deposit, loan, credit card and public deposit services, or that the undertakings participating in the violation were aware of the aforementioned framework agreement or common plan. The findings of the Board decision on these points were not supported by the necessary evidence and therefore the defendant authority's action was based on insufficient examination.

Even though the conclusion section of the relevant Board decision found that all of the 12 banks under investigation had violated Article 4 of the Act no 4054 in the field of deposit, loan and credit card services, an assessment of the information and documents of the file shows that some banks participated in the violation with regards to a single service (for instance TEB's violation was only related to deposit, HSBC's was only related to credit card services) while some other banks was not a part of the violation at all

for certain services (for instance, there is no evidence to suggest that public banks were part of the violation concerning loan services). As a result, all 12 banks cannot be said to have participated in the violation in all sectors (deposits, loans, credit cards, public deposits). Therefore, it is not in compliance with the law to hold all 12 banks responsible for all of the violations which were committed by different banks in different sectors.

To be clear, the decision in question clearly failed to show that the 12 banks under investigation acted in coordination under a single framework agreement or common plan and should have assessed the relevant banks separately, for each service related to which they were part of the violation. However, the authority's relevant act comprising the subject matter of the suit was taken within the framework of a single, continuing infringement and is therefore in violation of the law. Consequently, the appealed Administrative Court decision dismissing the suit was found to be against the law.

Source:

https://www.rekabet.gov.tr/Safahat?safahatId=0304a3d0-747d-40de-a93c-77177ff43dba

Revision of decision requests were also accepted in the other suits filed by the other banks against the Board decision concerned. (See: https://www.rekabet.gov.tr/tr/KararlaIlgiliDavalar?kararId=30851aa5-2cf3-4c54-b284-e192ed6ed71b

- **9th Administrative Court of Ankara's dismissal decision numbered E: 2018/640 K: 2018/2723**

Metropolitan Municipalities do not have the nature of an undertaking. The legality of their decisions are examined in the nullity suits filed and the Competition Authority does not have the power to conduct investigations and take decisions.

The decision was taken in the suit failed by the Turkish Competitive Telco Operators Association against the Competition Authority decision dated 27.09.2017 and numbered 17-30/489-222, concerning the claim that İstanbul Metropolitan Municipality violated the Act no 4054 by effectively rendering the switching right practice granted to operators with the Electronic Communications Law no 5809 inoperational and engaging in discriminatory practices to the advantage of İstanbul Elektronik Haberleşme ve Altyapı Hizmetleri San. ve Tic. A.Ş. ile Türk Telekomünikasyon A.Ş.,

which is a subsidiary of the Municipality. The relevant section of the decision is as follows:

"... *but the İstanbul Metropolitan Municipality is not an undertaking. İstanbul Metropolitan Municipality does not produce goods or services in the same market with companies operating in the field of fixed and mobile communication, compete with each other with the goods and services they produce, and neither can such competition may lead to a competition infringement under the Act no 4054. Besides, the tasks and powers of metropolitan municipalities are determined by the Law for Metropolitan Municipalities no 5216, according to which the legality of the İstanbul Metropolitan Municipality decisions may only be examined with a nullity suit and the Competition Authority does not have the power to conduct investigations or take decision on this subject. On the other hand, the application of the plaintiff was not completely rejected. The Competition Board discussed the Preliminary Inquiry Report dated 16.08.2017 and numbered 2017-2-11/OA on its meeting of 27.09.2017, numbered 17-30, and took the decision numbered 17-30/489-M, launching an investigation on İstanbul Elektronik Haberleşme ve Altyapı Hizmetleri San. ve Tic. A.Ş. in order to determine whether this undertaking violated the Act no 4054 by its practices related to infrastructure building efforts of electronic communication operators. As a result, it is understood that the defendant authority did not reject the application of the plaintiff but instead directed its investigation concerning the actions in the complaint not towards the municipality itself but towards the company owned by the municipality which did have the nature of an undertaking. Consequently, it was concluded that the decision comprising the subject matter of the suit was not in violation of the law."*

Source:

https://www.rekabet.gov.tr/Safahat?safahatId=7abd647a-37be-497d-9f45-209f38d0da8d

- **A Structural Break Cartel Screen for Dating and Detecting Collusion**

Published By: Journal of Competition Law & Economics, 2018, Volume 45, No.2
Authors: Carsten J. Crede

The interest in cartel screening methods is increasing every day, thanks to the success of the empirical methods used by competition authorities to identify cartels. Current cartel screening methods can be classified as structural and behavioral screening methods. Structural screening methods use the characteristics of the industry to identify those markets which could become subject to cartelization, while behavioral methods try to identify cartels based on the effects of collusive agreements on the market. The current article introduces a new behavioral method for cartel screening which tries to identify a cartel through structural breaks caused by fluctuations in industry prices. Structural breaks uncovered by the method in question show that there is a high possibility for cartelization and the market should be examined more closely. In addition, structural breaks may assist in determining the start date of an identified collusive agreement. In the article, this newly-developed screening model is used for pasta markets in Italy, France and Spain.

The first step of the implementation involves examining the price movements between 2003 and 2012 and identifying the factors that caused these price movements by regression analysis. The second step applies a fluctuation test to the independent variables of the regression analysis, in order to uncover structural breaks. The third stage of the analysis utilizes the programming algorithm developed by Bai and Perron (1998, 2003) to find the numbers and dates of the structural breaks in Italian, Spanish and French markets. The results suggest three breaks in Italy and four in Spain in the pasta market between the same dates. No break has been found in the French pasta market. The first break in Italy represents the fast price increase observed following the establishment of the cartel, the second break represents the price decrease following the discovery of the cartelization, and the third break is related to the upwards trend in prices following the identification of the cartel due to concerted practices between the companies.

The article claims that variance-based cartel screening techniques are successful to uncover long-term stable cartels, but are inadequate for identifying unstable cartels such as those in the Italian and Spanish pasta

markets with short-term, sudden changes in the price. However, structural break screening techniques can identify even short-term or unstable cartels. Another superiority of structural break techniques over other behavioral cartel screening models is the fact that they do not take a certain agreement as base for defining cartel operations. It is sufficient for the cartel to affect industry prices for detection. Also, these tests are not prone to manipulation. For instance, if a cartel knows that the relevant market is screened with an examination based on price variance, it may complicate the detection of the cartel by making arbitrary price changes in order to keep the variance fixed through time. Such artificial price increases can be easily identified in structural break models, which should protect from the manipulation problem.

Source:

https://doi.org/10.1007/s10657-014-9437-0

- **When is upstream collusion profitable?**

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Authors: Dingwei Gu, Zhiyong Yao, Wen Zhou and Rangrang Ba

Many competition authorities were mobilized when it was found that automotive suppliers manufacturing parts and components of Japanese cars (bearings, climate control systems, compressors, etc.) had cartelized and raised prices between 2000 and 2011. Even an examination of the relevant investigations launched in USA show that 2.9 billion dollars in criminal sanctions were imposed on the 48 companies and 62 individuals found guilty. A large portion of the final manufacturers negatively affected by the cartel were strong Japanese companies such as Toyota, Honda and Nissan, which tend to establish long-term, close relationship with their suppliers. In light of the global power held by the companies in question, it would be unthinkable for these firms to be unaware of or unable to intervene in the cartel. On the other hand, it was very remarkable that these final manufacturers with leading roles in the automobile market did not submit complaints to relevant authorities concerning the high prices stemming from the agreements. Claiming that this could only be possible if suppliers covered the losses of final manufacturers, the authors of the article concerned look for the conditions which allowed suppliers to still be profitable, even after covering the losses of automobile manufacturers.

In order to find an answer, they use the two-stage "successive oligopoly" model, which addresses the behavior of two vertically related, separate

industries. The model analyzes the relationship between the supplier and final manufacturers, each of which have an oligopolistic structure, as well how this affects the consumer. The study shows that a horizontal and a vertical externality always occur in vertically-related industries characterized by oligopolistic competition. The vertical externality represents how the change in output is reflected to the suppliers while the horizontal externality represents the externalities caused by how the change in output for one final manufacturer is reflected on other final manufacturers. Companies manufacture more in comparison to a monopoly as a result of vertical externalities, while they produce less as a result of horizontal externalities. The price formed after the agreement in the supply industry would increase the joint profits of all companies, supplier or final manufacturer, if the two externalities cancel out. If the horizontal externality dominates, firms produce too much to the detriment of their collective interest. Overproduction increases the input prices while decreasing total output; this brings the cartel prices of the suppliers towards the monopoly level and thus increases the profits of all companies participating in the cartel. Consumer surplus and welfare is reduced when final manufacturers pass the increasing input costs on to sales prices.

The study summarizes the factors affecting the profitability of the structure built as a result of the supplier agreements as follows:

1) If the number of companies are large in both industries or if the market shares of the firms have a balanced distribution, supplier profitability goes up. 2) Decreasing product differentiation in final products or the existence of a convex demand structure makes it easier for suppliers to act jointly. 3) As the convexity of final manufacturers' cost structure increase, it becomes harder for suppliers to act jointly.

As a result, it is very difficult to uncover cartelization initiatives by suppliers, since there is no direct relationship between suppliers and consumers. Competition authorities need to monitor the demand behavior of final manufacturers, the level of product differentiation and the equilibrium status of both industries, all of which affect supplier profitability.

Source:

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Turkish Competition Authority
REKABET KURUMU

www.rekabet.gov.tr

Üniversiteler Mahallesi 1597. Cadde No:9 Bilkent Çankaya 06800 / ANKARA
Tel: (0312) 291 44 44
Faks: (0312) 266 79 20