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INTRODUCTION

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We are proud to present to you the Competition Bulletin for the second quarter of 2020, which includes news on developments in competition law, industrial organization and competition policy.

In the "Selected Reasoned Decisions" section of this issue, we included three investigation decisions an done preliminary investigation decision.

The "News around the World" section of the Competition Bulletin includes decisions from European Union, Spain and Germany.

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

"Economic Studies" section includes a summary of an aricle published by European Competition Law Review titled "Big Data: Understanding and Analysis of Competition Effects" and another article published by Journal of Antitrust Enforcement titled "Exclusionary Conduct in Data Driven Markets: Limitations of Data Sharing Remedy".

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 and Competition Advocacy Department

- **It was decided that Philips abused its dominant position in the market for subtitle technology related to digital video broadcasting.**

Decision Date:	Decision No:	Type:
26.12.2019	**19-46/790-344**	**Investigation**

As a result of the application by VESTEL related to the claim that Koninklijke Philips N.V. (PHILIPS) and Türk Philips A.Ş. (TÜRK PHILIPS) violated the Act no 4054 by not complying with the commitment to the relevant standard setting organization that it would license its essential patents related to subtitle technology on FRAND terms, an investigation was initiated. Under the scope of the file, the relevant market was defined as "the market for subtitle technology related to digital video broadcasting" and the second relevant product market as "panel television market" with respect to the patents licensed by PHILIPS. For the patents owned by Philips, according to the minimum requirements set by TSE (Turkish Standards Institution), compliance with the standard no ETSI 300 743, corresponding to DVB subtitling standard, is compulsory for TV and set-top box producers, due to additional features and picture quality, broadcasters and consumers use this standard, the fact that Philips's patents no EP 307 and EP 393 related to TV products' subtitle functioning, is standard essential patent (SEP) for compliance with ETSI standard is accepted and announced by DVB consortia, Philips's License Program is referred to in DVB website regarding DVB Subtitling standard, TV producers in Turkey has no alternative than getting a license from Philips, the technology subject to Philips's patents is indispensable for standard operators who has to use that technology, it is not possible to make production or export and therefore compete in the panel TV market in a way to meet the ETSI standard, if they are unable to access the technology, Philips's commitment to license its SEP's under FRAND conditions encourage licensees to make investments and bear sunk costs in this area, which supports the indispensability factor.

Within this framework, it was concluded that the SEP's in question had 100% market share during the period when they benefit from patent protection in the relevant technology market and PHILIPS was dominant in the market for subtitle technology related to digital video broadcasting thanks to the SEP's it owned.

The case law of the court related to reasonable price of SEP, which states that the license offer made by the licensor should be determined according

to transparency principle. What factors the price item depends on and how it is calculated should be stated. It was concluded that PHILIPS carried out discriminative activities because PHIILIPS did not announce license fees, which was contrary to transparency principle. In order to prove that a SEP owner under FRAND commitment does not carry out discriminative or abusive behavior, its activities should be compliant with transparency principle.

Moreover, PHILIPS did not comply with the step "application to an independent third party for price determination" in order that SEP owner undertaking could use its right to request for a court order towards a licensee, which is a legal right, in line with competition law, PHILIPS reversed the general burden of proof and added a condition in the Agreement not to claim nullity. Depending on the reasons found, it was decided that PHILIPS, which was dominant in the relevant market, abused its dominant position under the scope of Article 6(2)(b) of the Act no 4054 by means of making direct or indirect discrimination between purchasers with equal status by offering different terms for the same and equal rights, obligations and acts. As a result, PHILIPS was imposed fines.

- **A preliminary inquiry was made within the scope of Article 4 of the Act no 4054 on undertakings dealing with container transportation from / to ports located in the center and surrounding districts of İzmir.**

Decision Date:	Decision No:	Type:
02.01.2020	**20-01/3-2**	**Preliminary Inquiry**

The subject of the preliminary inquiry is the agreements for fixing employee salaries of undertakings transporting containers to / from the ports located in the center of Izmir and surrounding districts by road.

The documents obtained within the scope of the preliminary inquiry suggested that there might be a wage determination agreement or a no-poaching agreement. It was emphasized that while a wage determination agreement between undertakings not only reduces and harmonizes the costs of the undertakings but also restricts employee mobility similar to no-poaching agreements. Within this framework, in addition to creating an infringement of competition due to the fact that they formed a procurement cartel, wage determination agreements can also be evaluated within the scope of anti-competitive effects of direct restrictions on the labor market. This approach was adopted by the Board in BFİT decision. It was concluded

that wage determination and no-poaching agreements may have similar results in connection with each other, but depending on the file in question, considering the statements regarding the fixing of the salaries of the employees and the fact that it was clear that undertakings in this regard were in agreement, the practice that could be considered a violation was determined as the wage determination agreement. The issues regarding the no-poaching and the prevention of transfers were accepted as a part of the wage determination agreement or one of the results to be achieved with this agreement. It was also evaluated that the agreement within the scope of the file was not a part of any legitimate cooperation, but was an obvious agreement on the purchasing side beside the alleged price determination agreement made within the scope of the file numbered 2018-4-036, and in this sense, the conducts between the parties were regarded as restriction of competition by object.

On the other hand, it was understood that the violation claims were clarified during the preliminary investigation phase, the agreement did not have a noticeable effects on the market when the salary differences were taken into account, and when the number of drivers of the undertakings were examined, it was not possible to ascertain that the drivers were prevented from transferring to other undertakings, and also there was not a large purchasing power within the scope of the file. It was decided that it was not necessary to initiate an investigation within the framework of the case law of the Council of State and the Board and the principle of procedural economy and that an opinion should be sent to the relevant undertakings to end the violation pursuant to the third paragraph of Article 9 of the Act no 4054.

- **It was decided that DUBAI, ERGO, EUREKO and SOMPO violated Article 4 of the Act no 4054 with respect to open and close**

Decision Date:	Decision No:	Type:
23.01.2020	**20-06/62-33**	**Investigation**

A preliminary inquiry was made upon the application by the Insurance Supervision Board of the Ministry of Treasury and Finance with the allegation that the undertakings operating in the voluntary insurance market with large risk capacities (including project financing) violated Article 4 of the Act no 4054 by agreeing with each other; consequently, an investigation was launched about Aksigorta A.Ş. (AK), Allianz Sigorta A.Ş. (ALLIANZ), Axa Sigorta A.Ş. (AXA), Dubai Starr Sigorta A.Ş. (DUBAI), Ergo Sigorta A.Ş. (ERGO), EUREKO, Sompo Sigorta A.Ş. (SOMPO), Zurich Sigorta

A.Ş. (ZURICH. As a result of the investigation, it was concluded that AK, AXA and ZURICH did not violate the Act no 4054. On the other hand, it was decided that other undertakings violated the Act no 4054 as the correspondence between them showed that they negotiated and / or shared among themselves competition-sensitive information such as policy terms, price, and premium during / before the bidding process, in addition, they took decisions by contacting with their competitors on whether to submit proposals directly to the customers and they reduced the uncertainty in the market by determining their horizontal / vertical positions on the customer basis for future periods; thus they violated Article 4 of the Act no 4054 through agreements and / or concerted practices. However, in terms of the ongoing single violation approach, the correspondence, information and documents that are the subject of the violation were examined, even if it is accepted that 10 communications obtained under the file are in harmony with each other regarding general economic purpose (restriction of competition in terms of open and close coinsurance transactions) and geographic markets (Turkey), as it could not be proved that all undertakings party to this communication were aware of the communications that other undertakings perform for the joint aim or at least foresaw this and accepted the risks that may arise in this context, it was concluded that there was only one framework agreement within the scope of the file and that these communications constituted a single violation. Afterwards, the conclusion was drawn by evaluating whether the correspondence detected was a part of a single violation between the undertakings concerned or separate violations.

It was also underlined in the decision that the information exchange was made within the knowledge of the customer and whether it would result in a competitive outcome against the customer is important for whether there was competitive sensitive information exchange regarding reinsurance and coinsurance transactions; questions such as "if I have the customer, would you give me support?" would not create concerns in terms of competition, however, insurance companies in competition may not have information about each other's new proposal, therefore any information sharing or communication beyond this question may distort competition. It is emphasized at this point that in the evaluation in terms of competition law of the communications between these companies regarding transactions carried out by more than one insurance company, the time, content of the communications and whether the customer has information about the said communications are important, and since the competition in the market takes place at more than one level, communication at each level should be connected and limited to that level conditions.

- **It was decided that Google abused its dominant position by means of putting its competitors in a disadvantageous position with respect to competition**

Decision Date:	Decision No:	Type:
13.02.2020	**20-10/119-69**	**Investigation**

The file was about the claim that GOOGLE excludes its competitors out of the market for online comparison shopping market by means of product advertisements in Shopping Unit area and its practices concerning that area. The relevant product market is defined as "general search services". Another relevant product market is defined as "online comparison shopping services" because Google's Shopping service is an online comparison shopping service and is a different market than other specialized search services, marketplace platforms, online retailing and online search advertising. It was concluded that GOOGLE was dominant in both markets.

The claims in the file were listed as follows: Google Shopping Unit is placed at the top in a wide area and together with product pictures, Google Shopping does not provide a better service than other online comparison shopping websites thus decreases consumer benefits, comparison shopping websites cannot give advertisements in Google Shopping like other e-trade websites, the results placed in Google Shopping are listed as "Google shopping results" and creates ambiguity that the area is and advertisement area, although the searched website name is clearly stated in searches, Google Shopping is placed at the top, Adwords advertisements which are ranked higher in Google panel are in fact at lower ranks, results from competing websites are pushed down in search results.

The claims were analyzed one by one. There is not a finding regarding the claim that although Google shows the advertisements given by its competitors offering comparison shopping services in advertisement panel at upper positions, it lists the said advertisements at lower lines in fact and Google intentionally put its competitors in lower ranks in organic search results. However, it was understood that current display way and place of Google Shopping, which offers less options and content than its competitors, may artificially affect consumers and decrease consumer welfare, in this scope Google discriminates against competing comparison shopping services in general search services, does not allow the competitors to enter Shopping Unit under equal conditions and the fact that it offers comparison shopping services in an area where it creates ambiguity concerning advertisements discriminates in favor of its vertical services by

using its power in general search services. It is not reasonable that Google shows Google Shopping Unit by positioning similarly in searches where competing comparison shopping websites' brand or website names are used and this practice increases the effects of the activities analyzed under the file. Moreover, it was also found that Google's practices created anticompetitive foreclosure effects in comparison shopping market in Turkey. It was concluded that Google complicated its competitors' activities by discriminating in favor of its comparison shopping services and distorted competition in comparison shopping market. It was concluded that Google violated article 6 of the Act no 4054 in the period analyzed and administrative fines were imposed.

To terminate the infringement and to ensure competition in the market, Google shall be imposed the following obligations: to provide conditions in general search results page where competing comparison shopping services shall not be less advantageous than its relevant services, to remove clicking feature of Shopping Unit in other channels in a way to be compatible with mobile channel, to resolve uncertainty in a reasonable way about the title and labeling of Shopping Unit about the fact that the area is advertisement, to terminate positioning Shopping Unit primarily in case brands or website names of competitors offering comparison shopping services are used in searches through Google, to submit a report once a year periodically to the Authority for five years as of the date when the first compatibility measure is applied. The obligations should be fulfilled and documented to the Competition Authority within three months.

- **EU General Court annulled the Commission's CK Telekoms decision.**

With its decision dated 11 May 2016[1], the EU Commission had prohibited the acquisition of full control over Telefónica Europe Plc (O2) by CK Hutchison Holdings Ltd via its subsidiary Hutchison 3G UK Investments Ltd (Three); stating that the undertaking would increase its share in the retail mobile telecommunication market to 30-40% post-transaction, thus becoming the leader in the market and the number of players in the market would decrease from four to three.

The EU General Court annulled the Commission's decision with its decision of 28 May 2020.Daha fazla göster This decision became the first court decision concerning the "significant restriction of effective competition" test used in concentration control.

In the decision, it is stressed that the decrease in the competitive pressure created by the transaction parties on each other and their competitors after the transaction did not indicate, on its own, a significant limitation of effective competition within the framework of the harm theory on unilateral effects.

The decision stated that there was no difference between oligopolistic markets and others in terms of burden and standard of proof, that the Commission had to present proof of quality where the causality relationship was ambiguous and the analysis is future-oriented, that it was not sufficient for the scenarios and theories to be meaningful only in a theoretical perspective and they needed to be realistic and comprehensible. The court has noted that, in this particular case, the standard of proof should be "strong probability".

In this context, the Court decided that none of the three harm theories proposed by the Commission in its decision was sufficiently proven. It is further explained that the harm theory concerning unilateral effects did not show that competition would be "significantly" restricted; that in the harm theory concerning unilateral effects on network sharing agreements, the Commission made a mistake by categorizing the increased transparency in network investments as a unilateral effect; and that in the harm theory concerning unilateral effects related to the wholesale market, evaluating the transaction party Three as an important competitive power in the wholesale

[1] https://op.europa.eu/en/publication-detail/-/publication/4e780f23-8608-11e6-b076-01aa75ed71a1/language-en/format-PDF/source-119652675

market was not appropriate and that therefore, it could not be demonstrated that the competition was significantly restricted.

Sources:

http://curia.europa.eu/juris/document/document.jsf;jsessionid=36785460C813DD2000BED80C90092467?text=&docid=226867&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1825961

https://www.lexology.com/library/detail.aspx?g=baedc65d-923b-4873-bf32-db1c21285558&utm_source=lexology+daily+newsfeed&utm_medium=html+email+-+body+-+general+section&utm_campaign=lexology+subscriber+daily+feed&utm_content=lexology+daily+newsfeed+2020-06-02&utm_term=

- **EU Commission is gathering public opinion on "new competition instrument"**

On June 2, 2020, the EU Commission has started to gather public opinion on the Commission's "new competitive instrument", which envisages conducting a market investigation and introducing structural and behavioral solutions as a result. The "new competition instrument" targets structural competition problems such as a structural lack of competition or the existence of structural risks against competition in a market.

in parallel with the "new competitive instrument," the Commission also began a process of collecting public opinion on the initiative to regulate very large digital platforms[2]. It is expressed that the two initiatives are complementary to each other and the existing regulations.

In the note on the new competitive instrument, the legal basis of the instrument is stated to be Articles 103 and 114 of the Agreement on the Functioning of the European Union. Although the note explains the need for the new instrument by referencing the structural features of the digital economy and the problems it presents, the policy options for using the new instrument include the ability to use this new instrument in all sectors of the economy.

This instrument, which is presented to public opinion, resembles the "market investigation" power of the British competition authority (CMA), which has been used for a long time within the framework of the oversight

[2] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers

duty (section 131 (1) of the Enterprise Act 2002 as amended by the ERRA13 (EA02)). The CMA can conduct market studies in the sectors it deems necessary, as a result which it can recommend legislative amendments, invite industry players to self-regulate, expand consumers' access to information, and conduct market investigations. It can them introduce structural and behavioral remedies in order to eliminate the problems detected as a result of the market investigation, which is a more detailed examination.[3]

Source:

https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-instrument

- **Spanish competition authority has published guidance on competition compliance programs**

The Spanish Competition Authority (CNMC) published a guide on how to evaluate compliance programs in the context of competition law on June 10, 2020. The guide contains the criteria that the CNMC will take into account when evaluating the effectiveness of a compliance program, what criteria other competition authorities consider in their evaluations, and the benefits that can be offered to undertakings that implement compliance programs, including reductions in administrative fines.

In the press release, it was expressed that the guideline is intended to assist enterprises in the implementation and development of compliance programs. While it was emphasized that an effective compliance program should include clear behavioral parameters and institutional measures, the following were specified as important factors in assessing the effectiveness of a compliance program:

- Key administrative bodies and senior managers must participate in the program,
- The compliance officer must be independent and autonomous,
- Risk identification,
- Design of monitoring protocols and mechanisms,
- Existence of a denunciation channel,
- Internal procedures for the management of complaint and violation notifications,

[3] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/624706/cma3-markets-supplemental-guidance-updated-june-2017.pdf

- Disciplinary system.

Sources:

https://www.cnmc.es/sites/default/files/editor_contenidos/Competencia/Normativas_guias/202006_Guia_Compliance_FINAL_eng.pdf

https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2020/20200610_NP_guia%20de%20compliance_def%20ENG.pdf

- **German Federal Court of Justice annulled the stay of execution decision concerning the Facebook decision.**

With its decision of February 6, 2019, the German competition authority (Bundeskartellamt) had prohibited the tying the use of the Facebook.com social network by private customers located in Germany who also use the other commercial products of Facebook (WhatsApp, Oculus, Masquerade, Instagram) to the collection of user and device data and the linking of this data with Facebook.com accounts without user consent.[4] The Dusseldorf District Supreme Court had stayed the execution of this decision of the Bundeskartellamt with its decision of August 26, 2019, numbered VI-Kart 2/19 (V), harshly criticizing the decision concerned.[5]

The Federal Court of Justice revoked the lower court's stay of execution decision with its decision of June 23, 2020. The press release regarding the decision states that the Federal Court of Justice is of the opinion that Facebook held dominant position in the German social networks market, that the contracts terms were unfair, and that Bundeskartellamt did not have to show that Facebook had dominant position in the social media advertising market, contrary to the opinion of the Dusseldorf court.

While Bundeskartellamt's decision is still awaiting a ruling on the merits before the Dusseldorf District Court, the 14-month period for Facebook to fulfill the requirement of the competition authority decision has started.

Source:

https://globalcompetitionreview.com/article/1228183/german-court-reinstates-interim-facebook-decision

[4] https://www.rekabet.gov.tr/Dosya/rekabet-bulteni/rekabet-bulteni-nisan-2019-20190503120948251-pdf, s. 17-18.
[5] https://www.rekabet.gov.tr/Dosya/rekabet-bulteni/rekabet-bulteni-ekim-2019-20191107151035486-pdf, s. 10-11.

- **Ankara 12th Administrative Court Decision No. 2018/2099 E, 2019/2342 K.:**

No action can be taken under Article 9.3 of the Act no 4054 without establishing that there was an infringement of Article 4 of the Act.

The suit filed by the plaintiff association of undertakings requesting the annulment of the Competition Board decision dated 03.05.2018 and numbered 18-13/230-105 was accepted. The decision concerned the rendering of an opinion under Article 9.3 of the Act, stating that the association should terminate any decisions and practices involving the publishing of a price list which might be considered to fall under Article 4 of the Act and should repeal those provisions in their by-law involving the preparation of a price list.

In its decision to accept the suit, the Court made the following assessment: "*it was found that the Board did not assess all of these factors together to establish that the plaintiff infringed Article 4 of the Act no 4054 by publishing a price list, and that an action under Article 9.3 of the Act no 4054 could only be taken following an establishment of infringement under the legislation. In the current suit, the Board decision comprising the subject matter of the case which asked that the decisions and practices aimed at the publishing of price lists based on the risk of infringement be terminated and any provisions in the by-law concerning the preparation of price lists be repealed was found to be incompatible with the law*."

Source:

http://rekabet.gov.tr/Safahat?safahatId=947843b7-85f3-473e-abc3-33bee64af925

- **Plenary Session of the Administrative Law Chambers of the Council of State Decision dated 14.04.2019 and numbered 2017/3087 E., 2015/1459 K.:**

The ongoing administrative decision process of the Competition Board affects the terms of litigation for regulatory acts.

The suit was filed by the Competition Authority, requesting the annulment of some provisions of the regulations issued by the the the Union of Turkish Engineers and Architects (TMMOB). The suit was dismissed on the basis that

the "*suit was not filed within the term of litigation*" taken by the Joint Session of the Thirteenth and Eight Chambers of the Council of State.

The plaintiff authority appealed the decision, and the Plenary Session of the Administrative Law Chambers, as the court of appeal, reversed the judgment, with the following assessment: "*...in response to the court judgment which annulled, on procedural grounds, the final decision of the Competition Board concerning the report prepared as a result of the investigation initiated to address the complaint submitted on behalf of the İzmir Chamber of Commerce by its Chairman; in light of the fact that the file concerning the annulled decision numbered 02-04/40-21 was re-opened and that a suit was filed requesting the annulment of the By-laws which constitute legal barriers to imposing administrative fines on the TMOBB and the TMOBB Chamber of City Planners, which are under investigation due to the reasons listed in the final stay-of-execution decision during the proceedings, it has been found that the administrative decision-making process was ongoing before the Competition Board. Therefore the By-Laws which comprise the subject matter of the suit filed by the Competition Authority would be addressed during the decision-making process of the Competition Board, and thus the suit filed requesting the annulment of the aforementioned By-laws was within the term of litigation*..."

- **Ankara 14th Administrative Court decision numbered 2018/1164 E, 2020/1071 K.:**

  The Competition Board can launch a new investigation concerning an undertaking to which it previously rendered an opinion under Article 9.3 of the Act but did not initiate an investigation, in case it detects the same violation once more

The plaintiff undertaking filed a suit against the Competition Board's administrative decision dated 14.12.2017 and numbered 17-41/640-279, on the grounds that "the defendant authority previously launched an investigation on the same subject and that launching another investigation was unfair and illegal." The court dismissed the suit with the following assessment: "*...an examination of the claim that it was illegal to initiate an investigation on the same subject despite the previous final decisions of the Board on the subject and the lack of any new evidence or documents reveal the fact that the aforementioned Board decisions were misunderstood to mean that the conduct under examination had not been considered an infringement. The Board had previously warned to "terminate the violation" under Article 9.3 of the Act no 4054, or chose not to launch an investigation*

since it did not collect any information or document indicating the existence of a pool system. However, Article 303 of the Code of Civil Procedure no. 6100 states that 'For a formally finalized judgment in one case to be considered a finalized judgment on substance in another case, the parties to the cases as well as the grounds for the cases must match and the operative provisions of the first case must be the same with the requested outcome of the second case'. In accordance with this provision, a second case meeting the requirements listed in the Code may be dismissed on the grounds that a final decision on that case exists. However, it is observed that the investigation comprising the subject matter of the present case included many information and documents that were not acquired during the previous preliminary examination, and therefore the aforementioned claims of the plaintiff company were found to be invalid."

Source:

http://rekabet.gov.tr/Safahat?safahatId=9b99d59c-1c35-4fc9-9daa-ff6998ae3c56

- **Ankara 17th Administrative Court Decision Numbered 2019/991 E., 2020/409 K.:**

  The Competition Authority must conduct detailed examinations for all relevant markets connected to the violation under investigation

The court accepted the lawsuit requesting the annulment of the decision to impose administrative fines on the Association of Turkish Travel Agencies on the grounds that it violated Article 4 of the Act no 4054 by forcing agencies organizing hajj and umrah visits to purchase the mandatory package tour insurance policies from one of its subsidiaries, and subsequently annulled the administrative action concerned.

In its nullity decision, the court made the following assessment: "since violation of Article 4 of the Act no 4054 was not clearly and tangibly demonstrated by only investigating the service sector offering hajj and umrah visits while failing to launch an examination or investigation into the insurance services sector."

Source:

http://rekabet.gov.tr/Safahat?safahatId=cbff99d2-227d-4a3d-adaf-d1590af1cd5a

- **BIG DATA: Understanding and Analysis of Competition Effects**

Published By: European Competition Law Review 2020, 41-5: 215-224

Authors: Bill Batchelor and Caroline Janssens

Basic approaches regarding possible competition problems that arise mainly with big data are evaluated in the article. There are two basic approaches about the issue in the literature. According to the first of them, ex-ante regulation rules should be developed for the transactions including big data and implemented through an independent regulator. The other view advocates the option of intervention in cases where anti-competitive actions occur instead of ex-ante regulation because overregulation may deter new entries and limit the innovation incentive.

It is possible to examine anti-competitive behavior related to big data under three topics. These are concentration transactions, abuse of dominant position and protection of personal data.

There are two dimensions of concentration transactions. One of them is horizontal issues regarding concentration transactions. Big data has not been examined as a separate market in the EU application, data concentration has been considered as one of the potential issues of competition concern in the analysis of horizontal acquisitions, as it is in Thomson/Reuters and Monsanto/Bayer decisions.

Concerning the vertical effects of concentrations, with the same approach as the horizontal effects, whether there is a foreclosure effect on the essential input as a result of the concentration of undertakings that are not competitors of each other or whether the transaction targets a destructive strategy is focused on. In this context, it was concluded in the IMS Health / Cegedim decision that there would not be a foreclosing effect regarding data after the concentration. On the other hand, it was foreseen that access to basic data would be limited as a result of the concentration transaction and the parties committed the fair access of the competitors to Magister (the e-learning system including secondary schools) in the Sanoma Learning / Iddink decision.

Apple/Shazam Decision is a typical decision whether there is destructive strategy in the vertical concentration transactions. In the decision, whether Apple carried out a destructive on rival digital music service providers (such as Spotify, Google Music) using Shazam's data and it was concluded that such an activity could not be realized.

In the context of abuse of dominant position, the focus is on entry barriers. Big data is considered as an economic parameter that can lead to dominance and abuse by creating a barrier to market entry. Indeed, in the Google Shopping Decision, the Commission argued that data accumulation could be considered as an entry barrier because data accumulation also creates a network effect. Google's superiority in the online advertising market stems from this fact.

In some cases, refusal of access to data can be accepted as abuse of dominant position. For instance, after the Thomas / Reuters concentration, an investigation was carried out against the new undertaking due to the restriction of access to data. Likewise, in the Independent Car Repairers case, the restriction on access to technical information on automobile parts was evaluated under the scope of abuse of dominant position.

The third dimension of the competition restrictions regarding big data is related to the use of personal data. In principle, violations of personal data protection in EU practice are not considered within the scope of competition law. Indeed, a specific Directive is in force and implemented against such actions. However, the common aspects of competition and data security disciplines have started to be discussed, with issues such as data portability and access to data coming to the fore within the scope of solving the competition problems in digital markets.

Debates continue about what kind of policy should be produced regarding the mentioned issues. In this framework, suggestions and evaluations included in certain studies about the issue are summarized in the article. These studies are OECD Big Data Report (2017)[6]; UK Furman Report (2019)[7]; EU Cremer Report (2019)[8] and Germany Competition 4.0.[9] Reports. The main policy recommendations included in these reports are summarized in a table and evaluated comparatively in the article.

As a result, an approach that will strike a balance between the two approaches stated at the beginning is required in the policy setting regarding big data. It is well known that an interventionist approach in such dynamic areas can have negative consequences. However, regulations have

[6] https://www.oecd.org/daf/competition/big-data-bringing-competition-policy-to-the-digital-era.htm
[7] https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel
[8] https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf
[9] https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3

played a role in eliminating market failures in many infrastructure sectors in the EU.

It is not easy to detect the gaps in current policy enforcement activities. However, as stated in the example decisions, the detection and analysis of competition restrictions arising from data are taken into account in EU competition law practice. Therefore, the changes to be made in the current legislation should be made carefully.

Source:

https://core.lexxion.eu/data/article/15415/pdf/core_2020_01-018.pdf

- **Exclusionary Conduct in Data Driven Markets: Limitations of Data Sharing Remedy**

Published By: Journal of Antitrust Enforcement (2020, 0, 1-24)

Authors: Vikas Kathuria and Jure Globocnik

The natural consequence of finding of an infringement of Article102 TFEU is to eliminate the harm to consumer welfare by restoring competition by means of effective measures. Since big data is the most important source in data driven markets, a dominant undertaking may prevent its competitors from economy of scale by depriving them of user data. Indeed, the European Commission found Google guilty of excluding its competitors through this strategy in Android licensing case. However, the Commission did not impose any data sharing obligation. The article discusses the viability of mandatory data sharing to restore competition in effective markets with respect to both theoretical and practical aspects. The article concludes that data sharing is not the optimal remedy for increasing consumer welfare.

It is accepted that competition authorities should go beyond prohibiting the unlawful practice to terminate the violation effectively and to restore competition in certain cases. OECD observes that while remedies have curative, corrective or preventive role, sanctions punish. The US Department of Justice lists the goals of remedies in abuse of dominant position cases as follows: to terminate the defendant's unlawful conduct, prevent its recurrence, and re-establish the opportunity for competition in the affected market.

The article shows theoretical approaches related to the remedy concept and discusses whether mandatory data sharing is administrable. In case a court

or competition authority imposes the dominant player the obligation to share its data with its competitors, it will have to answer questions regarding price, quantity and similar issues. In data sharing decisions taken up to now, the data in question have been traditional data such as subscriber database and so-called "big data", which is a current fact that has not been the subject of any decision. Another potential problem regarding mandatory data sharing is that the data can be used beyond the market affected by abuse of dominant position. Competition authorities or courts may rule that the use of data should be limited to clearly set purposes but it is almost impossible to monitor such limitation.

The article suggests that competition should be restored to the level that had existed at the time of the infringement began instead of the level that would have existed but for the infringement. GDF-Suez decision by the French Competition Authority dated September 9, 2014 and numbered 14-MC-02 is remarkable among the example cases in the article. In the said decision, GDF-Suez, which was previously a monopoly in the electricity and gas market that was liberalized in 2007, was imposed an obligation to share consumer data that it obtained during that period with new entrants under transparent and non-discriminatory terms. According to the article, GDF-Suez case is different from Google case anatomically. French Competition Authority took a decision with an approach "to restore competition to the baseline level instead of but for the infringement level." The Article highlights that the mandated data sharing was related to customer database and collected during the period when the undertaking was a monopoly. It is not appropriate to compare it with big data.

Another important point of discussion is the consent of the data subject. The data collected by the dominant company is the sum of the data of each natural person who is a private law subject. Theoretically, each natural person gives consent to share its personal information and data especially with that firm. Whether imposing a company, to which natural persons give consent to share their information, to share that information with its customers is legally legitimate is open to discussion.

After those discussions, the article clearly states that mandatory data sharing is not the optimal remedy in exclusionary abuse of dominant cases.

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