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INTRODUCTION

We are proud to present Competition Bulletin's first issue of 2016. From this issue onwards, Competition Bulletin will shift to a quarterly publication schedule. As before, our sections titled "Selected Reasoned Decisions," "News around the World," and "Selected Decisions under Administrative Law" will continue. In addition to those sections, we will also have a brand new section, titled "Economic Studies". News in this section will be collected from among economic studies conducted in the field of competition economics.

In this issue "Selected Reasoned Decisions" section includes Competition Board decisions on the undertakings Unilever, Beta Marina, Turkish Airlines and Bayer; "News around the World" includes news items from the U.S., EU and Israel; "Selected Decisions under Administrative Law" includes decisions taken by the Council of State and Ankara Administrative Court concerning Competition Board decisions taken at various dates, and "Economic Studies" section includes studies published by the U.S. Federal Trade Commission's Bureau of Economics and the EU Commission on concentrations.

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

With our best regards.

Department of External Relations, Training and Competition Advocacy

- **Within the framework of the investigation conducted in relation to the claim that Unilever San. ve Tic. Türk A.Ş. and Advertising Self-Regulatory Board jointly or singly complicated the operations of competitors, it was decided that the undertakings concerned did not violate the Act no 4054.**

Decision Date:	Decision No:	Decision Type:
16.10.2015	**15-38/618-210**	**Investigation**

The investigation, conducted in response to the 10th Ankara Administrative Court's decision dated 27.05.2014 and numbered 2013/1641 E.2014/590 K., dealt with the claims that since Unilever San. ve Tic. Türk A.Ş. (UNİLEVER), which held dominant position in the market, was represented efficiently at the Advertising Self-Regulatory Board (ASRB), ASRB failed to act in an impartial manner in its decision-making process; that there were attempts to prevent the market operations of the complainant undertaking through the ASRB, and that ASRB's related recommendation to ban the complainant undertaking's advertisements were not treated as a simple recommendation due to the influence of UNİLEVER on the channels of advertisement.

During the investigation stage, no information, documents or findings were acquired between ASRB and UNİLEVER officials in support of the aforementioned claims, suggesting that ASRB took decisions under the influence of UNİLEVER or any other advertiser, or that UNİLEVER applied pressure on ASRB to complicate the operations of Fermet Gıda Ürünleri San. ve Tic. A.Ş.'nin (FERMET GIDA) in the area of advertising. Since there were no information or documents proving UNİLEVER acted in concert or coordination with the ASRB to complicate the operations of FERMET GIDA in the market, and since there were no findings that would lead to such a conclusion, it was decided that no violation took place under article 4 of the Act no 4054 on the Protection of Competition (act no 4054).

On the other hand, in relation to the claim that UNİLEVER abused its dominant position in the market to complicate the operations of FERMET GIDA through ASRB, it was decided that there were no violations under article 6 of the Act no 4054 either, since the investigation did not identify any conduct that could have been characterized as an abuse within the framework of the file, even if UNİLEVER or ASRB were assumed to hold dominant positions in the market. As a result, it was decided that imposing administrative fines on the undertakings under examination was not necessary.

- **Individual exemption granted to the "Cooperation Agreement" signed between Bayer Türk Kimya Sanayii Ltd. Şti. and Türkiye İş Bankası A.Ş., as well as to the consumer finance project that was formed accordingly.**

Decision Date:	Decision No:	Decision Type:
16.10.2015	**15-38/618-210**	**Exemption**

In the examination conducted concerning the request for the grant of a negative clearance or exemption to the agreement signed between Bayer Türk Kimya Sanayii Ltd. Şti. (BAYER TÜRK) and Türkiye İş Bankası A.Ş. (İŞ BANKASI), as well as to the consumer finance project that was formed accordingly, the relevant market was identified as the "Turkish market for Regorafenib, which is an active substance used in the treatment of advanced colorectal cancers and gastrointestinal stromal tumors," and it was stated that "credit card payment services" market was expected to be affected by the transaction.

Under the agreement, patients will be able to pay for the cost of the pharmaceutical, which is produced by BAYER TÜRK and which does not have an equivalent in Turkey, using any credit card registered in the system issued by İŞ BANKASI, with an option to defer payment for one month and to split the payment into two installments. Accordingly, İŞ BANKASI credit card customers will be able to take advantage of installments and deferred payments by having the pharmacies enter the barcode numbers of the drug into the POS equipment, once those barcode numbers are submitted by BAYER TÜRK to İŞ BANKASI and defined in the system by İŞ BANKASI.

The relevant transaction is deemed to be a vertical cooperation related to the distribution of the drug. The agreement was not granted negative clearance due to the de facto exclusivity expected to arise in practice, and it was not assessed under the Communiqué no 2002/2 since the 40% market share was exceeded. However, an individual exemption assessment was conducted. As a result, the agreement was granted individual exemption, since it fulfilled all of the conditions listed in article 5 of the Act no 4054.

- **It was decided that authorization should not be granted to Setur Servis Turistik A.Ş.'s acquisition of all of the shares of Beta Marina Liman ve Çekek İşletmesi A.Ş. and Pendik Turizm Marina Yat ve Çekek İşletmesi A.Ş.**

Decision Date:	Decision No:	Decision Type:
09.07.2015	**15-29/421-118**	**Final Examination**

The acquisition of all of the shares of Beta Marina Liman ve Çekek İşletmesi A.Ş. (BETA TURİZM) and Pendik Turizm Marina Yat ve Çekek İşletmesi A.Ş. (PENDİK TURİZM) by Setur Servis Turistik A.Ş. (SETUR), which is controlled by Koç Holding A.Ş. (KOÇ HOLDİNG), affects the markets for "mooring services provided at marinas and boat parks," "dry dock area services," and "area renting services."

In relation to the market mooring services provided at marinas and boat parks for the districts of Adalar, Ataşehir, Beşiktaş, Beyoğlu, Çekmeköy, Kadıköy, Kağıthane, Kartal, Maltepe, Pendik, Sancaktepe, Sultanbeyli, Şişli, Tuzla, Ümraniye and Üsküdar, it was concluded that

- The acquisition would cause competitive concerns since the resulting market share and concentration increase would be well above the thresholds prescribed;
- Following the transaction, in addition to Kalamış Marina which it operates, KOÇ HOLDİNG would also acquire control over İstanbul City Port Marina, the former's closest competitor, and the merged entity would hold significant power in the market, which could then be used in order to raise prices;
- Existing players in the market or potential entrants would not be able to sufficiently limit KOÇ HOLDİNG's incentives to increase prices at Kalamış Marina and İstanbul City Port Marina to eliminate any competitive concerns created by the transaction;
- There would be no countervailing buying power in the market in response to potential price increases.

Another factor taken into consideration within the framework of the above assessment concerning the market is the effect KOÇ HOLDİNG's decision not to sign a transfer of operating rights agreement for Kalamış Marina would have on the market. In addition, if the notified acquisition is realized, for an undetermined transition period KOÇ HOLDİNG would operate both Kalamış Marina and İstanbul City Port Marina, which are active in the relevant market defined in relation to İstanbul City Port Marina. Within this framework, it was decided that KOÇ HOLDİNG's decision not to sign the

transfer of operating rights contract would not affect the assessments made, particularly in light of the fact that the market conditions that form the basis of the concentration assessment would not change during the transition period and that SETUR did not make any commitments to eliminate any competitive concerns in the transition period.

It was found that the transaction would not lead to a significant concentration in the "market for mooring services provided at marinas and boat parks" for any alternative geographical market definitions that might be made in relation to Göcek Village Port Marina and Göcek Exclusive Marina,

In relation to the dry dock area services provided to provinces with a coast on the Marmara Sea, in light of the

- Large market share of the merged undertaking post-transaction, even with the most limited market size estimates,
- Large number of undertakings that would be operating in the relevant market following the transaction, and the fact that competitors' services would be substitutable for the services of the merged undertakings, and
- the fact that competitors had sufficient capacity to meet the demands of any customers that may retreat from any potential price hikes implemented by the merged undertaking,

it was decided that the customers of the merged undertaking after the transaction would have the opportunity to choose competing undertakings and that this might act to eliminate any incentives for the merged entity to increase prices.

It was found that the transaction would not lead to a significant concentration in the "market for dry dock area services" for any alternative geographical market definitions that might be made in relation to Göcek Village Port Marina and Göcek Exclusive Marina,

It was also found that the transaction would not lead to a significant concentration in the "market for area renting services" for any alternative geographical market definitions that might be made in relation to İstanbul City Port Marina, Göcek Village Port Marina and Göcek Exclusive Marina

Within this context, it was decided that the transaction in question would not lead to the creation or strengthening of a dominant position in the "market for mooring services provided at marinas and boat parks," and thereby to a significant lessening of competition in the relevant market for "Adalar, Ataşehir, Beşiktaş, Beyoğlu, Çekmeköy, Kadıköy, Kâğıthane,

Kartal, Maltepe, Pendik, Sancaktepe, Sultanbeyli, Şişli, Tuzla, Ümraniye ve Üsküdar districts".

Since the transaction in question would lead to KOÇ HOLDİNG acquiring dominant position in the relevant market defined for İstanbul City Port Marina and thereby to a significant lessening of competition in that market, it was decided that the transaction should be rejected in accordance with article 7 of the Act no 4054.

- **Competition Board rejected the claim that Türk Hava Yolları A.O. foreclosed Pegasus Hava Taşımacılığı A.Ş. through the incentive policies it implemented for ticket sales agencies.**

Decision Date:	Decision No:	Decision Type:
09.07.2015	**15-29/427-123**	**Preliminary Inquiry**

The complaint by Pegasus Hava Taşımacılığı A.Ş. (PEGASUS) essentially claims that discounts and incentives provided to agencies by Türk Hava Yolları A.O.'nun (THY) had the goal or effect of foreclosing the market to PEGASUS or preventing its operations as an effective competitor. The practices in question are generally examined under the heading of discount systems in competition law. The system implemented was found to fall under a type which does not include exclusivity but which can potentially lead to it; however, it was also determined that a significant portion of the market was not foreclosed to competition. In addition, it is also concluded that the incentives provided by THY to agencies would have either a very limited or no effect on the market, since the final decision is made by the end user. As a result, concerning the discount system, it was stated that

- THY was the most important and indispensable player in the market for sales made through agencies,
- However, in an assessment related to the number of agencies, even if it were assumed that all THY agencies overlapped with PEGASUS agencies, PEGASUS would still have a significant number of agencies which would not make THY sales,
- THY's incentive systems would have a limited effect due to various reasons, such as the fact that the unit discounted/incentivized would be different from the unit/individual who would be purchasing the service,
- Particularly for business customers, it was not possible to talk about an information asymmetry between the agency and the customer,
- For individual customers, on the other hand, ticket prices and other factors could be checked by alternative methods such as by internet

or by phone, which meant that agencies would have limited opportunities to direct these types of customers as well,
- The last point above was also supported by the fact that the number of sales through the internet has been increasing in the recent years.

Additionally, it was found that discount systems implemented by the THY under its incentive policy did not transform into predatory pricing and did not foreclose competitors. As a result, it was decided that the complaint should be rejected.

- **Competition Board rejected the claims that Türk Hava Yolları A.O. (THY), directly or through the General Directorate of Civil Aviation of the Ministry of Transport, Maritime Affairs and Communication, excluded third parties from the İstanbul-Bakü-İstanbul route between Turkey and Azerbaijan and that the cooperation between THY and Azerbaycan Havayolları Kapalı Tip Anonim Şirketi (AZAL) was in violation of the Act no 4054.**

Decision Date:	Decision No:	Decision Type:
01.09.2015	**15-34/512-160**	**Preliminary inquiry**

The application, which requested confidentiality, basically claims that the cooperation between THY and AZAL (code sharing agreement - CSA) was in violation of the Act no 4054. A CSA, which involves one airline allowing the use of its codes in the flights of another airline, enables more than one airline to provide transportation services as if these services are provided by a single airline. CSAs are an important factor in the establishment of multinational airline alliances. They enable higher listings in computer reservation system screens and they have also become a cost-free marketing tool to draw the attention of those airlines that wish to protect and strengthen their positions in the market. Additionally, they ensure other benefits including revenue increases due to economies of scale realized through a rise in traffic concentration and cost advantages resulting from shared services. They also extend flight networks and increase flight frequencies. Thus, airlines can increase their market shares without incurring additional costs. This means alliances ensure market access.

Provisions concerning routes and number of flights between Turkey and Azerbaijan are regulated in the Air Transportation Agreement and Memorandum of Understanding, signed between the civil aviation institutions of the two countries. Accordingly, under the current agreement

multiple designation principle is in effect but single designation may be used on a route-by-route basis. Within this framework, the Turkish designated company in the İstanbul-Bakü route is THY, while the designated Azerbaijani airline company on the Azerbaijan side is AZAL. In this case, the CSA signed between THY and AZAL is a contract implemented voluntarily by the parties themselves and has the characteristics of an agreement between competitors. The agreement in question does not have exclusivity provisions and does not violate article 4 of the Act no 4054 in terms of its objectives.

It was determined that the agreement did not cause a decrease in the number of flights for the relevant route, did not lead to market allocation or frequency limitations, that the parties did not share commercial risks following the agreement, that the CSA did not serve to decrease the competitiveness for either party in relation to the other, that the information exchanged between the parties were not competition sensitive, and that ticket prices were not fixed. As a result, it was decided that the complaint should be rejected.

- **Contract Manufacturing Agreement signed between Bayer Türk Kimya Sanayii Ltd. Şti. and Zentiva Sağlık Ürünleri San. ve Tic. A.Ş. was found to be in accordance with article 4 of the Act no 4054.**

Decision Date:	Decision No:	Decision Type:
28.07.2015	**15-32/460-142**	**Exemption**

The Contract Manufacturing Agreement (Agreement) in question concerns the contract manufacturing of certain drugs by Zentiva Sağlık Ürünleri San ve Tic. A.Ş. (ZENTIVA) on behalf of Bayer Türk Kimya Sanayii Ltd. Şti. (BAYER TÜRK). Essentially, the production of pharmaceuticals are subject to regulation. These products must be manufactured in line with the safety, quality and efficiency standards in accordance with their intended use and license requirements. Within this framework, in order to ensure that the contracted products are only manufactured at a ZENTIVA facility that meets the standards, BAYER TÜRK demanded that the products in question be manufactured exclusively by ZENTIVA. The exclusivity provision of the agreement was not considered to be a competitive restraint within the framework of the characteristics of the product. As a result, it was decided that the Contract Manufacturing Agreement was not in violation of article 4 of the Act no 4054, and that an exemption assessment under article 5 of the same Act is necessary.

- **Thai Union and Bumble Bee merger collapsed in the U.S.**

Thai Union's proposed acquisition of Bumble Bee Seafoods has been terminated earlier in December because the parties concluded that it is unlikely to get a clearance from the United States Department of Justice (USDOJ).

Thai Union is a publicly held Thai company and has operations in the U.S. through its subsidiary Chicken of the Sea. Bumble Bee is a U.S. based company, owned by privately held Lion Capital LLP. Both companies sells shelf-stable seafood products.

The market for shelf-stable seafood products in the U.S. is currently dominated by three major companies, Starkist, Chicken of the Sea, and Bumble Bee. The proposed acquisition would have reduced the number of players from three to two in the market. Thai Union would have been the market leader with nearly %50 market share.

Thai Union announced its acquisition plan one year ago. After twelve months, USDOJ announced that "it had serious concerns that the proposed transaction would harm competition". Assistant Attorney General Bill Baer of the department's Antitrust Division said that "Our investigation convinced us – and the parties knew or should have known from the get go – that the market is not functioning competitively today, and further consolidation would only make things worse."

Sources:

http://globalcompetitionreview.com/news/article/40007/tuna-deal-canned-following-doj-pressure/

http://www.justice.gov/opa/pr/chicken-sea-and-bumble-bee-abandon-tuna-merger-after-justice-department-expresses-serious

http://www.thaiunion.com/en/newsroom.ashx

- **US Libor case against Former Rabobank Employees**

In October 2013, Rabobank accepted a prosecution agreement with the DOJ, it paid $325 million in fines and admitted that a number of its traders manipulated London InterBank Offered Rate (Libor rate). Upon this admission, the DOJ filed a case against Rabobank traders for manipulating the Libor rate and for defrauding some of participants that engaged in swap transactions with Rabobank traders. According to the DOJ, the traders made Libor submissions in favour of Rabobank traders' positions.

The DOJ have won the case for two traders with one of the jury's verdicts at Southern District of New York released on 5th November. The two convicts are former Rabobank employees, Anthony Allen and Anthony Conti. Allen was Rabobank's global head of liquidity and finance and the manager of the company's money market desk in London. Allen and Conti are both UK citizens, however they came to the US to stand trial in October 2014, when they have been indicted for conspiracy.

Libor is a benchmark interest rate, in which the submissions from banks around the World, including Rabobank, were taken into account and indicates the rates those banks would charge when they need to borrow from other banks. Libor is an important indicator for businesses and consumers as it is used as a benchmark rate for the contracts, credit cards and consumer lending loans.

Assistant Attorney General Baer, Head of the DOJ's Antitrust Division said "The department will continue to pursue aggressively those involved in illegal schemes that undermine the integrity of financial markets. And we will hold individuals criminally accountable for directing illegal corporate behaviour."

On the other hand, the two defendants have appealed the verdict at the end of November. They said there is not sufficient evidence to find them guilty.

Sources:

http://globalcompetitionreview.com/news/article/39784/doj-wins-first-libor-criminal-trial/

http://globalcompetitionreview.com/news/article/39970/us-libor-convicts-say-jury-not-rational/

http://globalcompetitionreview.com/usa/article/39640/doj-ex-rabobank-traders-spar-admissible-evidence-ahead-trial/

http://www.justice.gov/opa/pr/two-former-rabobank-traders-convicted-manipulating-us-dollar-yen-libor-interest-rates

- **Ramirez nominated as Chair of the US FTC**

Edith Ramirez, Chairwoman of the United States Federal Trade Commission, has been nominated to a second term by President Barack Obama. She was sworn in as a Commissioner of the FTC on April 5, 2010, and she has been serving as FTC Chairwoman since March 4, 2013.

Ramires has had a successful term as Chairwomen of the FTC. During her term, the FTC has concluded more than 200 enforcement actions on consumer protection and competition related cases. Before taking office at the FTC, she was a partner at Quinn Emanuel Urquhart & Sullivan, LLP. Before that, she had worked as an associate at Gibson, Dunn & Crutcher, LLP in Los Angeles.

There are currently three commissioners, Julie Brill, Maureen K. Ohlhausen, and Terrell Mcsweeny, as well as a Chairwoman at FTC. FTC has a democratic majority with three seats against one republican commissioner, Maureen K. Ohlhausen. Former Republican Commissioner, Joshua Wright, has left the FTC this year and returned to his academic career at George Mason University. His seat is still vacant. Despite democratic majority at the FTC, Wright had convinced the Commissioners to agree on the Section 5 Reform, which he advocates strongly.

Sources:

http://globalcompetitionreview.com/news/article/40137/ramirez-renominated-head-us-ftc/

https://www.ftc.gov/about-ftc/biographies/edith-ramirez

http://www.rekabet.gov.tr/File/?path=ROOT/1/Documents/B%C3%BClten/Rekabet%20B%C3%BClteni%20A%C4%9Fustos%202015.pdf

- **AB InBev merges with SABMiller**

Two large brewer companies, ABInBev and SABMiller, have made public their proposed merger on 11 November. With £71 billion in value, the agreement would create the world's largest brewer. The deal must get regulatory clearance from the EU, US, China, South Africa, Colombia, Ecuador, Australia, India and Canada.

The deal has created antitrust concerns that the estimated post-merger total market share would be about 65 percent in sales value terms and 80 percent in sales volume terms in the US. Therefore the highest scrutiny against the deal was raised in the US. Another country that the deal may create antitrust concern is China. The deal is also expected to affect small brewers and beer distributors. The company created following the deal would close the distribution market to craft brewers and other rivals. The market for raw materials would also be closed to access by them. ABInBev's executive Carlos Brito expressed that they plan to focus their activities outside the US, and they have proposed to sell SABMiller's stake in Molson

Coors which constitutes the full extent of SABMiller's market activity in the US. Thus they would not expect any change in the US beer market. However, it is expected that concerns about the deal will continue to be submitted as the DOJ inquiry is under way.

Sources:

http://globalcompetitionreview.com/news/article/39622/ab-inbev-appeals-sabmiller-shareholders-68-billion-takeover-offer/

http://globalcompetitionreview.com/usa/article/40091/beer-execs-defend-deal-senate-hearing/

http://globalcompetitionreview.com/news/article/39809/ab-inbev-sabmiller-announce-millercoors-divestment/

http://globalcompetitionreview.com/usa/article/39659/ab-inbev-inks-106-billion-deal-shadow-probes/

- **Record Fine from the French Authority**

French Competition Authority has fined Orange, a telecom company, 350 million euros for abusing its dominance in the markets for mobile and fixed line telecommunication services for business clients. This amount is the highest fine against a single company.

Orange is said to hinder competition between 2000 and 2015. The Authority started the investigation in 2010 upon complaints by Bouygues Telecom and SFR. After carrying out several dawn raids at France Telecom and Orange facilities, the Authority has concluded that Orange abused its dominance by implementing four different practices. First, Orange restricted the access in a discriminatory way to the essential information about local loop network. This practice affected the retail market for fixed telecommunication services for business customers.

Second, Orange implemented a "change of mobile" loyalty programme in the market for mobile telecommunications services for business customers. Only non-residential customers can benefit from this programme if they extend their subscription for 12 or 24 months.

Third, Orange carried out a loyalty discount scheme for non-residential clients since 2003. In particular, Orange offers discounts to those clients who extend their contract from 12 months to 24 or 36 months. Orange offers discounts to those clients according to the number of phone lines in their subscription and their consumption.

Fourth, Orange set up an exclusivity discount for virtual private networks between 2006 and 2015. Orange offered discounts to its VPN customers only if they commit to use Orange exclusively to connect their networks.

In addition to this high fine, Orange accepted the harms that its practices caused to the economy and accepted injunctions to restore competition in the market.

Sources:

http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=607&id_article=2686

http://globalcompetitionreview.com/news/article/40211/france-punishes-orange-largest-ever-fine/

- **France and Germany launched joint inquiry**

French Competition Authority and German Bundeskartellamt have jointly begun a sector inquiry on online companies' ability to gain market power by collecting and using big data.

According to the statements quoted in GCR, the study is about assessing possible anti-competitive concerns that may arise from collecting big data and sharing them between competitors. The scope of the questions sent to the companies by both authorities is suggests that the Agencies are trying to reach a conclusion on merger and abuse of dominance cases.

This joint cooperation is said to be understood as an indicator of a more aligned approach that the authorities are trying to adopt, especially after their different attitudes towards Booking.com case.

In the investigation about online hotel reservation platforms carried out by several European countries, while France had accepted the commitments offered by Booking.com together with Sweden and Italy, Germany had rejected them. The concern at issue was the price parity clauses used by Booking.com. According to the price parity clause, the hotels would have to give Booking.com their best prices and would not be able to give those prices to other online platforms. Booking.com offered the authorities to terminate the price parity clauses for the online platform. However it protected the clauses with respect to hotels' direct sales.

Sources:

http://globalcompetitionreview.com/news/article/39892/france-germany-uk-go-big-data-probes/

http://globalcompetitionreview.com/news/article/40225/bookingcom-appeal-german-mfn-ban/

http://globalcompetitionreview.com/news/article/38456/unprecedented-collaboration-leaves-germany-isolated-price-parity-clauses/

- **Israel's Leviathan Controversy**

Israel's long standing controversy on Leviathan Gas field has come to a new stage with the exemption granted by Prime Minister Benjamin Netanyahu to the joint venture between Delek Group and Noble Energy.

According to the joint venture agreement, Delek Group and Noble Energy would be able to develop and sell gas jointly for 15 years using the same distribution channel. The joint venture agreement caused the resignation of the former head of Competition Authority, David Gilo. Gilo was arguing the joint venture has the potential to create a de facto monopoly in the natural gas market. The government has planned a settlement agreement with the companies. The country's economy minister Aryeh Deri also resigned last month after declining to approve the settlement plan.

Netanyahu used his power to grant an exemption to the joint venture from antitrust scrutiny on the grounds that the benefits to the country's national security should overrule any antitrust concerns. However, Israel's opposition party Meretz has filed a petition in Israel's Supreme Court to block the joint venture.

Sources:

http://globalcompetitionreview.com/news/article/40221/netanyahu-confirms-controversial-leviathan-gas-settlement

http://globalcompetitionreview.com/news/article/38980/israel-offers-further-leviathan-concessions-awaits-knesset-approval/?utm_source=Law+Business+Research&utm_medium=email&utm_campaign=5881691_GCR+Briefing&dm_i=1KSF,3I2CB,IT2UTG,CJM1B,1

http://www.rekabet.gov.tr/File/?path=ROOT/1/Documents/B%C3%BClten/Rekabet%20B%C3%BClteni%20Temmuz%202015.pdf

- **13th Chamber of the Council of States Decision dated 14.04.2015 and numbered 2011/710 E., 2015/1459 K.**

The duration of exemption in fuel dealership agreements start with the dealership contract instead of the lease or usufruct rights contract

The suit filed for the annulment of the Competition Board decision dated 2.12.2010 and numbered 10-75/1544-597 (Opet-Emka; refusal of individual exemption request) was accepted by the 13th Chamber of the Council of State, and the transaction was annulled. The court found the refusal to grant individual exemption in violation of the law, based on the following assessment: "Competition law deals with those agreements by which persons feel bound and which render them unable to take decisions freely. Therefore, the plaintiff station's request for an exemption from the date it started operations is an unacceptable one. The exemption should start from the date the first agreement with the non-compete obligation was put into force (i.e. when the dealership contract was signed), however in the disputed Board decision the start of the exemption is based on the lease contract, which is not in compliance with the law. On the other hand, as stated in the 13th Chamber decisions dated 28.06.2010, numbered E:2009/3044, K:2010/5458 and dated 13.05.2008, numbered E:2006/1604, K:2008/4196 as well as in many other decisions, the leading reason why vertical agreements in the liquid fuel sector become problematic in competition law is the long duration of the vertical agreements and the leasing/usufruct rights granted by the proprietor dealer. The aforementioned decisions of the 13th Chamber found that lease contracts and usufruct rights could affect ongoing dealership relations, leading to a foreclosure effect in the sector However, the start of the vertical relation should not be assessed in the way laid out in those decisions. This is because, simple conclusion of a lease contract or the establishment of usufruct rights before the parties enter into a dealership relation cannot be taken as the starting date of the exemption (since non-compete obligations cannot exist in an as-yet non-existent vertical relationship)."

- **13th Chamber of the Council of States Decision dated 18.06.2015 and numbered 2014/2360 E., 2015/2296 K.**

Participation in a single practice among many is sufficient to prove participation in an infringement

Abiding by the reversing decision, 13th Chamber of the Council of State dismissed the suit filed with the request to annul the Competition Board decision dated 16.03.2007 and numbered 07-24/236-76. The Board decision in question had found that undertakings supplying therapeutic cardiological consumables in the medical consumables market had concluded agreements in violation of article 4 of the Act no 4054 on the Protection of Competition, and imposed of administrative fines in accordance with articles 16.2 and 16.4 of the same Act.

In its judgment of dismissal, the Court made the following assessment: "In the section where findings on the undertakings are assessed, the Board decision at issue concludes that article 4 of the Act no 4054 was violated regarding the plaintiff company, in light of the fact that Osman Alkan was the company representative and taking into consideration the findings numbered 1, 2, 26, 45, 47, 73, 74, 82 and 86. In accordance with articles 16.2 and 16.4 of the same act, the decision imposes administrative fines at 4% of the net sales in 2001. Since the investigation report states that Osman Alkan was the representative of Medisis Mühendislik ve Ticaret Ltd. Şti., since the aforementioned findings would have implications for the company in question, and since the defendant administration was unable to provide any evidence to the contrary, it becomes clear that the above-mentioned findings cannot be accepted as evidence against the plaintiff company.

However, following the examination of the file of the decision appealed, it is understood that investigated undertakings operating in the medical consumables market, including the plaintiff company, had signed a memorandum on 17.01.2002 to withdraw consigned goods from hospitals and to refuse supplying goods to the hospitals, and they had also sent a letter with a similar content to the Minister of Labor and Social Security Yaşar Okuyan on 30.01.2002 (Finding 25). In this case, it becomes clear that the plaintiff company violated article 4 of the Act no 4054 and it is decided that the Chamber decision should be reversed on the grounds that the Board decision at issue was in compliance with the law when it imposed administrative fines on the plaintiff company."

Article 46.1 of the Act no 2577 states that Council of State's judicial chamber decisions may be appealed before the Council of State; article 38 of the Act no 2575 states that the Plenary Session of the Administrative Law Chamber shall review decisions taken by administrative law chambers as first instance courts, and article 49.4 of the Act no 2577 states that while administrative courts may choose to disregard the reversal and insist on their previous decisions, compliance with the decisions of Council of State's

Plenary Session of the Administrative and Tax Law Chambers is mandatory. Therefore, Council of State's judicial chambers do not have a facility to insist in case the decisions they took as a first instance court are reversed in appeal.

In light of the aforementioned situation and the regulation of article 49 of the Act no 2577, the suit must be dismissed on the grounds mentioned in the decision of the Plenary Session of the Administrative Law Chamber."

The remarkable side of this case is the fact that, following the 13th Chamber's annulment of the administrative action for failing to meet proof standards, the Council of State Plenary Session of the Administrative Law Chamber reviewed the case on the request of the Board, and found the administrative action in compliance with the law, reversing the annulment decision.

- **13th Chamber of the Council of States Decision dated 27.03.2015 and numbered 2010/2162 E., 2015/1243 K.**

An Exclusive dealer may prevent the sales of the relevant product by other parties through legal means as part of its right to legal remedies.

13th Chamber of the Council of State dismissed the suit requesting the annulment of the Competition Board decision dated 24.03.2010 and numbered 10-26/371-M (IEC Elektronik, rejection of complaint). The court found the rejection of the complaint in compliance with the law, with the following evaluation: "It was found that the plaintiff IEC Elektronik Dış Ticaret A.Ş. imported the "Nintendo Wii" brand game console, the sole importer of which to-date was Nortec Eurasia. The company in question stated that it held exclusive rights for the Wii Sport Pack which was a Nintendo brand product and which could not be sold separately from the console, declaring that it got a banderole from the Ministry of Culture and Tourism. The stores of some companies that wanted to buy goods from them were raided by the police with the search and confiscation warrants granted by the prosecution office, they were subjected to assessment and evidence collection transactions. The company attempted to introduce a sales ban on the full product group based on the aforementioned DVDs and the company thereby continued to use its monopoly and dominant position in Turkey to harm the customers. Based on the above claims, it was requested that this conduct of the undertaking in question be examined under the competition law and any required legal proceedings be started. However, with its decision dated 24.03.2010 and numbered 10-26/371-M,

the Competition Board decided that the aforementioned application did not fall under the Act no 4054 and should be rejected.

Article 36 of the Constitution secures the right to legal remedies by prescribing that everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before courts through legitimate means and procedures. In this case, it is clear that Nortec Eurasia, which is the sole importer of the Wii Sport Pack product, holds exclusive rights in Turkey for its distribution and was granted a banderole from the Ministry of Culture and Tourism. The company took the actions listed in the complaint within the framework of its right to legal remedies, and all such conducts and practices of the undertaking fell outside the scope of the Act no 4054 Articles; therefore the decision in question is not in violation of the legislation."

- **13th Chamber of the Council of States Decision dated 18.06.2015 and numbered 2011/339 E., 2015/1257 K.**

The Board may render opinions for warning and information purposes, even when no infringement is found

13th Chamber of the Council of State dismissed the suit filed requesting the annulment of the Competition Board decision dated 02.09.2010 and numbered 10-57/1165-446, which concerned the rejection of the complaint stating that Hyundai complicated the operations of the plaintiff company in the sales of spare parts and service provision for Hyundai brand vehicles and the rendering of opinion to Hyundai under article 9.3 of the Act no 4054.

In its judgment of dismissal, the court made the following observation: "No contradiction to law has been observed in the Board decision in relation to the finding that initiating an investigation was not necessary. As for the rendering of opinion to Hyundai under article 9/3 of the Act no 4054, even though, as mentioned above, a violation was not identified during the preliminary inquiry phase, any points that require the undertakings to pay attention to protect competition following the Board decision may clearly be notified to the undertakings under article 9.3. Hence, no contradiction to law has been found in the Board decision taken to ensure such notification.

The remarkable aspect of this suit was the fact that the Council of State emphasized that a finding of violation was not necessary before rendering opinions to the undertakings.

- **13th Chamber of the Council of States Decision dated 04.06.2015 and numbered 2009/7085 E., 2015/2081 K.**

A joint venture making sales to the parent companies for the first three years does not show that the joint venture is not fully functional

Council of State's 13th Chamber dismissed the suit filed claiming that Competition Board decision dated 26.08.2009 and numbered 09-39/981-247 granting authorization, under article 7 of the Act no 4054 on the Protection of Competition, to the creation of a joint venture by Opet Petrolcülük A.Ş. and Türk Hava Yolları A. O., failed to take into account the fact that the authorized joint venture and service purchasing agreement had the restriction of competition in the relevant market as its goal, that it was facilitating cooperation, and that it would lead to the foreclosure of the market. The suit also claimed that the aforementioned decision was not based on concrete data and the risks stemming from vertical integration were not taken into consideration in the Board decision.

In its judgment of dismissal, the court made the following assessment: "The plaintiff company claims that the goal of the joint venture agreement was to exclude POAŞ from the market and thereby restrict competition, and that the five-year vertical agreement as well as to article 8 titled 'Deadlocks,' which was again limited to five years, would render the relevant joint venture not fully operational and would once again show that it had the restriction of competition as its goal and effect. However, where the parent undertakings are significantly active in the downstream and upstream markets of the relevant product, the determining factor in establishing full functionality is the content of the relationship between the parent undertakings and the joint venture. If the joint venture sells a significant portion of its products to the parent companies and does not make remarkable sales to other undertakings in the market, this would cause the joint venture not to be classified as an independent economic entity. But even if a significant part of the sales of the joint venture is to the parent companies, this can be deemed reasonable under certain circumstances. Accordingly, the joint venture may be accepted as fully functional if its sales to the parent companies are high during the first years after its founding. This period should be sufficiently long to allow the joint venture to establish itself in the market and, in general, depending on the specific structure of the market, the first three years would be sufficient. In addition, if the sales to the parent undertakings are done in line with the market conditions, the

joint venture must be deemed fully functional, even if their share in the overall sales are significantly high. In light of all of the above-listed points, the claims of the plaintiff are found to be groundless.

On the other hand, even though a duration of three years is generally regarded as reasonable in agreements, since the establishment of this joint venture in the market is dependent on whether it can complete the necessary investments and start trading actual products, the five year period granted to the joint venture is found reasonable. Therefore, it is clear that THY may choose to switch suppliers once the partnership makes the necessary investments and is able to offer appropriate prices.

- **Ankara 16th Administrative Court's decision dated 15.5.2015 and numbered 2014/1067 E, 2015/679 K:**

Professional Associations and chambers are not exempt from competition law.

16th Administrative Court dismissed the suit filed, requesting the annulment of the Competition Board decision dated 26.02.2014 and numbered 14-08/162-71, which rejected the application for the grant of a certificate of negative clearance or exemption to the "Minimum Appraisement Fee Tariffs," prepared by the Insurance Experts Executive Committee working under the Union of Chambers and Commodity Exchanges of Turkey (TOBB).

In its judgment of dismissal, the Court made the following assessment: "It is clear that persons or organizations which provide goods and services in the market and which have economic integrity shall be accepted as undertakings and treated under the Act no 4054. Within the framework of the current conflict, insurance expertise is clearly an economic structure operating and providing services in the insurance field. Even though the Act dated 18.04.2013 and numbered 6456 repealed the provision of article 22/19 of the Act no 5684, which states "the amount of appraisal fees are determined freely by the insurance expert and the party that appointed expert," currently no legal arrangement has granted a special power to the Committee to establish minimum or maximum fees for insurance appraisals. On the other hand, the Committee has been charged with "preventing unfair competition between the members of the profession and to take and implement the necessary measures to that end," by article 26/2(b) of the Insurance Law no 5684, which may include practices aimed at the service and the members such as improving the conditions of service

provision among the members of the profession or maintaining the credibility and prestige of the profession but does not grant the Committee the power to unilaterally set tariffs. However, the "Minimum Appraisement Fee Tariffs," established by the Insurance Experts Executive Committee sets the minimum price for the service to be provided in the market which should be determined independently by the insurance expert and the receiver of the service. In that sense, it prevents free competition and violates article 4 of the Act no 4054. Therefore, the Board's decision not to grant negative clearance to the aforementioned Tariffs was not found to be in violation of the law.

- **Simulating a Homogenous Product Merger: A Case Study on Model Fit and Performance**

Published By: US Federal Trade Commission, Bureau of Economics, October 2015

Authors: Daniel Greenfield, Nicholas Kreisle ve Mark Williams.

The study examines Tesoro's 2013 acquisition of British Petrol's Los Angeles refinery and sets up a merger simulation model adopted to the petroleum market. US Federal Trade Commission conducted a nine-month survey before authorizing the relevant merger. The hybrid model used in the examination provides a more realistic and detailed framework than the standard Cournot mode.

The study also tests the predictability and reliability of the empirical estimates of the acquisition's effect on prices. The study estimates the effect of the acquisition by making use of the Difference in Differences and Synthetic Control methods. Both models showed that the merger had some effect on Los Angeles fuel prices.

The fact that the standard Cournot model was unable to reveal the aforementioned price effect shows that the results of the hybrid model were more reliable.

Source:

https://www.ftc.gov/reports/simulating-homogenous-product-merger-case-study-model-fit-performance

- **Ex-post analysis of two mobile telecom mergers: T-Mobile/tele.ring (Austria) and T-Mobile/Orange (Netherlands)**

Published By: EU Commission, 2015

Authors: Luca Aguzzoni, Benno Buehler, Luca Di Martile, George Ecker, Ron Kemp, Anton Schwarz ve Robert Stil.

This report, which is a joint project by the EU Commission (DG Competition), the Netherlands' Competition Authority (ACM) and Austria Telecommunications Regulatory Authority (RTR), evaluates the effects of the 2007 merger between the Austrian T-Mobile/tele.ring and Dutch T-Mobile/Orange companies on retail prices through the use of qualitative and quantitative analyses.

The study adopts two strategies to estimate the mergers' effect on the relative domestic telecommunications market.

First, a fixed price index was established by taking into account the changes seen in existing usage over time. These changes may sometimes be mistakenly associated with merger-related price differences instead of with changes in the consumer preferences stemming from the telecommunications market.

Secondly, since the effect of the merger could not be correctly estimated by comparing the price movements pre- and post-merger due to the general trend of declining prices in similar countries, possible prices for Austria and the Netherlands were estimated by modelling the case where the merger was not realized.

The results of the quantitative study showed that the increases in prices seen in the Netherlands Telecom market post-merger were not encountered in Austria. The study examined the causes of the increase in prices in detail.

Source:

http://ec.europa.eu/competition/publications/reports/kd0215836enn.pdf

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