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Contributors to this Volume

Mehmet ÖZDEN

Osman Tan ÇATALCALI

Nazlı VAROL

Tuğçe KOYUNCU

Ömer Faruk ÇELİK

Dr. Mehmet ÖZKUL

Bilge TANRISEVEN

Contact

bulten@rekabet.gov.tr

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CONTENTS

INTRODUCTION

We are proud to present to you the Competition Bulletin for the months of April, May and June of 2016, which includes news on developments in competition law, industrial organization and competition policy.

In this edition there are 6 investigations and 2 preliminary inquiries conducted by the Competition Board in "Selected Reasoned Decisions" section.

The "News around the World" section of the Competition Bulletin includes news from South Africa, U.S.A., United Kingdom and Spain.

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

The last section, "Economic Studies", includes an article which was issued by the European Journal of Economics titled "Procompetitive Dual Pricing" and an OECD economic study titled "Regulations in Services Sectors and Their Impact on Downstream Industries ".

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.

Department of External Relations, Training and Competition Advocacy

- **The claim that railway cargo services and block train transportation brokerage services providers operating in West Europe and Southeast Europe destinations restricted competition by allocating customers was found to be out of the scope of the Act no 4054.**

Decision Date:	Decision No:	Type:
16.12.2015	**15-44/740-267**	**Investigation**

Two leniency applications submitted in the case claim that Schenker & Co AG (SCHENKER AUSTRIA), Schenker A.E.1 (SCHENKER GREECE), Schenker Arkas Nakliyat ve Ticaret A.Ş. (SCHENKER ARKAS), Fertrans AG (FERTRANS), Kühne + Nagel International AG (K+N SWITZERLAND) , Kühne+Nagel A.E. (K+N GREECE), Rail Cargo Logistics - Austria GmbH2 (RCL AT) and Raab-Oedenburg-Ebenfurter Eisenbahn AG3 (GYSEV) established a cartel by allocating customers in railway transportation brokerage services for block trains. The applications state that this cartel could also have affected Turkey between 1998 and 2011 via SCHENKER ARKAS, which is controlled by SCHENKER AUSTRIA.

The leniency applications present evidence related to the customer allocation in question, showing that this allocation included incoming and outgoing transportation to Turkey. Based on this evidence, on the statements given in the leniency applications and on other information acquired within the framework of the file, observations were made on the customer allocation claimed to have been implemented within the framework of the Balkan Train and Soptrain collaborations to begin with, and later the effect of this allocation on Turkey was examined.

- In their entirety, the observations concerning the Balkan Train cooperation show that

  - SCHENKER AUSTRIA, SCHENKER GREECE, FERTRANS and PROODOS started in 1998 to make preparations for the cooperation concerning the joint purchase of block train haulage services as well as the customer protection program as an integral part of the former, to be implemented on 01.01.1999, with the cooperation and customer protection program put into practice at the beginning of 1999;
  - In 2000, EXPRESS also got involved in the block train cooperation and the customer protection program but left the cooperation and the program in 2001;

- In mid-2004, EXPRESS re-entered the block train cooperation and the customer protection program;
- At the start of 2005 RAABERSPED, a subsidiary of EXPRESS, began managing the customer protection system;
- Between 2001 and 2006, SCHENCKER ARKAS took part in the implementation of the customer protection system, on the direction of SCHENKER AUSTRIA;
- At the end of 2007/beginning of 2008, the registration system managed by RAABERSPED was terminated and customer allocation between the parties continued;
- Between 2004 and 2009, EXPRESS GREECE got involved in the customer protection system;
- The customer protection program continued until 2011, despite the occasional conflicts between the parties;

➢ the observations concerning the Soptrain cooperation show that

- At the end of 2001, SCHENKER AUSTRALIA, SCHENKER GREECE, FERTRANS, PROODOS and GYSEV entered into a cooperation for joint purchasing of railway haulage services related to the Soptrain block train route and, within the framework of that cooperation, implemented a customer allocation program very similar to the Balkan Train cooperation;
- The customer protection system was managed by the GYSEV and customer lists as well as registration requests were kept by GYSEV;
- In addition to managing the customer protection system, GYSEV also took part in the customer allocation system as a transportation broker;
- In 2005, K+N SWITZERLAND became a party to the communications related to the customer allocation;
- In 2005, EXPRESS became a partner in the block train cooperation and was included in the customer protection program;
- The customer protection program continued until mid-2009, despite occasional disputes between the parties.

Within the context of these assessments, it was concluded that the above-listed companies based abroad entered into an agreement for customer allocation within the scope of Balkan Train and Soptrain collaborations through a practice called customer protection and thus restricted competition.

The assessment conducted to see whether the customer allocation agreement implemented within the framework of the Balkan Train collaboration directly affected the Turkish market came to the following conclusions:

- In the periods 1999-2001, 2003-2004 and 2007-2011, no direct effect on the Turkish market could be identified;
- In 2002, it had a direct effect on the Turkish market, but this effect was not "significant" enough to warrant the examination of the customer allocation under the Act no 4054 and it could not be established that the effect was "the goal or was predictable";
- In the period 2005-2006, it had a direct effect on the Turkish market but this effect was not "significant" enough to warrant the examination of the customer allocation under the Act no 4054 and neither was the effect "the goal/predictable".

In light of the information and documents included in the file, it was decided that the customer allocation agreement implemented within the framework of the Balkan Train collaboration could not be evaluated under the Act no 4054, since it could not be established that the agreement in question affected the Turkish markets in the periods 1999-2004 and 2007-2011 within the meaning of article 2 of the Act, and since the agreement did not lead to any effects in the Turkish markets in the period 2005-2006 under article 2 of the Act.

In the assessment conducted to see whether the customer allocation agreement implemented within the framework of the Soptrain collaboration affected the Turkish market, it was found that the agreement in question did not have any effects on the Turkish market under article 2 of the Act and therefore could not be examined under the Act no 4054.

- **The claim that cement producers operating in the Aegean Region engaged in practices infringing the Act no 4054 was examined and it was decided that the undertakings investigated violated article 4 of the Act no 4054 by colluding to allocate regions and increase prices.**

Decision Date:	Decision No:	Type:
14.01.2016	**16-02/44-14**	**Investigation**

In summary, the applications claim that cement producers operating in Denizli, Muğla and İzmir colluded to significantly markup cement prices, allocate regions and costumers based on the location of cement plants, and

prevented dealers from selling other brands of cement on the basis of cement plants.

Within the framework of the file, sales amounts and price movements of bulk cement were examined in İzmir, Aydın, Muğla, Manisa, Denizli, Burdur, Uşak and Isparta, which are the provinces where the investigated cement producers sell their products and therefore where their mutual interests overlap.

On-the-spot inspections were conducted at the investigated undertakings which resulted in various findings related to the claims. First of all, the period(s) of time when the claimed conduct was likely to take place was separated from the periods when the competitive structure held sway. To that end, documents were examined in three different periods depending on their nature, namely pre-January-March 2013 (first quarter of 2013), between January-March 2013 (first quarter of 2013) and October-December 2014 (fourth quarter of 2014) and post-October-December 2014 (fourth quarter of 2014). Examination of the pre-January-March 2013 documents led to the conclusion that this period displayed a competitive structure.

Conversely, investigation of the period between January-March 2013 and October-December 2014, a completely different structure is encountered. The documents submitted for this period include communications relating to two separate meetings in which the year 2013 was reviewed and certain strategies for the first period of 2014 were shared. It is observed that two meetings were held on 18.12.2013 and 12.02.2014, at the İstanbul Foreign Trade Complex in order to discuss export-related topics. The minutes of the meetings show that undertakings under investigation participated in these meetings. In this context, it is observed that the undertakings shared stock amounts, tried to destock clinker by selling it to different markets, gave information on future sales strategies and talked about variable costs, which is a critical operating data.

In light of the nature of the information comprising the subject of the communication and exchange conducted between the investigated undertakings, it was assessed that in the meetings mentioned in the documents, undertakings concerned established a relationship that could affect each other's market behavior and decreased any uncertainty concerning their future conduct.

Within this framework, it was concluded that between January-March 2013 and October-December 2014, the behavior of the undertakings concerned and the market performance data showed similarities to those markets where competition is prevented, distorted or restricted. In fact, competitive

conditions in the market in this period were not in parallel with the conditions that should have existed in the market under normal circumstances. This conclusion can be drawn by comparing the period between January 2009 and January 2013, which can be deemed a reference for normal market conditions, with the period between January-March 2013 and October-December 2014.

Between January 2009-January 2013, CEM I 42.5 weighted average sales prices fluctuated in the TL 60-100 band, while they increased approximately 83% within 21 months after January 2013, from TL 85 to TL 156. During the same period of time, unit production costs of CM I 42.5 for the undertakings went up around 16% to reach TL 90. CEM II 42.5 weighted average sales prices fluctuated in the TL 80-110 between January 2009-January 2013, but just like CEM I 42.5, these prices also entered an upward trend in January 2013, increasing around 54% from January 2013 to October 2014 to reach TL 160. Consequently, it was found that in the 2013-2014 period, which is the subject of the infringement claims, CEM I 42.5 demand did not show a stable increase, with the demand increasing in 2013 compared to the previous period while in 2014 staying even below the 2011 levels.

As a result, price increases in this period were much higher than those between January 2009-January 2013 and they cannot be explained with rational and reasonable justifications, such as cost or demand increases. Price increases significantly over cost increases were reflected in the profit rates of the undertakings investigated, with their profitability showing significant rises. Average profit per ton in CEM I 42.5 for the investigated parties mostly fluctuated in the TL 10-35 band in the January 2009-January 2013 period, and dropped to the TL 8-10 band in the January-March 2013 period. However, from this date to October 2014, they increased 712% over the January 2013 level, reaching TL 66. It was observed that average profit per ton in CEM II 42.5 for the investigated parties fluctuated in the TL 20-40 band during the January 2009-January 2013 period, but it increased by 159%, reaching TL 70.

As a result, it was concluded that the undertakings investigated violated article 4 of the Act no 4054 between January-March 2013 and October-December 2014 by engaged in concerted practices to allocate regions and increase prices.

- **The Board examined the claim that the Kayseri Chamber of Bakers and Flour Sellers and the Turkish Bread Producers Federation violated the Act no 4054 by interfering in the bread sales prices of bakeries operating in Kayseri and forcing these undertakings to a certain price level, and decided that imposing an administrative fine on these undertakings was not necessary.**

Decision Date:	Decision No:	Type:
21.01.2016	**16-03/59-20**	**Investigation**

In summary, the applications claim that the Kayseri Chamber of Bakers and Flour Sellers (CHAMBER) interfered with the bread sales prices of undertakings operating in Kayseri in the field of bread sales, that the CHAMBER increased maximum prices for bread from 50 kuruş to 85 kuruş in September, and that bakers selling under that price were threatened by the CHAMBER both verbally and through the media.

The attachments to the application in question included newspaper clippings as well as screen captures from the social media account of the CHAMBER related to the CHAMBER practices aimed at preventing bread sales below a certain price. Within this framework, a number of news items were found stating that the CHAMBER encouraged bread sellers to sell bread at the maximum price tariffs in 2014.

The news emphasized the pressure exerted and the suggestions made by the CHAMBER's and the Bread Producers Federation' (FEDERATION) officials to prevent the sales of bread below the going rate. In the raids carried out by authorized personnel with police and constabulary accompaniment, the bakers were told that it was against the law to sell bread below the so-called going price, which is understood to be the maximum price level. During the preliminary inquiry process, on-the-spot inspections were conducted at the premises of the CHAMBER following the aforementioned news published in the media, which found certain documents including lists titled "those selling cheap bread" with the bakery names and addresses, as well as the minutes book with the CHAMBER's executive board decision to take legal action against those selling bread below the going rate. The first of these documents lists the names and contact information of twenty-one bakeries found to have been selling bread at cheaper prices. The executive board decision of the CHAMBER prescribed sending notices to the businesses selling cheap bread.

In the interview conducted, the chairman of the CHAMBER stated that only five bakeries were sent notices under the above-mentioned decision, that those bakeries engaged in unfair competition by selling below-cost, and that currently maximum price tariffs were at 85 kuruş, while bread was sold at prices fluctuating from a below-tariff 50 kuruş to 85 kuruş. On-the-spot inspections conducted at the CHAMBER and the FEDERATION during the investigation revealed no documents suggesting interference in bread prices.

Lastly, following on-the-spot inspections and interviews, bread prices were examined at some bakeries operating in the Municipality borders in Kayseri. The observations made at the aforementioned examinations showed that bread prices at the bakeries were between 50 and 85 kuruş.

It was understood that news items published in local and national press with headlines such as "Bread To Be Sold at a Single Price," "Bakeries Engaging in Competition To Be Fined," "Bakeries Selling Bread Below 1 TL To Be Shut Down" referred to a court decision approved by the Supreme Court, and in turn professional organizations of bakeries referred to the aforementioned court decision to warn bakeries selling cheap/below-cost bread. At this stage, it became clear that the warnings extended to the bakeries did not aim to restrict competition, but were implementing the court decision. In that context, the practices of the parties comprising the subject matter of the complaint were simply carrying out the substance of the court decision in question.

On the other hand, the relevant warnings were local in scale and did not affect the market. In fact, as mentioned above, on-the-spot inspections conducted during the investigation showed variations in bread prices in the relevant region of Kayseri and there were a large number of bakeries selling below the maximum price tariffs.

Examinations and observations made during the investigation process demonstrated that the CHAMBER and the FEDERATION in Kayseri were not engaged in any practices with the aim or effect of restricting competition. Therefore, it was concluded that the CHAMBER and FEDERATION under investigation did not violate article 4 of the Act no 4054 and that imposing fines on the two associations of undertakings was not necessary.

- **It was decided that Solgar Vitamin ve Sağlık Ürünleri San. ve Tic. Ltd. Şti. did not violate articles 4 and 6 of the Act no 4054, and therefore it was not necessary to impose administrative fines on the undertaking in question under article 16 of the same Act.**

Decision Date:	Decision No:	Type:
18.02.2016	**16-05/116-51**	**Investigation**

The investigation conducted in response to the annulment decision of the 13th Chamber of the Council of State, dated 25.11.2014 and numbered 2011/147 E., 2014/3741 K. examined the claim that Solgar Vitamin ve Sağlık Ürünleri San. ve Tic. Ltd. Şti. (SOLGAR) refused to supply to Anadolumed Ecza Deposu Tic. A.Ş. (ANADOLUMED), and thus abused its dominant position by engaging in discriminatory practices and violated articles 4 and 6 of the Act.

Refusal to supply is listed among the instances of abuse of dominant position in article 6 of the Act no 4054. In order for such a refusal to supply to be considered a violation, certain conditions must exist in addition to the relevant undertaking holding dominant position in the relevant market. These conditions are listed in paragraph 43 of the Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings as follows: the refusal should relate to a product or service that is indispensable to be able to compete in a downstream market, the refusal should be likely to lead to the elimination of effective competition in the downstream market, the refusal should be likely to lead to consumer harm.

It was found that the market share data for SOLGAR in the food supplements market in 2009 were not uniform, however they were not sufficient to deem SOLGAR dominant in the relevant market in any event. Even though establishing that SOLGAR did not hold dominant position is sufficient, in order to ensure completeness, the practices were examined to see whether they had the characteristics of an abuse under article 6 of the Act no 4054, under the assumption that SOLGAR did have dominant position.

The application claims that ANADOLUMED repeatedly submitted orders to SOLGAR to purchase products and requested the implementation of the sales and delivery conditions used for other pharmaceutical warehouses, but that SOLGAR refused to response to the orders and did not supply goods to ANADOLUMED. In response, through a notary public the applicant sent to SOLGAR a purchase order including the products it wanted to buy and as well as a bank letter of guarantee exceeding the amount ordered. On the

other hand, SOLGAR offered the fact that ANADOLUMED purchased the shares of EMEK ECZA which was in debt to SOLGAR as the reason for refusing to deal with ANADOLUMED and emphasized that the products SOLGAR imported were food supplements that were not sold by prescription, equivalents of which could be supplied from various importers in the market. When the current commercial relationship between the parties was examined, during the investigation period ANADOLUMED stated that its commercial relationship with SOLGAR had restarted in 2012 but that SOLGAR supplied goods to them with 100% guarantee and ANADOLUMED stopped its operations as of September 2014.

In terms of the condition that the refusal should relate to a product or service that is indispensable to be able to compete in a downstream market, which is a required condition for considering a refusal to supply a violation, the share of SOLGAR products within the sales of ANADOLUMED and the availability of the product in question from alternative channels were examined. As a result, it was concluded that the products concerned were not indispensable in these respects.

On the other hand, in its decision dated 03.01.2015 and numbered 13-01/3-3, the Board made the assessment that for undertakings which do not provide any added value to the product they purchase and simply purchase and resell it, the product in question cannot be deemed to be indispensable for the continuation of their operations. Within that framework, it cannot be said that the products SOLGAR refused to sell were indispensable for ANADOLUMED, which simply resells these products, since SOLGAR does not compete downstream.

In relation to the condition that the refusal should be likely to lead to the elimination of effective competition in the downstream market, it can be said that the present case does not involve an undertaking with dominant position upstream exercising that power to foreclose competitors downstream. As a matter of fact, SOLGAR is not active in the downstream market. In other words, since the seller ANADOLUMED simply resells SOLGAR’s products, there is no meaningful competition between the two undertakings. In addition, pharmaceutical warehouse business does not involve supplying a mandatory input from the pharmaceutical market. Rather, the relationship between the two markets is simply one of resale-distribution. In this sense, pharmaceutical warehouses do not provide an added value to the pharmaceuticals supplied.

In relation to the condition that the refusal should be likely to lead to consumer harm, the examinations conducted during the investigation

showed that there were many firms operating in the food supplements market and there were no significant barriers to entry, such as licensing. In that context, in a market which includes a large number of pharmaceutical warehouses and pharmaceutical firms and in which pharmaceutical companies do not tend to work with a single warehouse, any product that could not be supplied from SOLGAR could be purchased from other companies or even online. Consequently, it was concluded that ANADOLUMED being unable to sell SOLGAR products was not likely to lead to consumer harm.

Within that framework, it was established that none of the three conditions required for refusal to supply was fulfilled in the case concerned. In addition, it was found that SOLGAR should be seen as justified in refusing to supply goods to ANADOLUMED since EMEK ECZA was in debt to SOLGAR and the connection between ANADOLU EMEK and EMEK ECZA had adversely affected the commercial credibility of ANADOLUMED.

- **Competition Board decided that Ecocaps's S.R.L Socio Unico selling its ALU-LID lid systems exclusively to Türk Tuborg Bira ve Malt Sanayi A.Ş. in Turkey could not be characterized as an abuse of dominant position under Article 6 of the Act no 4054 and granted individual exemption to the Can Protection Cover Supply Agreement and the Can Protection Cover Application Machine Agreement, signed between ECOCAPS's S.R.L Socio Unico and Türk TUBORG Bira ve Malt Sanayi A.Ş.**

Decision Date:	Decision No:	Type:
10.02.2016	**16-04/69-27**	**Preliminary Inquiry**

The application made by Anadolu Efes Biracılık ve Malt Sanayi A.Ş. (EFES) concerns the fact that Ecocaps's S.R.L Socio Unico (ECOCAPS) does not provide lid packaging/protection systems to EFES in accordance with the exclusivity provision in the agreement ECOCAPS signed with TUBORG. Within that framework, Competition Board first assessed ECOCAPS unilateral actions under article 6 of the Act no 4054, then evaluated the exclusivity agreement signed between ECOCAPS and TUBORG under article 4 of the Act no 4054.

The alleged infringing party ECOCAPS was hypothesized to hold dominant position and its actions were analyzed under that assumption. Even though

a gradual increase and a certain decrease was observed in the market shares of TUBORG Bira ve Malt Sanayi A.Ş. (TUBORG) and EFES respectively, EFES holds high market share both in the beer market itself and in the organized-conventional, can and other beer product segments of the beer market. In that sense, it was concluded that EFES being unable to procure ECACAPS lid systems for a certain period of time was not likely to create foreclosure effects. In addition, more than half of the sales in the beer market were generated in the segments which fall outside the application of the lid systems in question and were unaffected by any actions related to these lid systems.

Thirdly, it can be observed that TUBORG's market share had a strong tendency to increase since 2010, and a comparison of the sales trends of the two undertakings in the period before and after March 2015, which was when TUBORG started to use lid packaging/protection system, showed that can beer sales also displayed a similar increase, barring occasional variations. In terms of the can beer segment, it is clear that there is a positive relationship between market shares and ECOCAPS protection/lid technology use that is noticeable but not substantive enough to create a difference in the relative market shares of the players that can change average market shares. This is because, after TUBORG started to use the systems in question, its market share in can beer market increased a little more than the general market share increase trends. Additionally, it should be kept in mind that the relevant comparisons concerned a case where EFES did not choose to use any of the alternative cover systems aimed at the can beer market.

Besides, it was observed that in the growing can beer market, EFES increased its sales while its tendency to lose market share decreased where TUBORG's tendency to win market share in the can beer market decreased despite increasing beer sales since 2010. As a result, it can be inferred that a portion of the consumers in the relevant beer segment attributed value to the lid systems in question within the framework of sub-marginal consumer characteristics and the market shift in question slowed down. Considering beer market does not include "can beer market with hygienic covers" as a market definition, an assessment of all of the above data suggests that ECOCAPS lid systems do not constitute a critical input in order to operate in the beer market.

Therefore, it was concluded an individual exemption under article 5 of the Act no 4054 could be granted to the "Can Protection Cover Supply Agreement" and the "Can Protection Cover Application Machine Agreement"

signed between ECOCAPS and TUBORG, which include provisions restricting competition under article 4 of the Act no 4054.

- **Nuh Çimento Sanayi A.Ş. and Nuh Beton A.Ş. were found not to have violated article 6 of the Act no 4054 via price squeeze.**

Decision Date:	Decision No:	Type:
18.02.2016	**16-05/118-53**	**Investigation**

The investigation was initiated following the annulment decision of the 13th Chamber of the Council of State, dated 25.11.2014 and numbered 2011/69 E., 2014/3739 K., and it was related to the following claims: that Nuh Çimento Sanayi A.Ş. (NUH ÇİMENTO) held dominant position in the Anatolian side of Istanbul (including Kocaeli) and engaged in price squeezing in the ready-mix concrete market by exercising the power it achieved through its dominant position, that the complainant Detaş Beton San. A.Ş. (DETAŞ BETON) had won the tender for the Yeşil Vadi Housing Project and had been supplying ready-mix concrete to the project when NUH ÇİMENTO intervened in favor of Nuh Beton A.Ş. (NUH BETON), that it took away the rest of the job from the complainant by making an offer at a lower price than DETAŞ BETON and with long-term fixed rates, and that NUH ÇİMENTO refused the complainant's demands for cement. It was stated that NUH ÇİMENTO continued these practices from 2004 until June 2010, which was the date of the complaint.

In line with the previous decision of the Board, the analyses of geographical market for cement used the Elzinga-Hogarty (E-H) test, which is based on examining past product flows, as well as the 10% criteria, which was developed by the Board and which takes into account the share of a cement plant's sales to a certain province in the total consumption of that province. The aforementioned tests and geographical distances were evaluated in conjunction. As a result, the geographical market with the highest risk and the narrowest possible area was defined as "İstanbul, Kocaeli, Sakarya and Yalova provinces". The relevant geographical market in terms of ready-mix concrete was defined as "the Anatolian side of İstanbul".

On-the-spot inspections conducted at NUH ÇİMENTO and NUH BETON premises did not find any information or documents supporting the claims put forth in the application.

For the practices in question to be considered within the framework of refusing to deal or price squeeze cases, which are among the examples of exclusionary abuse listed in article 6 of the Act no 4054, the primary condition is that the vertically integrated undertaking claimed to have

engaged in the conduct must hold dominant position in the upstream market it operates, which is the cement market in this case. Within the framework of the file, dominant position analysis was conducted based on the 2004-2010 data for gray cement, and on the 2006-2010 data for bulk cement, which comprises a significant portion of the purchases by ready-mix concrete firms. The primary indication in establishing dominant position is the market share of the undertaking in the relevant market. The existence of barriers to entry is another factor used in dominant position analysis in direct conjunction with market share analysis. However, the established practice of the Board is to accept that undertakings holding less than 40% of the market share are less likely to be dominant, while more detailed examinations are conducted for undertakings with a higher market share.

Since cement production is a capital-intensive business requiring significant investment which take time to become operational with sunk costs, it may be said that barriers to entry are high in this sector. During the period in question Traçim Çimento San. ve Tic. A.Ş. and Sançim Bilecik Çimento Madencilik Beton Sanayi ve Ticaret A.Ş. entered the market, however these undertakings did not acquire a substantial share in the relevant geographical market.

For the calculations related to the gray cement and bulk cement market, intra-group sales of NUH ÇİMENTO were also included in the market share for the assessment of the highest risk case. Even in such a situation, NUH ÇİMENTO's share in the relevant market stayed below 40-50%, which is the critical threshold in dominant position evaluations. It is possible for Akçansa Çimento Sanayi ve Ticaret A.Ş. (AKÇANSA) to put competitive pressure on NUH ÇİMENTO both by its factory in the European side of İstanbul and by its terminals situated in the Kocaeli and Yalova provinces. Additionally, there were ports in the relevant geographical market and more than one undertaking was in operation during the period examined that could put competitive pressure on NUH ÇİMENTO in terms of both gray cement and bulk cement.

In dominant position assessments, the principle is that the undertaking in question must be able to maintain its market share for a reasonable period of time and there must be no competitors in the market that could exert pressure on the undertaking, i.e. the undertaking must be able to set the supply and price of the product on its own. When viewed from this perspective, it was found that the market share of NUH ÇİMENTO between 2004 and 2010 was mostly below the 40% level, which is the critical threshold in dominant position analyses, and that there were competitors in the market which could put pressure on the undertaking. Due to these

reasons, it was found that NUH ÇİMENTO did not hold dominant position in the geographical market limited to the "İstanbul, Kocaeli, Yalova and Sakarya" provinces for gray cement or bulk cement.

In addition, in order to consider the practices in the complaint instances of refusal to supply and price squeeze, the upstream product must be essential for operating in the downstream market. In other words, ready-mix concrete producers operating downstream must not have an actual or potential substitute for the supplies of the cement product provided by NUH ÇİMENTO. However, when we examine how much of the ready-mix concrete undertakings' bulk cement needs in the Anatolian side of İstanbul are met by NUH ÇİMENTO competitors, it can be observed that the cement supplied by NUH ÇİMENTO is not essential or irreplaceable to operate in the relevant region.

Analyses conducted in the ready-mix concrete market on predatory pricing found that NUH BETON did not have dominant position on the Anatolian side of İstanbul, since it had a low market share and since there were no significant economic or legal barriers to entry into the market, owing to the structure of the ready-mix concrete market.

As a result, it was decided that NUH ÇİMENTO and NUH BETON did not violate article 6 of the Act no 4054 and that it was not necessary to impose administrative fines on the aforementioned undertakings under article 16 of the same Act.

- **The joint production and commercialization agreement carried out by the Ramazan Çetin Teknik Hazır Beton Ortaklığı was found to be under the scope of article 4 of the Act no 4054, the entity was refused individual exemption and administrative fines were imposed on the undertakings participating in the entity as well as in the formation thereof.**

Decision Date:	Decision No:	Type:
18.02.2016	**16-05/117-52**	**Investigation**

The claims in the file state that Magtaş Mad. İnş. Pet. Ür. Oto. Taş. Ürt. San. ve Tic. Ltd. Şti. (BOYABAT BETON), Dostlar Kum Çakıl İnş. Müt. İhr. İth. San. ve Tic. Ltd. Şti. (GÜNEŞ BETON), Çetin Nakliyat Yakıt San. ve Tic. Ltd. Şti. (ÇETİN BETON) and Çakılsan Yapı Mal. Taş. İnş. Taah. Hafr. San. ve Tic. Ltd. Şti. (ÇAKILSAN BETON) operating in ready-mix concrete production in the Sinop province together founded a company titled Ramazan Çetin

Teknik Hazır Beton Ortaklığı (TEKNİK BETON) and colluded to increase ready-mix concrete prices from TL 110 in July to TL 155.

The relevant product market was defined as the ready-mix concrete market, while the relevant geographical market was defined as two distinct markets, "Sinop Province Central, Erfelek and Gerze districts" and "Sinop Province Boyabat, Durağan and Saraydüzü districts."

It was found that TEKNİK BETON could not be assessed as a joint venture since it did not fulfill the joint control requirement. Therefore, this was not a merger/acquisition transaction under article 7 of the Act no 4054 and the Communiqué no 2010/4 and there was no need to take action within this framework.

The assessment under article 4 of the Act no 4054 found that ÇAKILSAN BETON, ÇETİN BETON and BOYABAT BETON, which were active in the relevant market as well as GÜNEŞ BETON, which was planning to enter the market, agreed to conduct the production, marketing and distribution of ready-mix concrete via TEKNİK BETON. As a result of the agreement the two largest ready-mix concrete producers in the market, i.e. ÇETİN BETON and ÇAKILSAN BETON, stopped their ready-mix concrete operations by leasing their ready-mix concrete production and distribution facilities to TEKNİK BETON. In addition, BOYABAT BETON and GÜNEŞ BETON also rented a number of their concrete mixers to TEKNİK BETON. During the interviews conducted, it was also mentioned that the facilities of the partners were made available to TEKNİK BETON for production when needed. The parties emphasized that the partners could freely maintain they own operations. However neither BOYABAT BETON nor GÜNEŞ BETON could make production, the former first because of an attack on the facility and then because of a malfunction, and the latter because of a lack of the necessary certification. GÜNEŞ BETON's facilities were used to a large extent to make "illicit production" for TEKNİK BETON. Consequently, following its establishment, only TEKNİK BETON had active ready-mix concrete operations in the relevant market until GERÇEK BETON started its operations. In this regard, the agreement between the parties was deemed to be a "joint production and commercialization" agreement.

In order to assess whether competition was restricted with this horizontal cooperation agreement, first it must be established whether the agreement had the restriction of competition as its goal or as an actual or potential effect. If the agreement is restricting competition, the benefits resulting from the agreement must be identified and it must be determined whether these benefits outweigh the anti-competitive effects of the agreement. In

other words, when assessing horizontal cooperation agreements signed between competitors under the Act no 4054, the first step is to see whether the agreement is restricting competition. If the agreement is found to have restrictive effects on competition under article 4, then it must be determined whether the agreement could benefit from exemption under article 5 of the Act.

Since an agreement which restricts competition by object constitutes a violation under article 4 by its nature, it is not necessary to analyze the actual or potential effects of the relevant agreement on the market. When assessing whether an agreement restricts competition by object, the contents of the agreement, the objectives it is trying to attain, and the economic and legal framework in which it exists must be taken into consideration.

The information acquired shows that the Central geographic market had a concentrated structure before the agreement. ÇETİN BETON and ÇAKILSAN BETON transferring all of their ready-mix concrete operations to TEKNİK BETON caused a further concentration in the market. Since the other two plants owned by the partners were unable to make production due to various reasons around the time TEKNİK BETON was founded, only TEKNİK BETON was active in the Central geographical district until GERÇEK BETON entered the market. During this process, even though BOYABAT BETON and GÜNEŞ BETON could maintain their operations on their own behalf, it can be concluded that signing such a joint production and commercialization agreement in a market for a homogeneous product that is quite concentrated as in the case of the relevant product market would generally lead to competition problems such as price coordination, maintenance of production amounts and customer or region allocation. In fact, the relevant product and geographical markets mostly display the above-listed market characteristics of those markets where horizontal cooperation agreements may cause competitive problems.

Within this framework, the fact that all of the undertakings active in the market during the relevant period as well as one potential competitor entering into a joint production, marketing and distribution agreement can be said to have provided significant market power to the parties and prevented competitive conduct. In addition it was also concluded that, in light of the aforementioned characteristics of the relevant market, the establishment of TEKNİK BETON and the joint production and commercialization activities carried out via that entity posed a high risk of leading to the undertakings' coordinating their prices and outputs, even though the each of the parties could maintain their own operations

separately. Also, even in the absence of a joint production and commercialization agreement, the existing shareholder and control structure of TEKNİK BETON was likely to lead to coordination between the operations of the undertakings in the relevant market.

Consequently, the TEKNİK BETON entity and the joint production and commercialization agreement carried out via TEKNİK BETON were found to fall under article 4 of the Act no 4054, and it was concluded that the entity in question could not be granted individual exemption under article 5 of the Act no 4054.

- **It was decided that the "Fuel Sales Practices for 2016," sent by Türkiye Petrol Rafinerileri A.Ş. to fuel distribution companies to be used through 2016 and the "Turnover Premium" system used in diesel fuel withdrawals by distribution companies from TÜPRAŞ could not be considered as abuses of dominant power.**

Decision Date:	Decision No:	Type:
16.03.2016	**16-10/159-70**	**Preliminary Inquiry**

In essence/in the final analysis, the premium system implementation can be seen as a discount system. Under article 6 of the Act no 4054, in order to consider Türkiye Petrol Rafinerileri A.Ş.'s (TÜPRAŞ) discount systems as a violation in the context of unilateral conducts, first it must be established that TÜPRAŞ held dominant position in the market, and then that the turnover premium system it implemented led to anti-competitive exclusion or discrimination. In fact, the assessment conducted within the framework of the file included a relevant market evaluation but not a dominant position analysis; instead, it was assumed that the alleged infringing part TÜPRAŞ held dominant position and the turnover premium system was analyzed accordingly.

In light of the fact that currently approximately half of the diesel fuel demand in the market is fulfilled by imports and that TÜPRAŞ is the sole source of domestic production, it was concluded that the turnover premium implemented by TÜPRAŞ could not have an exclusionary impact. Accordingly, the practice in question had to be assessed in order to determine whether it would lead to exclusion among the distributors operating in the downstream market.

When the turnover premiums implemented by TÜPRAŞ for the diesel fuel market were examined, it was concluded that the premium system in question was retroactive and progressive, however it ensured a significant

amount of flexibility to customers by allowing them to benefit from the upper segment if they exceeded the purchase amount planned at the beginning of the period, or to switch to a lower segment if they missed their target.

Additionally, the premium system under examination was not personalized and instead quantity discounts had standard targets, were transparent and were provided to all customers on equal terms and for objective amounts. For these reasons, it was concluded that the system in question was designed not in accordance with certain characteristics of the distributors but with the nature of the commercial transaction conducted, unlikely to result in an anti-competitive discrimination between distributors.

On the other hand, it should also be noted that the premium system was basically implemented in order to utilize the diesel fuel production capacity increased by the investments of TÜPRAŞ, that currently nearly half of the diesel fuel demand was provided through imports, that a significant portion of the demand would still be fulfilled by imports even after the aforementioned increase in capacity, and that there were no signs suggesting a restriction in the imports by made distributors.

Furthermore, it was observed that the premium system started from a reasonably low tonnage of 10,000 tons; that the lowest premium rate 1.75% corresponded to purchases of 10,000 to 100,000 tons, while the highest premium rate 3% corresponded to purchases of 1,500,000 tons and up; that even though premium rates increased with 0.25% steps, each 0.25% increase required a gradually increasing amount of purchase. Therefore, since the marginal returns of the premium system gradually decreased, it seems likely that the system would be more advantageous for small and medium sized distributors.

An examination of the total diesel fuel sales made by TÜPRAŞ in 2015 as well as of the information on the sales made to which distributors would be covered by the turnover premiums if the premium system was implemented revealed that 32 distributors benefited from the turnover premium system in question and that nearly 99% of the total diesel fuel sales made by TÜPRAŞ was covered by the system.

On the other hand, it should be noted that competitive conditions were largely determined by structural factors and purchasing policies of buyers in the jet fuel distribution market, also involving a turnover premium system within the scope of the Jet A-1 Sales Practices for 2015, which is implemented as a standard contract between TÜPRAŞ and bunker fuel delivery/distribution organizations and which was granted negative

exemption by the Board. On the other hand, for the diesel fuel distribution market, neither of the restrictions were valid and the market included a higher number of players. In light of these facts, it would be difficult to say that the premium system examined would have anti-competitive effects in the distribution market.

Lastly, the evaluation made by the distributors concerning the effects of the premium system emphasize that the premium system in question did not cause anti-competitive discrimination in the distribution market, that its wide range allowed it to cover a large number of distributors, that it would improve the cost asymmetry between the distributors who had and lacked the ability to import, and that it decreased the difference between the purchase conditions of undertakings with different scales. Within this framework, it was concluded that the turnover premium system which would be implemented for diesel fuel purchases by distributors under the ""Fuel Sales Practices for 2016," sent by Türkiye Petrol Rafinerileri A.Ş. to fuel distribution companies to be valid though 2016 did not constitute an abuse of dominant position by means of discount systems.

- **Halliburton Co. and Baker Hughes Inc., Operating in the Oilfield Services Market, Cancel Merger Plans in response to Opposition from the U.S. Justice Department and the EU Competition Commission**

Halliburton Co and Baker Hughes Inc., second and third largest companies operating in the oilfield services market, had announced their plan to merge in October 2014 but their merger plan met with strong criticism from the U.S. Department of Justice and the EU Competition Commission.

In the press releases issued by U.S. Justice Department Attorney General Loretta LYNCH and U.S. Justice Department Assistant Attorney General Bill BAER it is stated that the U.S. Justice Department had filed a lawsuit on 06.04.2016 to stop the merger since the oilfield services market would become a duopoly following the merger and the measures presented by the undertakings were found to be insufficient.

The joint declaration by Halliburton Co. and Baker Hughes Inc. issued on 06.04.2016 stated that the American government was underestimating the competitiveness of the industry, that the merger would allow consumers to access higher quality and more efficient products and services, and that the businesses they offered to divest were sufficient to eliminate U.S. Justice Department's concerns on the subject.

Sources:

http://www.reuters.com/article/us-bakerhughes-m-a-halliburton-idUSKCN0XS1KW

http://globalcompetitionreview.com/news/article/40834/us-doj-sues-block-halliburtonbaker-hughes/?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=6971432_GCR%20Briefing&dm_i=1KSF,45F6W,IT2UTG,F35OC,1

https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-brief-remarks-press-conference-call-announce

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https://www.justice.gov/atr/file/838661/download

- **Cartels to be Criminalized in South Africa**

An act which was entered into force on May 1, 2016 in South Africa allows imposing a fine of around 40.000€ and up to 10 years of imprisonment to the managers and directors of undertakings participating in a cartel.

In a statement issued on April 21, 2016, the South African Ministry of Development Ebrahim Patel stated that the new law would strengthen the government in fighting corruption, cartels and anti-competitive conduct, all of which increase prices and prevent entry into markets by new undertakings.

Following the entry into force of the law, criminal prosecution of those managers who initiate the undertakings' participation in the cartel will not be carried out by the South African Competition Commission, but by the National Prosecuting Authority, and the Prosecuting Authority will also decide whether or not to prosecute the managers in question. However, South African Competition Authority will be able to make submissions to the National Prosecuting Authority concerning those individuals who can benefit from leniency.

Sources:

http://globalcompetitionreview.com/news/article/40933/south-africa-criminalises-cartels/?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=7027509_GCR%20Briefing&dm_i=1KSF,46MGL,IT2UTG,F828G,1

http://www.economic.gov.za/communications/speeches/minister/minister-speeches-2016

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- **After Almost 20 Years, FTC Blocks Merger Request by Staples Inc. and Office Depot Inc. Once More**

The lawsuit filed by FTC in order to stop the merger of Staples Inc. and Office Depot Inc. was concluded with FTC blocking the merger of the two undertakings once again. In his decision, Judge Emmet G. Sullivan presented the fact that the parties failing to put the necessary emphasis on the competitive pressure exerted by Amazon as the grounds for his refusal

to allow the planned merger between the parties. The decision also observed that,

- consumers in the business to business customer market wanted to work with a single provider,
- a distinct market was created since these customers were not price-sensitive and had demands different from other customers,
- Staples Inc. and Office Depot Inc. were in direct competition with each other for this customer group but Amazon was not yet a competitor to Staples Inc. and Office Depot Inc. with respect to this group of customers,
- referring to the FTC v. Sysco, USF Holding Corp., and US Foods, Inc.Decision, the acquisition of the second largest undertaking in a market by the largest firm would undoubtedly damage competition in that market,

The press release on the decision issued by Staples Inc. expressed their disappointment with the decision ruling in favor of FTC, despite FTC wrongly defining the product market and failing to sufficiently defend its position.

Following the decision, Staples Inc. will pay USD 250 million to Office Depot Inc. for the failed merger in accordance with the agreement signed between the parties.

Sources:

http://globalcompetitionreview.com/news/article/41077/staples-failed-show-amazons-competitiveness-says-judge-sullivan/?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=7117106_GCR%20Briefing&dm_i=1KSF,48JLE,IT2UTG,FGDMQ,1

http://res.cloudinary.com/gcr-usa/image/upload/v1463523824/FTCvStaplesopinion_ynexyl.pdf

http://www.marketwatch.com/story/staples-office-depot-merger-killed-by-antitrust-claims-again-2016-05-10

http://investor.staples.com/phoenix.zhtml?c=96244&p=irol-newsArticle&ID=2167275

- **Spain National Markets and Competition Commission Issued A Notice Detailing the Procedures for Dawn Raids**

Spain's National Markets and Competition Commission (SNMCC) issued a notice on June 7, 2016 in order to announce the procedures to be followed by the SNMCC in dawn raids. In summary, the Notice states:

- undertakings are obliged to allow dawn raids,
- in case undertakings do not allow dawn raids, those undertakings may be imposed a fine of up to 1% of the turnover they generated the previous year and this may be deemed an aggravating factor in investigations that may be initiated on the undertakings concerned in the future,
- NMCC rapporteurs will present their authorization documents to the undertakings at the start of the raid,
- the undertakings shall receive a list of the terms used in computer searches at the end of the raid,
- a court order shall be requested where the dawn raid is or may be prevented,
- in case the court order is notified to the undertaking but the undertaking refuses to sign the notification acknowledgement and refuses entry to the rapporteurs for the inspection, the undertaking will be considered to be in contempt of the order and criminal charges will be brought against those concerned,
- in line with the EC Regulation 1/2003, NMCC rapporteurs have the right to examine and make copies of all documentation belonging to the undertakings, regardless of where they are stored, and they can seal any of their premises, and
- The undertaking and its staff shall collaborate with the rapporteurs during the raid in order to ensure that the rapporteurs do not gather documents that include privileged attorney-client communications or confidential information belonging to the company concerned,

Sources:

http://globalcompetitionreview.com/news/article/41261/new-dawn-raid-guidelines-spain/

https://www.cnmc.es/Portals/0/Ficheros/Competencia/Inspecciones/201606_Nota%20informativa%20inspecciones%20competencia.pdf

http://callolcoca.com/wp-content/uploads/2016/06/Dawn-Raid-Alert.pdf

- **United Kingdom Competition and Markets Authority publishes final Cement Market Data Order and undertakings**

It was stated in a notice released by United Kingdom Competition and Markets Authority (CMA) on 13 April 2014 that Final Undertakings given by the Mineral Products Association under sections 159 and 165 of and Schedule 10 to the Enterprise Act 2002 were accepted. The related notice is as follows;

1. On 18 January 2012 the Office of Fair Trading made a reference to the Competition Commission (CC) under section 131 of the Enterprise Act 2002 (the Act) concerning the supply or acquisition of aggregates, cement and ready-mix concrete in Great Britain (the Reference).
2. On 14 January 2014 the CC published its report on the Reference, entitled Aggregates, cement and ready-mix concrete market investigation: Final report (the Report), in which it concluded that:
    a. a combination of structural and conduct features in the bulk and bagged cement markets in Great Britain (GB cement markets) gave rise to an adverse effect on competition (AEC) through coordination in those markets (the Coordination AEC);
    b. there were further features of the GB cement markets which combine to give rise to an AEC in the market for the supply of ground granulated blast furnace slag (GGBS) in Great Britain, as well as to an additional GGBS related AEC in the GB cement markets;
    c. the likely effect of those features and resulting AECs is higher prices for cement and for GGBS than would otherwise be the case;
    d. in order, in particular, to address the Coordination AEC and resulting customer detriment a number of remedies should be imposed under section 138(2) of the Act, including a remedy consisting of restrictions on the disclosure of any cement production and sales data concerning the GB cement markets;
    e. that remedy should be implemented by: (i) an order restricting the disclosure of production and sales volume data by any cement producer in the GB markets; and (ii) undertakings entered into by the Mineral Products Association (MPA) concerning the use of a suitable third party that is independent of the cement producers in GB for the collection and disclosure of production and sales volume data it receives from cement producers in the GB cement markets; and
    f. the remedy should be implemented in such a way as not to prevent the direct collection of cement market volume data from each of the cement producers in the GB cement markets

by the UK Statistics Authority (or its executive office, the Office for National Statistics) and any government agencies in accordance with their legal requirements to do so.

3. On 12 March 2014 Hope Construction Materials Ltd (Hope) and Lafarge Tarmac Holdings Ltd (Lafarge Tarmac) made an application to the Competition Appeal Tribunal (Tribunal) under section 179 of the Act requesting the Tribunal to, in particular, quash paragraphs 12.3 to 12.7 and 12.9(a), and paragraph 13.5(a), Figure 13.1 and paragraphs 13.7 to 13.138 of the Report.
4. On 1 April 2014 the remaining functions of the CC in relation to the Reference were transferred to the Competition and Markets Authority (CMA) under Schedule 5 to the Enterprise and Regulatory Reform Act 2013 and the Schedule to the Enterprise and Regulatory Reform Act 2013 (Commencement No. 6, Transitional Provisions and Savings) Order 2014.
5. In light of the challenges brought by Hope and Lafarge Tarmac, the CMA decided to place the implementation of the cement market volume data remedial action on hold pending the outcome of those proceedings.
6. On 4 August 2015, by Order, the Tribunal granted permission to Hope and Lafarge Tarmac to withdraw their applications for review.
7. On 25 February 2016 the CMA published a Notice of proposal to accept Final Undertakings from the MPA. On the same date, the CMA also gave notice of an intention to make an Order, which has the purpose and effect of restricting the disclosure by any cement producer in the GB cement markets of its cement production and sales volume data (the Cement Market Data Order).
8. The CMA has considered the representations received in response to the Notice of proposal to accept Final Undertakings and has decided to accept the undertakings in the form consulted upon without any material changes.
9. Pursuant to sections 138 and 159 of the Act. The CMA now accordingly accepts the following undertakings given by the MPA (the Undertakings).
10. The Undertakings may be varied, superseded or released by the CMA under section 159(4) and (5) of the Act.
11. This Notice and the Undertakings will be published on the CMA website.

The most important facts stated in the notice are disclosure and publication of GB cement production and sales volume data has been restricted and CMA has accepted final undertakings offered by the MPA concerning the use of an independent third party for the collection and disclosure of production and sales volume data which it receives from GB cement producers.

Source:

https://www.gov.uk/government/news/cma-publishes-final-cement-market-data-order-and-undertakings

- **9th Administrative Court of Ankara Decision dated 19.11.2015 and numbered 201/1622 E., 2015/1811 K.:**

It is unlawful to sell pharmaceuticals to pharmacies on a rotating basis.

9th Chamber of the Council of State accepted the case filed requesting the annulment of the decision dated 19.02.2014 and numbered 14-07/132-59. The decision in question stated that the complaint submitted by the plaintiff to the defendant authority claiming that competition was distorted through the abuse of dominant position with the provision of article 3.7 of the "Protocol concerning the Provision of Pharmaceuticals to Persons within the Scope of the Social Security Institution by the Turkish Pharmacists' Association Member Pharmacies" signed between the Social Security Institution and the Turkish Pharmacists' Association, effective between 01.02.2012 and 01.07.2015. The aforementioned provision concerned the exclusive distribution of and rotation-limit allocation to prescriptions of certain pharmaceuticals.

In its annulment, the Court made the following assessment;

"*Use of healthcare services is an economic and social right. In this respect, it places certain obligations on the public, or on the state as specified in the Constitution. The state is required to carry out these duties as part of the requirement of the "Covenant on Economic, Social and Cultural Rights" signed, to take the necessary measures to help everyone can access healthcare services, and to ensure that persons can use healthcare services without delay...*

In the present case, the protocol specifies that, for persons under the Social Security Institution coverage, pharmacies should provide the pharmaceuticals in certain prescriptions on a rotating basis, which makes the pharmaceutical harder to acquire for some people with blood diseases or dialysis patients. It is understood that patients who receive dialysis treatments three to four times a week are especially affected by the practice since, in order to purchase the drugs prescribed by the relevant doctor, they first need to ask the Chamber of Pharmacists which pharmacy is at the top of the rotation for the drug, purchase the drug from the pharmacy indicated by the Chamber, then ratifying the purchase at the Chamber of Pharmacists, which process leads to delays in treatment.

The reason for the protocol's provision to supply the listed drugs on a rotating basis by the pharmacies is to ensure orderly procurement of prescriptions from the warehouse for pharmacies, while eliminating

prescription brokerage, doubts and rumors in the market and unfair competition. On the other hand, a regulation made on these grounds undoubtedly may not abolish or harm the essence of patient rights. Within this context, it has been concluded that the relevant protocol's provision specifying the procurement of certain prescriptions for persons under the Social Security Institution coverage on a rotating basis by pharmacies prevents certain patients from accessing the drugs used in their treatments and causes delays. Therefore, the practice in question clearly violates the social law state principle specified in article 2 of the Constitution, article 5 of the Constitution which lists ensuring the welfare, peace, and happiness of the individual and society and improving the individuals' material and spiritual existence among the fundamental aims and duties of the State, "the right to life" specified in article 17 of the Constitution as well as the provisions of articles 56 and 50, as well as the aforementioned international regulations and other legislation. Consequently, application submitted by the plaintiff to the defendant authority with the claim that the provision of article 3.7 of the "Protocol concerning the Provision of Pharmaceuticals to Persons within the Scope of the Social Security Institution by the Turkish Pharmacists' Association Member Pharmacies," which subjects the prescriptions of certain pharmaceuticals to exclusive distribution and rotation-limit allocation conditions abused dominant position and thereby distorted competition should have been decided after the examination of the issues listed above. Instead, the relevant transaction comprising the subject matter of the present case dismissed the complaint on decided not to initiate an investigation, which has been found unlawful."

- **13th Chamber of the Council of State Decision dated 30.12.2015 and numbered 2015/1822E., 2015/4829 K.:**

The Regulation of Fines is lawful.

As a result of the suit filed in order to annul the Competition Board decision dated 29.08.2013 and numbered 13-49/711-300 (Frito Lay, violation, fine), the administrative action was annulled with the 6th Administrative Court of Ankara's decision numbered E:2014/368, K:2015/133. The court found that the defendant authority's violation decision was lawful, while annulling the administrative action on the grounds that the Regulation on Fines was unlawful. The annulment decision was appealed both by the plaintiff undertaking and the defendant authority. The 13th Chamber of the Council of State, as the court of appeal, overruled the plaintiff's appeal, but

accepted the appeal of the authority and revered the decision of the local court.

In the reversal, the court of appeal maintained its case-law finding the regulation lawful and made the following assessment:

"The arrangements made by the Regulation must be seen as the Board utilizing a regulatory action to present its discretionary power related to individual cases for all similar cases in the future. For administrative fines which are set on a relative basis, granting an expansive discretionary power to the authority to impose the administrative fine creates disadvantages in terms of equality and legal certainty principles for the sanctioned party, at which point either the amounts or ratios for relative administrative fines must be set in a narrow range, or the authority must identify objective criteria within the framework of the equality principle when exercising its discretionary power within the determined range, in order to implement the legal certainty principle for the party sanctioned with the administrative fine. Specifying objective criteria in the setting of administrative fines is crucial for allowing judicial review of the discretionary power of the authority and, thereby, for the realization of the principle of state of law..."

- **Council of State Plenary Session of the Administrative Law Chambers (PSALC) Decision dated 18.01.2016 and numbered 2013/72 E., 2016/11 K.:**

Existence of a sectoral regulator does not remove Competition Authority jurisdiction

13th Chamber of the Council of State accepted the action filed which requested the annulment of the Competition Board decision dated 3/7/2008 and numbered 08-43/586-219, rejecting the complaint that Türk Telecom violated the Act no 4054. The annulment decision was appealed by the defendant authority but was upheld by the PSALC.

In its upholding decision, PSALC made the following assessment:

"*the fact that a market is subject to regulation by a regulatory and supervisory institution does not take the conducts in that market out of the scope of the Act no 4054, in addition to which the paths followed and decisions taken by the Telecommunications Board and the Competition Board concerning a competition infringement would be different. Within that framework, the goal of the Telecommunications Board is to establish competition in the telecommunications market and to take measures and*

make regulations in order to prevent competition distortions and competitive harm. Administrative fines that might be imposed by the Competition Board as a result of an investigation conducted in relation to any infringement claims concerning undertakings in the telecommunications market seeks to penalize anti-competitive behavior and the motives underlying such behavior. Where the measures taken and the regulations made by the Telecommunications Board removes the effects of an existing competition infringement or completely eliminates the harm caused by the infringement, or where the subject concerns a request for regulation or intervention in the market in relation to a technical issue that is solely the matter of the telecommunications legislation, the Competition Board has discretion on whether to initiate an investigation, or a preliminary inquiry for the latter situation. However, this discretionary power must be used in line with the goal specified in the Act no 4054 and in a lawful manner. On the other hand, administrative sanctions that may be imposed by the Telecommunications Board for similar actions under the aforementioned legislative provisions must be taken into consideration by the Competition Board and the two institutions must cooperate with each other in relation to competition infringements in the telecommunications sector in general. In light of the above, concerning some of the claims in the complaints of the plaintiff in the present case, if it is determined that the specific behavior of Türk Telekom that lead to the Telecommunications Authority decisions carried the characteristics of an abuse of dominant positions or if concrete evidence suggesting such is found, there would be no barriers preventing Competition Board to launch an investigation on the subject and then impose sanctions in case an infringement is positively identified. On the other hand, the required examination under the Act no 4054 must also be conducted in relation to those issues which are related to the telecommunications legislation as well as those issues which are claimed to be implemented with the approval of the Telecommunications Board. In fact, failing to act in this manner would result in no sanctions being imposed on the dominant undertaking in the market for its anti-competitive behavior. It should also be emphasized that undertakings which operate in line with the decisions of the regulatory institutions cannot always be granted immunity from competition law rules. Under the circumstances, if the Telecommunications Authority had issued an opinion or imposed sanctions on this matter the Competition Board should have taken the aforementioned point under consideration when assessing the claims in the complaint in line with the grounds specified in the decision. Therefore, the Board decision stating that certain claims of infringement concerning Türk Telekom practices could not be assessed under the Act no

4054, that certain other claims of infringement could not be classified as an abuse since they resulted from specific regulations aimed at preventing competitive harm or from Telecommunications Authority decisions or were implemented with the authorization of the Telecommunications Board, and that it was not necessary to conduct a preliminary inquiry or investigation on the subject under the Act no 4054 is not justifiable..."

- **2nd Administrative Court of Ankara Decision dated 15.2.2016 and numbered 2016/303 E., 2016/366 K.:**

What is and is not in articles 10 and 11 of the Administrative Jurisdiction Procedures Law (AJPL)?

2nd Administrative Court of Ankara dismissed the suit filed by the plaintiff requesting a compensation of 200,000.00 TL for the pecuniary and 200,000.00 TL for the non-pecuniary damages he claimed to have suffered due to the defendant authority rejecting the complaint application he made concerning the firms which refused to provide pharmaceuticals and medical supplies following the robbery of the pharmacy he operated in Diyarbakır in 2001. In its dismissal, the Court included explanations concerning articles 10 and 11 of the AJPL, which are regularly confused with each other.

In its judgment of dismissal, the Court stated the following;

"... Article 7 of the Act no 2577 regulates the general claims procedure to be considered in the actions filed requesting the annulment of an administrative action which infringes on the interests of the persons concerned; article 11 sets the rules for the periods in which those affected by the administrative action may apply to 'cancel, revoke, amend or replace' the action in question before filing an administrative suit, as well as the rules for calculating the term of litigation in case of an application; and article 10 of the Act specifies the rules to be applied for litigation terms for those suits filed in response to the application submitted to the administration requesting and administrative action in the absence of such previous action. In summary, article 11 regulates how to calculate the term of litigation where there is a request to 'cancel, revoke, amend or replace' a previously established administrative action related to the parties concerned, while article 10 explains how to calculate the litigation term in case of a suit filed in response to a negative action established after an application submitted by the parties concerned requesting an administrative action where such action did not exist previously."

- **3rd Administrative Court of Ankara Decision dated 7.12.2015 and numbered 2015/909 E., 2015/1908 K.**

Judicial review is limited for administrative transactions under AJPL 28; sections found lawful in the first decision may not be reviewed again, compliance with the grounds for annulment is reviewed.

3rd Administrative Court of Ankara dismissed the suit filed requesting the Competition Board decision dated 20.08.2014 and numbered 14-29/613-266, taken in order to implement the annulment decision of the 13th Chamber of the Council of State, which found that the plaintiff company held dominant position in the "market for spare parts and maintenance for Siemens branded medical imaging and diagnostics devices" and abused its dominant position in the market, and therefore should be imposed administrative fines.

In its dismissal, the Court made the following assessment;

"*the decision concerning the plaintiff company was clearly taken in order to implement the annulment decision dated 28.01.2014 and numbered E:2010/3851, K:2014/146, taken by the Tenth Chamber of the Council of State as the court of first instance. Hence, the only issues that require examination in the present conflict must be how the decision was implemented, how the requirements of the decision were fulfilled and whether any conduct contrary to the legislation took place to the disadvantage of the plaintiff company during this process.*"

- **13th Administrative Court of Ankara Decision dated 15.02.2016 and numbered 2015/1892 E., 2016/352 K.**

13th Administrative Court of Ankara dismissed the case requesting the annulment of the Competition Board decision dated 25.12.2014 and numbered 14-54/932-420 which was taken as a result of the investigation conducted in response to the complaint filed by the plaintiff airline company with the claim that Turkish Airlines abused its dominant position in the market to prevent competing undertakings from entering new markets and complicated their undertakings in the existing ones, and which found that the Turkish Airlines did not abuse its dominant position and imposing administrative fines were not necessary.

In its judgment of dismissal, the court made the following assessment;

"the report in question was prepared in an objective and impartial manner by supervision personnel who are experts in their fields working at the institution which is the independent administrative authority in its field, which remains neutral towards the companies operating in the market, and which fills regulatory and supervisory roles concerning matter related to competition. In addition, the data included in the report match up with the information presented in the case file, therefore the Court has found the report in question to be sufficient as a basis for the decision to solve the conflict. Consequently it has been understood that Turkish Airlines did not abuse its dominant position to the detriment of the plaintiff company, and the Court decided that the transaction comprising the subject matter of the case which established that there had been no infringements and it was not necessary to impose fines was not in violation of the law or legislation."

- **Procompetitive Dual Pricing**

Published By: European Journal of Law and Economics

Authors: Markus Dertwinkel-Kalt, Justus Haucap, and Christian Wey

The study tries to introduce a new perspective by analyzing the procompetitive effects of dual pricing, that is, input market price discrimination. By referring to previous studies on the subject, the study shows the positive effects of price discrimination in intermediary goods markets on resource allocation, dynamism and productive efficiency. The study highlights that the increasing number of companies providing online services, in particular, have cost advantages in comparison to their competitors, which makes price discrimination by wholesalers an important factor for competitive equilibrium in the market. Within that framework, if price discrimination were prohibited, it would be easier for companies with low competitive power to exit the market, which would result in an increase in concentration. The study also highlights the fact that if input prices were implemented in the form of single prices, companies with low competitive power staying in the market (where this results from low input costs) would not lead to optimal outcomes for suppliers.

On the other hand, price discrimination both creates advantageous prices for inefficient firms and serves the final consumer, thus increasing social welfare. The study shows that this finding is also valid for consumers where buying power is calculated in a static environment.

The conclusion of the study states that price discrimination allows inefficient firms to stay in the market, that this is perceived as a threat by firms with higher competitive power, which then increase their investment in innovation and R&D activities.

Source:

http://link.springer.com/article/10.1007/s10657-015-9510-3

- **Regulations in Services Sectors and Their Impact on Downstream Industries**

Published By: OECD Economy Department

Authors: Balázs Égert, and Isabelle Wanner

OECD periodically measures the effect of competitive regulatory practices in non-manufacturing sectors on the overall industries through intermediate inputs. In its assessment, the article uses the regulatory impact indicator (REGIMPACT), which is calculated every 5 years by the OECD and which was last published in 2013. In addition, OECD also uses other indicators to analyze the effects of anti-competitive regulations on the economy. One of these indicators is the energy, transport and communication regulation (ETCR) indicator, which is derived from the product market regulation (PMR) indicator. ETCR is related to the regulations in the fields of electricity, gas, telecom, postal services as well as air, rail and maritime transport. Using the REGIMPACT indicator, ETCR indicator and the data for retail and professional services sectors which are published at longer intervals, the article evaluates the indirect effects of the regulations in these sectors on the other sectors of the economy. Since alternative indicators are unable to show indirect effects and thus do not allow comparisons between sectors and countries, the REGIMPACT indicator becomes useful for empirical studies.

In addition to showing how the indicator is calculated, the article also analyzes the developments in the downstream sectors of the industry by comparing the REGIMPACT indicators for 2008 and 2013. Challenges encountered in calculating the relevant indicator are also discussed. These challenges relate to the integration of infrequently-changing retail and professional services regulatory data with annually-changing energy, transport and communications regulatory data as well as to the sector weights used in the calculation of the REGIMPACT indicator.

Source:

http://www.oecd-ilibrary.org/content/workingpaper/5jlwz7kz39q8-en

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www.rekabet.gov.tr

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