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INTRODUCTION

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

This edition's "Selected Reasoned Decisions" section contains preliminary inquiries opened to Forest Engineers' Chamber, seven undertakings operating in the particle board and MDF market as well as the Particle Board Manufacturers Association and authorized services of Volkswagen, and exemption decisions which were notified by the Banks Association of Turkey, Roche Müstahzarları Sanayii A.Ş. and Daiichi Sankyo İlaç Ticaret Ltd. Şti.

The "News around the World" section of the Competition Bulletin includes news from EU Commission, United Kingdom, Ukraine and the Russian Federation.

"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 a summary of an article which was issued by the *Journal Of Competiton Law And Economics* titled "An Empirical Comparison between the Upward Pricing Pressure Test and Merger Simulation in Differentiated Product Markets" and the summary of another article issued by the *European Competition Journal* titled "Managing Antitrust Risks in the Banking Industry".

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

With our best regards.

Department of External Relations, Training and Competition Advocacy

- **The Board examined the claim that Forest Engineers' Chamber violated the Act no 4054 by setting minimum price tariffs**

Decision Date:	Decision No:	Type:
13.10.2016	**16-33/561-242**	**Preliminary Inquiry**

A preliminary inquiry was launched in response to a claim that the Forest Engineers' Chamber (OMO) published minimum price tariffs for work related to forest and wood industries and sanctioned professionals who refused to comply with these tariffs by banning them from practicing their profession.

In line with previous Board and court decisions on similar behaviors of professional associations, the Board is unable to take action against a practice by professional associations so long as that practice does not exceed the powers explicitly granted by law and related legislation. On the other hand, within the framework of competition advocacy efforts, the Board can render opinions to the relevant authorities concerning such practices that are based on statutory powers but pose the risk of restricting competition. However, the Board adopts a different approach towards those professional association practices which have the potential to restrict competition and are not based on any statutory powers. The Board can impose fines on the relevant practices of professional associations, can file a lawsuit to annul the legislation on which the practice is based, or can choose to issue an opinion to stop the practice.

The examination conducted showed that Article 13 with the title "Fees" of the Act no 5531 regulating the professional powers of forest engineers, forest industrial engineers and woodworking industrial engineers explicitly grants OMO the power to set minimum fee tariffs for professional work and to discipline those professional members who refuse to comply with these tariffs. Therefore, it was concluded that the OMO conduct comprising the subject matter of the complaint was fully based on the explicit power granted by article 13 of the Act no 5531, therefore no action could be taken against the OMO in relation to the claims in the application under the Act no 4054, and that there was no need to render opinion on the relevant articles of the regulation in question at this stage.

- **The Board examined the claim that seven undertakings operating in the particle board and MDF market as well as the Particle Board Manufacturers' Association violated articles 4 and 6 of the Act no 4054 by exchanging information to reduce uncertainty in the market, by conspiring to maintain prices, by engaging in discriminatory practices, by engaging in product tying practices and by refusing to supply goods.**

Decision Date:	Decision No:	Type:
13.10.2016	**16-33/571-248**	**Preliminary Inquiry**

This preliminary inquiry started upon receiving a complaint which stated that seven particle board and MDF manufacturers conspired to raise the price of their products together and met within the body of the Particle Board Manufacturers' Association (ASSOCIATION) to prioritize some buyers and set different terms and discount rates, thus engaging in discrimination by implementing different terms for equal buyers.

On-the-spot inspections conducted at the undertakings with regards to the first complaint during preliminary inquiry did not reveal any findings suggesting that the firms conspired to set particle board and MDF prices. In addition, a detailed price analysis is difficult because the products are differentiated and varied according to their characteristics, the price is mostly determined by negotiation on a customer-by-customer basis, and there is a corresponding variation in the terms and amount of discounts. However, an examination of the price lists submitted by the undertakings from a most-sold product group perspective showed that there was variation in product prices.

As is known, in line with Article 4(e) of the Act no 4054, "except exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts," can be considered an infringement. In this instance, in order find a violation under article 4, there must be an agreement and/or concerted practice between at least two different undertakings.

On-the-spot inspections carried out at the ASSOCIATION headquarters and the undertakings did not reveal any findings supporting the claim that the producers engaged in discriminatory practices by agreeing to give priority to certain undertakings and setting different terms and discount rates.

Another claim examined within the framework of the preliminary inquiry was that particle board and MDF manufacturers exchanged information through the ASSOCIATION to reduce uncertainty in the market. Information exchange between rivals, particularly when the information concerns future competitive strategies, may be considered an infringement under article 4 of the Act no 4054. On-the-spot inspections conducted at the ASSOCIATION in relation to the claim in question did not reveal any findings or documents in support of the relevant claim.

The examination under article 6 of the ACT no 4054, on the other hand, concluded that no undertaking held more than 40% market share in either of the product markets defined as the particle board market and the MDF market. Additionally it was found that, in the sector, there were a total of 25 different companies operating at 34 separate locations. Consequently, it was not possible to talk about a dominant position in the particle board and MDF markets, and the current case did not involve a dominant position, which is a prerequisite for discrimination, tying and refusal to supply infringements. In light of these facts, it was not deemed necessary to conduct an assessment on the other conditions of the practices in question.

- **The Board examined the claim that authorized services of Volkswagen only used contract Castrol brand motor oils which were not sold separately in the market, and that the service did not allow the use of Valvoline brand oil despite being approved by Volkswagen and brought in by the customer**

Decision Date:	Decision No:	Type:
13.10.2016	**16-33/575-251**	**Preliminary Inquiry**

According to Article 2 of the Communiqué no 2005/4, vertical agreements related to the purchase, sale and resale of new motor vehicles, their spare parts, or repair and maintenance services thereof are granted a block exemption from the prohibition in Article 4 of the Act under article 5.3 of the same Act, provided these agreements comply with the conditions laid out in the aforementioned Communiqué if they include vertical restraints.

Article 5 of the Communiqué no 2005/4 specifies the restraints which exclude agreements from the scope of the block exemption, and paragraph (j) of the same Act lists among these restraints "prevention of a distributor's or authorized service's ability to purchase original spare parts or spare parts of matching quality from a third undertaking of its choice and to use them for the maintenance and repair of motor vehicles". However, in instances of

repair, free-of-charge maintenance and vehicle recall under warranty, motor vehicle provider may require the use of the original parts it provides. In line with the above article of the Communiqué, prevention of the use of spare parts of matching quality would exclude vertical agreements from the protection of the block exemption, but the warranty period/coverage provides an exemption to this rule. Accordingly, it is possible to require the use of original parts while under warranty.

Looking at whether motor oil maintenance of vehicles were done under warranty, it was determined that using/changing motor oil itself was not a repair transaction under warranty per se, but a routine maintenance activity. Therefore use/change of motor oil does not fall under the aforementioned exception. Consequently, the decision states that the motor vehicle provider would be unable to require the use of original parts it supplied, and that otherwise the agreement signed would not benefit from exemption under the Communiqué.

However, the examination conducted into the case in question concluded that the provisions of the Communiqué no 2005/4 was not violated since the undertaking and its authorized services did not require the use of a certain brand but instead recommended certain ones and/or made certain standards obligatory.

In terms of the remaining claims listed in the application, it was found that the premium system implemented by the BP/CASTROL firm for the products it sells to DOĞUŞ OTOMOTİV services was not restrictive of competition, and the claim that the recommended oil brand was offered only in authorized services did not reflect the truth. Authorized services did offer some specialized motor oils, but their use was not obligatory; the same brand had other types of motor oil which met the standards of the relevant vehicle manufacturer and these types of oil could be supplied from other sources. In light of this information, it was concluded that the Act no 4054 and the Communiqué no 2005/4 were not violated by the practices mentioned in the complaint.

- **The Board granted a conditional 2-year exemption to the Banks Association of Turkey's (TBB) Board of Directors Decision recommending a TL15 interchange commission fee per transaction for foreign exchange check clearing until there was appreciable changes in costs or until members submitted applications to the TBB.**

Decision Date:	Decision No:	Type:
04.08.2016	**16-26/441-199**	**Exemption**

The decision reviews the notified decision of the Banks Association of Turkey (TBB), which is in violation of Article 4 of the Act no 4054, from the perspective of the exemption conditions set out in article 5 of the same Act.

According to the assessments made, the notified practice was found to meet the conditions laid out two of the four conditions specified in the Act no 4054, namely those in paragraphs (a) and (c), since it decreased operational burden, since it was in the form of a recommendation, and since the fees implemented by banks for retail customers showed some variation. However, fulfillment of the conditions set out in paragraphs (b) and (d) requires that the operation of the system be cost-based.

Due to the fact that the TBB calculations reflecting the arithmetic average of the banks' mean check costs were not cost-based, it was concluded that the calculations should have used the weighted average method which takes into account the size of the banks' foreign exchange check transactions. An examination of the nine banks included in the calculations in terms of their placement in the total size of the market according to the number and amount of foreign exchange checks showed that they corresponded to around 60% of the market, which meant the size of the banks included in the calculations reflected more than half of the market. However, calculations did not used the data set for 40% of the market. Even though including the data for the whole market in the calculations may have been difficult and time-consuming, it was remarked that this ratio must increase in the future. For instance, even including the largest four among the remaining banks in the calculations would make it possible to attain a size of around 80% of the market.

In order to ensure that banks are able to realize a uniform implementation, it was concluded that the TBB should publish a Guide for the relevant officials concerning which cost items to include in calculations and what procedures to use in this process. However, it was stated that the

participation of other banks in the calculation of the fee should also be ensured in order to increase the current ratio of 60%. In this context, the duration of the exemption was kept limited to two years. In this period of time, the TBB would able to complete the required work and the effects of the system could be determined, following which a new application could be made for a re-evaluation of the exemption.

In light of the above, it was decided that, due to the specific conditions of the service market in which foreign exchange check payments are made, an exemption under Article 5 of the Act no 4054 could be granted to the notified Board of Directors decision, provided the calculations used the weighted average method, taking into account the size of the banks' foreign exchange check transactions. The duration of the exemption was set at 2 years, starting from the date fulfillment of this condition within 30 days was certified.

- **Exemption granted to the dealership agreement to be signed between Roche Diagnostics Turkey A.Ş and its dealers on molecular diagnostics, sequencing systems and central point-of-care diagnostics solutions product groups**

Decision Date:	Decision No:	Type:
25.08.2016	**16-29/487-219**	**Exemption**

It was determined that the notified Agreement fell under article 4 of the Act no 4054 since it placed the buyer under non-compete obligations and active sales bans and allowed ROCHE to set the maximum sales prices the buyer could ask. ROCHE was found to have a market share exceeding the 40% threshold laid out in Article 2 of the Communiqué no 2002/2 solely in the market for self-testing devices and immuno-chemical test systems. Consequently, the notified Agreement benefited from the exemption provided in the Communiqué in terms of the other relevant markets. For the markets for self-testing devices and immuno-chemical test systems, an individual exemption evaluation was conducted for the Agreement.

Following the notified Agreement, the distribution of ROCHE products in Turkey would be handled by exclusively selected dealers. In the notification form, it is stated that dealers would be encouraged to focus on the needs of the customers, especially those of hospitals, in their regions in order to ensure faster response to customer demands at competitive prices. Thus, it is claimed that the relevant Agreement fulfilled the condition in Article 5(a) of the Act.

A competitive environment would result from exclusive dealers being able to pursue tenders in a more efficient manner. Even though exclusive dealership would decrease intra-brand competition, inter-brand competition would increase, creating competition and benefiting the consumer, which is interpreted to mean that the condition of Article 5(b) of the Act no 4054 is also fulfilled.

The notified Agreement authorizes exclusive dealers in specified regions and places non-compete obligations on these dealers. At this point, an assessment was conducted to determine whether the Agreement would lead to foreclosure in the markets for self-testing devices and immuno-chemistry test systems.

In light of the information acquired indicating that a large number of distributors existed in the relevant markets for both incumbent and potential competitors and that rivals in the relevant markets also operated via similar exclusive distribution agreements, it was that concluded the Agreement would not lead to significant competitive concerns in the market, that ROCHE having a distribution network with conditions similar to those of its rivals would allow ROCHE to compete efficiently and maintain this level of competition, thereby fulfilling the condition of Article 5(c) of the Act no 4054.

Lastly, it was found that the Agreement had a reasonable duration and it was not likely for this duration to lead to a more than necessary restriction in competition. Hence, it was assessed that the condition of Article 5(d) of the Act no 4054 was also fulfilled. Within this framework, it was decided that the dealership agreement in question could benefit from the exemption laid out in Article 5 of the Act no 4054.

- **Individual exemption granted to the Exclusive Tender Warehouse Agreement signed between Roche Müstahzarları Sanayii A.Ş. and MTS İlaç Dağıtım Tic. A.Ş., subject to conditions.**

Decision Date:	Decision No:	Type:
13.10.2016	**16-33/569-247**	**Exemption**

The notified Agreement authorizes MTS as the exclusive dealer for ROCHE's Altuzan, Mabthera and Herceptin, Perjeta and Kadcyola named products for the purposes of all purchases and tenders by other institutions on behalf of Public Hospitals Administration of Turkey (TKHK), Public Hospitals Association (KHB) and KHB General Secretariat, and of university hospitals (including the Social Security Institution).

The Agreement includes exclusivity and non-compete provisions. Within this framework, the Agreement falls under article 4 of the Act no 4054. In order to determine whether the Agreement should be evaluated under the Communiqué, market shares of the contract products in the hospital market were taken into consideration, based on active substances. None of the five contract products have generics. Under the circumstances, it is not possible to submit bids for other products in tenders for the relevant active substances. Consequently, the 40% threshold specified in article 2 of the Communiqué no 2002/2 was exceeded. For that reason, it was decided that the Agreement did not fall under the block exemption regulated by the Communiqué no 2002/2, and it was assessed under article 5 of the Act no 4054.

It was determined that the Agreement included provisions related to ensuring continuity of supply, enabling regular information flow to allow ROCHE to plan accordingly, and allowing MTS to keep inventory according to tender results. In addition, it was found that ROCHE handled the sales of its products via exclusively authorized warehouses since 2008, and its tender sales rapidly increased in the 2008-2015 period. Within this context, it was concluded that the condition of paragraph 5.1(a) of the Act no 4054 was fulfilled.

It was observed that the notified Agreement would lead to improvements in tender settling and participation for ROCHE products. In this case, the relationship between the parties would have a positive impact on drug expenditures of the public. Therefore, it was concluded that the condition of paragraph 5.1(b) was also fulfilled.

Additionally, it was found that competition would not be eliminated in a significant portion of the relevant market, since there are many pharmaceutical warehouses operating in the field of tender sales, both across Turkey and locally.

In conclusion, it was decided that the Agreement should be granted an individual exemption under Article 5 of the Act no 4054, with the condition that article 11.2 of the Agreement be amended to state that the non-compete obligation would only involve MTS İlaç Dağıtım Ticaret A.Ş. and the persons controlling this undertakings, and that only MTS İlaç Dağıtım Ticaret A.Ş.would be unable to bid in the relevant tenders with competing products, in order to fulfill the last condition for exemption.

- **It was decided that an exemption cannot be granted to the agreement signed between Daiichi Sankyo İlaç Ticaret Ltd. Şti. and Aksel Ecza Deposu A.Ş. granting exclusive authorization across Turkey to the latter warehouse for tenders related to the drug Simdax**

Decision Date:	Decision No:	Type:
08.09.2016	**16-30/504-225**	**Exemption**

The notified transaction requests the grant of an exemption to the Agreement signed between DAİİCHİ SANKYO and AKSEL, which grants exclusive authorization across Turkey to AKSEL for the tender sales of the drug Simdax.

The Agreement comprising the subject matter of the application is a vertical agreement signed between two undertakings operating at different levels of the human medicine market. Since the agreement specifies exclusivity and introduces non-compete obligations, it is in violation of article 4 of the Act no 4054. Because the market share of the provider in the relevant market exceeds 40%, it was determined that the Agreement could not benefit from the block exemption of the Communiqué no 2002/2, and an individual exemption assessment was conducted.

Hospital pharmacies must be as well-equipped as possible, both for sustainable public medicine expenditures and for rapid in-patient treatments. This, in turn, requires a high fulfillment rate for the medince needs of hospitals. The data in the file show that a large portion of Simdax demand from public hospitals was not fulfilled since DAİİCHİ SANKYO started working with AKSEL. Within this context, it was determined that the Agreement under examination failed to meet the condition of paragraph 5.1(b) of the Act no 4054.

Simdax is the only product with the active substance Levosimendan, and the notified Agreement makes AKSEL the exclusive warehouse for the relevant tenders. The explanation of the applicant indicates that the exclusivity would also be valid for group tenders, with the exception of those in which AKSEL would not participate. In this case, no other pharmaceutical warehouse would be able to bid in a group tender in which AKSEL would participate and which includes Simdax procurements. In other words, a competitive environment would not exist in such tenders. In light of the determinations made in Board decisions with similar subjects, it was found that the condition of paragraph 5.1(d) of the Act no 4054 was not fulfilled

by the Agreement in question, since the exclusivity established with the Agreement covered group tenders as well.

Consequently, it was decided that an individual exemption could not be granted to the Agreement in question, due to the fact that it does not fulfill the conditions specified in Articles 5.1(b) and (d) of the Act no 4054.

- **European Commission published competition merger brief regarding recent developments in telecom mergers**

European Commission in its competition merger review outlies the following evaluations for recent telecom merger cases investigated by the Commission.

In recent years there has been a wave of mergers, especially 4-to-3, in telecommunications throughout the EU. Thereof the Commission has gained significant experience in assessing the different issues raised by consolidations involving not only mobile-only operators but also mobile and fixed operators. While mobile-only mergers often raise horizontal concerns, fixed-mobile mergers require the analysis of possible conglomerate issues besides limited horizontal overlaps. Remedies on the other hand display case-specific structure, so it is obvious that there is no one solution that fits all cases.

Not all mobile-only mergers did lead to the creation or strengthening of dominance, but rather involved the elimination of the important competitive constraint that the merging parties previously exerted upon each other, and also with a reduction of competitive pressure on other competitors. The Commission repeatedly found that in mobile telecoms markets, which are typically national and oligopolistic, the proposed merger led to significant impediment of effective competition.

According to Merger Guidelines as for efficiencies to be taken into account, efficiencies must be (i) verifiable; (ii) passed on to consumers; and (iii) merger-specific; that is, there is no less restrictive alternative to the merger to achieve them. Though there are recent studies emphasizing dynamic efficiencies resulting from consolidation, the Commission has so far never found that consolidation would significantly spur investment. Not consolidation but competition and customer demand appear to be the key drivers of investment so far. So clearing the merger on claimed efficiencies post-merger may not guarantee that more investment will happen. Hence, there appears to be no evidence that consumers would benefit from more network investments, but there is a risk that they would be faced with less competition and higher prices. Furthermore, the Commission rejected the parties' network efficiencies as failing to be merger-specific, as a network sharing agreement found to be a realistic and attainable less restrictive alternative.

Source:

http://ec.europa.eu/competition/publications/cmb/2016/kdal16003enn.pdf

- **European Commission has fined Sony, Panasonic and Sanyo €166 million for price-fixing in the supply of rechargeable lithium-ion batteries.**

DG Comp has found Sony, Panasonic, Sanyo and Samsung violated competition law by conspiring to raise their battery prices and also exchanging commercially sensitive information regarding planned bids in the rechargeable lithium-ion battery market. Rechargeable lithium-ion batteries are used in portable devices such as laptops and mobile phones.

Panasonic, which bought out Sanyo in 2012, is accountable for €40 million for its own and €97 million for Sanyo, for a total of €137 million. Sony got fined €30 million. All companies acknowledged their involvement in the cartel and agreed to settle the case, therefore received a 10% reduction in their fines. Samsung, though got fined €58 million, has been granted full immunity for revealing the cartel to the authority as leniency applicant.

The cartel was found active from February 2004 to October 2007, and most of the illegal conduct took place in Asia but it affected prices in Europe. According to EU competition commissioner Margrethe Vestager the decision sends an important signal to companies: "if European consumers are affected by a cartel, the commission will investigate it even if the anticompetitive contacts took place outside Europe."

Source:

http://europa.eu/rapid/press-release_IP-16-4356_en.htm

http://globalcompetitionreview.com/article/1078677/battery-cartel-fined-eur166-million-by-dg-comp

- **DG Comp has accused Facebook of misleading on its Acquisition of WhatsApp**

The European Commission's Directorate-General for Competition in its Statement of Objections issued has alleged Facebook with providing misleading information during its acquisition of WhatsApp in 2014, opening the company to a possible fine of 1 % of its turnover.

It is stated that Facebook did not provide reliable information on how the company would combine its user accounts with those at the messaging service WhatsApp during the acquisition investigation. DG Comp official told that Facebook had misled the Commission when it said there was no potential to pool user accounts.

The European Commission approved the merger between the two companies in October 2014. This new inquiry will not affect the Commission's approval of the $22 billion merger, said DG Comp it is to probe Facebook for breaching procedural rules.

Sources:

http://europa.eu/rapid/press-release_IP-16-4473_en.htm

http://globalcompetitionreview.com/article/1079125/dg-comp-accuses-facebook-of-misleading-on-whatsapp

https://www.competitionpolicyinternational.com/eu-dg-comp-accuses-facebook-of-misleading-on-whatsapp/

- **CMA has imposed a record of approximately £90 million fine to Pfizer and Flynn Pharma for charging "excessive and unfair" prices to UK's National Health Service**

The Competition and Market Authority UK (CMA) has found the pharmaceutical manufacturer Pfizer and the distributor Flynn Pharma breached the competition law by overcharging the UK's National Health Service (NHS) for phenytoin sodium capsules, an anti-epilepsy drug, an important drug relied on by thousands of patients. In addition to fines the CMA has also ordered the companies to reduce their prices.

According to CMA's findings the companies hiked the prices of phenytoin sodium capsules by up to 2,600% overnight after the drug was deliberately de-branded in September 2012. The amount the NHS was charged for 100 mg packs of the drug raised from £2.83 to £67.50, before reducing to £54.00 from May 2014. Prior to September 2012, Pfizer manufactured and sold phenytoin sodium capsules to UK wholesalers and pharmacies under the brand name Epanutin and the prices of the drug were regulated. In September 2012, Pfizer sold the UK distribution rights for Epanutin to Flynn Pharma, which de-branded (or 'genericised') the drug, meaning that it was no longer subject to price regulation. As a result of the price increases, NHS expenditure on phenytoin sodium capsules increased from about £2 million a year in 2012 to about £50 million in 2013. The prices of the drug in the

UK were found to been many times higher than Pfizer's same drug's prices in any other European country.

The CMA has found that both companies have held a dominant position in their respective markets for the manufacture and supply of phenytoin sodium capsules and each has abused their dominant position by charging excessive and unfair prices.

Sources:

https://www.gov.uk/government/news/cma-fines-pfizer-and-flynn-90-million-for-drug-price-hike-to-nhs

http://globalcompetitionreview.com/article/1078432/cma-issues-record-fine-in-rare-excessive-pricing-decision

- **Ukraine's Antimonopoly Committee has imposed fines to petrol companies for similar pricing**

The Antimonopoly Committee had launched an investigation in 2013, following substantial increases to the price of retail fuels across Ukraine. The investigation ended in October 2016 and the Committee fined seven petrol station operators 204 million Ukrainian hryvnia (€7.23 million), by applying a controversial concerted practice provision that presume that the companies' similar and parallel pricing strategies amount to anticompetitive conduct.

The Committee's official told that the companies coordinated retail prices of light petroleum products at filling stations between January 2013 and January 2016. The enforcer claimed the companies' actions distorted competition and encouraged other petrol stations to change their own prices. The conduct was found to reduce competition in the market as a whole, and amounts to a violation of competition laws. A provision in Ukraine's competition law allows the enforcer to presume that similar behaviour by companies amounts to anticompetitive conduct, unless defendants are able to justify those similarities.

The authority respectively ordered OKKO, WOG Retail and Alliance Holding to pay €2.75 million, €1.9 million and €1.4 million; penalties against Zoloty Ekvator, AMIC Ukraine, Socar Petroleum and Parallel ranged from €52,370 to €573,000.

On the other hand the parties argue the enforcer's decision is debatable, since there was no leniency applicant and the authority did not have any concrete evidence (a smoking gun) that concerted practices had taken

place. The enforcer's only evidence was a correlation analysis, in which it looked at the prices each company paid for petrol and other cost factors. Thereof the parallel pricing of companies not adjusted by cost or other variables was found to be an infringement.

Source:

http://globalcompetitionreview.com/article/1070738/ukraine-fines-petrol-companies-for-similar-pricing

http://ukropnews24.com/the-gas-station-was-fined-million-will-it-stop-the-growth-of-fuel-prices/

- **Russia and South Africa agree to strengthen cooperation in joint investigations of cases on violating competition**

Representatives of Federal Antimonopoly Service of the Russian Federation (FAS) and the Competition Commission of the South African Republic (SACC), agreed to strengthen cooperation and signed a "Memorandum of Understanding" (MoU), as focussing particularly on joint investigations of the markets of social importance like pharmaceuticals, telecommunications, car manufacturing and food products, in which pending or future sectoral inquiries would see information-sharing.

The authorities discussed possibility of joint investigations of cartels and signing an agreement at the government level, which will enable to exchange confidential information at the state of preliminary investigation.

Source:

http://en.fas.gov.ru/press-center/news/detail.html?id=48184

https://africanantitrust.com/tag/mou/

- **9th Ankara Administrative Court Decision dated 4.03.2016 and numbered 2015/589 E., 2015/528K.:**

Issuing an "out-of-scope" decision when preliminary inquiry is required constitutes incomplete examination.

The complaint submitted to the Competition Authority on 05/02/2015 requesting the initiation of an investigation under the Act no 4054 on the Protection of Competition on Türk Hava Yollan Anonim Ortaklığı (THY) on the grounds that THY abused its dominant position in the ticket sales market was refused with the Competition Board decision dated 05/03/2015 and numbered 15-10/145-M. The lawsuit filed for the annulment of this decision was accepted by the court and the transaction in question was annulled.

In its annulment decision, the court emphasized that the complaints submitted under the Act could not be refused without initiating a preliminary inquiry to remove suspicions, and made the following assessment: "*During the preliminary inquiry to be conducted in order to determine whether initiating an investigation on a complaint claiming an Act no 4054 violation is necessary, the defendant agency must examine the conduct in question in light of the documents, information and evidence gathered as a result of the extension of the inquiry and clarified in a manner that leaves no room for suspicion, particularly since the issues referred to in the omplaint of the plaintiff were found to fall within the scope of the Act no 4054. However, the complaint comprising the subject matter of the case herein was refused without operating the preliminary inquiry and/or investigation methods specified in the relevant legislation, which was ruled not to have been in compliance with the law...*"

- **12th Ankara Administrative Court Decision dated 31.12.2015 and numbered 2015/480 E., 2015/2873 K.:**

Why is exclusivity illegal?

12th Ankara Administrative Court dismissed the lawsuit filed with a request to annul the Competition Board decision dated 13.08.2014 and numbered 14-28/585-253, which was taken as a result of the investigation conducted into the complaint claiming that competition in the relevant markets was prevented by the exclusivity provisions in the contracts for building base stations/cell towers signed by TURKCELL İletişim A.Ş. and its wholly-owned subsidiary Kule Hizmet ve İşletmecilik A.Ş. which introduce an obligation to supply a single buyer.

In its dismissal, the court included the following assessment: "*Exclusivity agreements are agreements which place a buyer under an obligation to purchase the entirety or a significant portion of its demand for a product or group of products only from a single supplier. These agreements may be examined under article 6 of the Act if the supplier holds a dominant position. In this context, a written agreement between the dominant undertaking and the buyer including an exclusivity provision is not necessary; oral agreements and/or dominant undertaking practices which may lead to de facto exclusivity (such as various obligations placed on the buyer or indirect provisions in agreements) are also evaluated within this framework. Exclusivity agreements signed by a dominant undertaking also have restricting effects on competition. By preventing the access of (actual and potential) competitors to necessary channels, exclusivity agreements foreclose relevant market(s) and thus may restrict the likelihood that other firms might emerge as an efficient competitor for the dominant undertaking.*

Foreclosure effects of exclusive agreements increase as the exclusive portion of the dominant undertaking's sales within the total sales in the market, i.e. tied market share, increases. In particular, anti-competitive effects increase if tied market share is sufficiently high to prevent a competing firm from operating efficiently by taking advantage of economies of scale However, if the dominant undertaking implements exclusivity only for important (in that they are financially strong or their place of business is critical in terms of location) buyers (that is to say, in case it selects important buyers), anti-competitive foreclosure effects may still arise even in the absence of significant tied market share."

This decision is significant in that it is a court decision that includes qualitative explanations concerning the matter of exclusivity.

- **13th Chamber of the Council of State Decision dated 22.3.2016 and numbered 2011/4117 E., 2016/776 K.:**

When fulfilling the requirements of a court decision which found the refusal of a complaint after a preliminary inquiry unlawful, it is not sufficient to initiate an investigation as a formality; the transaction must be executed in accordance with the grounds of the annulment.

The lawsuit was filed for the annulment of the Competition Board decision dated 26.05.2011 and numbered 11-32/676-212 concluding that there were no findings suggesting that the complainee undertakings violated article 6 of the Act no 4054, which was itself taken as a result of an investigation initiated to implement an annulment, by the Plenary Session of Administrative Law Chambers, of the 10th Chamber of the Council of State

decision concerning the dismissal of a lawsuit filed against the previous Competition Board decision ruling that opening an investigation was unnecessary and the complaint should be refused, taken as a result of the preliminary inquiry conducted in response to the complaint submitted by the complainant company with the claim that articles 4 and 6 o the Act no 4054 on the Protection of Competition were violated.

The court accepting the lawsuit made the following assessment in its decision: *"...the relevant Board decision states the later stages of the investigation revealed that, on various dates, the investigated parties held interviews with and corresponded to request information from some of their largest natural person customers, competitors, harbor pilots who were claimed not to have been interns, as well as with officials from the Undersecretariat for Maritime Affairs. However, the investigation file did not include information and documents on these matters.*

The complaint of the plaintiff company produced witnesses for the claim that harbor pilots were made to sign contracts with punitive conditions and asserted that there was a pending lawsuit filed for the collection of the bonds taken from harbor pilots. Notwithstanding, the Board decision did not make any assessments of these claims and stated that interviews conducted with some of the harbor pilots suggested that, to-date, there were no legal instruments for which legal proceedings were started, that the bonds asserted to exist had to have been signed in 1996, and that under these circumstances, the testimonies by the harbor pilots interviewed by the rapporteurs claiming 'they did not remember signing any such bonds' seed to be reflecting the truth.

In relation to the claim that an article was added to the incorporation contract to impose sanction on those harbor pilots who transferred to other companies, it was stated that article 22 added to the incorporation contract for this purpose was brought before the courts, the court decision was finalized and article 22 was struck out from the incorporation contract. Following the conclusion of this process, stakeholders could freely work at other companies. Despite the above, this situation, which might comprise a violation, was eliminated by the executive board of the complainee undertaking. This shows that the conduct had been continuing for some time and there was nothing to prevent the Competition Board from evaluating, within the term of limitations for the investigation, whether this conduct comprised a violation. Otherwise, conduct whose implementation in the past had caused competition violations could go unsanctioned. On the other hand, the annulment decision came to the conclusion that Med-Marine demanded Eksay A.Ş.'s cooperation in the İskenderun Port and otherwise it would complicate the operations of the latter undertaking in the İzmit Bay. This situation suggested the existence of an abuse of a

commercial advantage acquired in one geographical market to distort competitive conditions in another geographical market, in violation of article 6(d) of the Act no 4054.

Consequently, the preliminary inquiry report stated that it would be beneficial to include this among the investigations subjects. Despite that, the Competition Board decision comprising the subject matter of the case could not find any such conduct and even came to the conclusion that initiating an investigation was not necessary on the grounds that the examinations carried out by the rapporteurs had found the exact opposite conduct. This conclusion clearly was not in compliance with the goals and principles of competition law. There is no doubt that claims based on such concrete documents can only be confirmed or disproven as a result of an investigation. In spite of what is said in the decision, ***the investigation conducted following this decision failed to carry out an examination*** *before assessing that a similar abuse was not possible in consideration of the starting and conclusion dates of the investigation, even though the rapporteurs made no concrete determination on the subject. This issue also required an assessment to be made concerning the period in which the alleged violation existed, taking into account the term of limitations,* ***but it is clear that the decision was taken without taking the grounds of the aforementioned court decision into account, and based on incomplete examination.***

Under the circumstances, it is clear that ***simply launching an investigation*** *in response to the above annulment by the Plenary Session of the Administrative Law Chambers* ***would not mean that the annulment decision is complied with****, and the Board decision comprising the subject matter of the case, which was taken based on incomplete examination* ***without taking the grounds of the annulment into account*** *was not in compliance with the law."*

- **13th Chamber of the Council of State Decision dated 22.3.2016 and numbered 2011/1129 E., 2016/778 K.**

Refusing a complaint following a preliminary inquiry where launching an investigation is indicated constitutes incomplete examination

The lawsuit filed which requested the annulment of the Competition Board decision refusing the complaint was accepted by the 13th Chamber of the Council of State.

In its annulment, the Court made the following assessment: *"...the Board decision comprising the subject matter of the lawsuit did not sufficiently examine the claims that there were no gas supply problems during the*

period of gas shortages, that BOTAŞ's opinion on the shortages was not requested, that the examination should have been extended to include correspondence with BOTAŞ in order to unearth the material facts of the case, however the complaint was refused at the preliminary inquiry stage without doing this and an investigation was not initiated.

As such, in order to ensure that the claims concerned are examined under article 6 of the Act no 4054, the defendant administration should have launched an investigation in order to make an assessment in light of the information, documents and evidence acquired by an extended inquiry and in order to clarify the matter in a manner that is free of all suspicion. Therefore, the Board decision taken as a result of an incomplete examination refusing the complaint and ruling there was no need to launch an investigation has been found to be incompliant with the law."

- **13th Chamber of the Council of State Decision dated 24.3.2016 and numbered 2011/4211 E., 2016/456 K.**

The duration of the exemption granted in fuel agreements are based on the first contract restricting discretion

The lawsuit filed requesting the annulment of the Competition Board decision dated 17.08.2011 and numbered 11-45/1077-373was dismissed by the 13th Chamber of the Council of State.

In its dismissal, the Court made the following assessment: "*As a result of the agreement signed between the plaintiff (provider) and the dealer, the dealer was prevented from undertaking the dealership of other distributors on the immovable comprising the subject matter of the case, starting from the date the dealer signed the agreement. In other words, it was impossible for the dealer to enter into a vertical agreement with another undertaking competing with the provider. Therefore, it was concluded that the non-compete obligation started on that date. Consequently, the Board's refusal of the request to consider the actual operational date of the petrol station as the starting date when calculating the duration of exemption for the agreement was found to be in compliance with the law.*"

- **13th Chamber of the Council of State Decision dated 18.5.2016 and numbered 2015/5104 E., 2016/1849 K.**

Previously, an administrative action of the Board in which it refused a complaint on the grounds that "a 4-month period was not sufficient in terms of its effects to foreclose a market to a rival by means of price squeeze"

was annulled with the 8th Ankara Administrative Court's decision dated 09.06.2015 and numbered E:2014/1793, K:2015/965.

Competition Board appealed the case and requested that the first instance decision be reversed, claiming that the subjects of price squeeze and market foreclosure fell under the purview of the Competition Board, that European courts conducted very restricted examination on such subjects, that the court decision failed to present the principles that could justify considering a 4-month period sufficient for a competition violation, that the decision was groundless and was based on incomplete examinations.

The appeal court found the request for review justified and reversed the decision, with the following assessment: "*the decision which found that there was no abuse of dominant position by means of price squeeze, taken following the determination that a four month period (October 2012 - February 2013) would not be sufficient for anti-competitive foreclosure, did not constitute an unlawful act. On the other hand, the Administrative Court decision which failed to fully explain how a competition violation committed through price squeeze and simply found that a 4-month period was sufficient for abuse of dominant position by means of price squeeze was ultimately wrong.*"

The significant part of this reversal is that it includes detailed and competent analyses concerning the definition and conditions of price squeeze conduct, following which it emphasizes that the defendant administration sufficiently carried out this analysis while the first instance court failed to conduct a concrete analysis on whether price squeeze actually took place.

- **An Empirical Comparison between the Upward Pricing Pressure Test and Merger Simulation in Differentiated Product Markets**

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Author: Lydia CHEUNG

In recent years, merger analysis began to focus on price effects instead of market concentration. In contrast to the traditional approach based on concentration changes, this new approach focuses on price effects induced by the merger. The frontrunners of this paradigm shift are the US Justice Department and the Federal Trade Commission, which published the horizontal merger guidelines in the United States, and the Competition Commission, which revised the Merger Assessment Guidelines in the UK. This important shift in approach, has given rise to the Upward Pricing Pressure (UPP) as a new merger screening tool. The UPP, which is the subject matter of the article, identifies net price effect post-merger by comparing firm's incentive to increase price due to lost competition against the incentive to decrease price due to cost savings.

This article is one of the first studies comparing the empirical predictions of the UPP test with predictions from merger simulations. The study shows how this fast screening tool leads to the same decision as other tools. In order to assess the UPP's sign, rank and magnitude predictions, the article makes uses of hypothetical mergers in a big cross-section of airline route markets. When the test is compared with merger simulations, it gives similar sign predictions in 90% of the observations and the same decile predictions in 75% of the observations. There is a mean magnitude difference of $17 between the two models. The study investigates the performance of both the first and second terms of the UPP using different hypothetical mergers and lastly, explores whether certain market or product characteristics lead to large discrepancies in the UPP using model selection techniques.

Source:

https://academic.oup.com/jcle/article/12/4/701/2547754/AN-EMPIRICAL-COMPARISON-BETWEEN-THE-UPWARD-PRICING

○ Managing Antitrust Risks in the Banking Industry

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Authors: Danise SCHELD, Johannes PAHA & Nicolas FANDREY

In the recent years, significant fines have been imposed on banks for violating antitrust laws. For instance, Deuthsche Bank had to pay $466 million in 2013 for participating in the Euro interest rate derivatives cartel. This was the fourth largest cartel fine imposed on a single firm by the European Commission's Directorate General Competition between 1969 and 2016. As the number of cases prosecuted and the fines impose by competition authorities increase, the matter of ensuring competition law compliance becomes even more important in the banking sector.

This article presents the costs and benefits of antitrust risk management, arguing that antitrust risk management studies are essential for banks to survive and maximize their values. On the one hand, the article emphasizes an approach to assessing the residual risk of non-compliance with antitrust laws, and on the other it shows how antitrust risk management can be implemented efficiently in banks' existing risk management structures using various models.

The study makes a contribution to the literature in three aspects. First of all, it shows that antitrust law violations are as widespread in the banking sector as they are in others and that they can have severe consequences for bank shareholders and managers. Secondly, the article proposes a framework for a more effective assessment and management of antitrust risks and the consequences thereof. Thirdly, it shows how this can be achieved in an efficient manner, by integrating these compliance efforts with existing risk management structures.

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