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

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

The "News around the World" section of the Competition Bulletin includes news from UK, Germany and the Nederlands and the first decision taken by Eurasian Economic Commission.

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

"Economic Studies" section includes a summary of an aricle published by Review of Industrial Organization titled "*Algorithmic Pricing What Implications for Competition Policy?*" and another article published by the Journal of Competition Law & Economics titled "*Estimating Diversion Ratios in Hospital Mergers*".

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

With our best regards.

External Relations, Training and Competition Advocacy Department

Investigation concerning Abalıoğlu Yem Soya ve Tekstil A.Ş.

Decision Date:	Decision No:	Type:
13.03.2019	**19-12/156-71**	**Investigation**

As a result of the preliminary inquiry made in response to the claims that Abalıoğlu Yem Soya ve Tekstil A.Ş. (ABALIOĞLU) and Ağaoğlu Tarım Maden Orman Ürünleri Tekstil İnş. Trz. Gıda San. ve Tic. Ltd. Şti (AĞAOĞLU) made an agreement with an exclusive dealer provision regarding LEZITA brand white meat and eggs, later ABALIOĞLU terminated the agreement because AĞAOĞLU sold competing brands, the situation might be the same for other sellers who made agreements for the sale of LEZITA brand white meat and eggs, the Board took the decision dated 14.07.2011 and numbered 11-43/940-304 that it was not necessary to initiate an investigation concerning ABALIOĞLU. As a result of the lawsuit brought by AĞAOĞLU, 13th Chamber of the Council of State annulled the abovementioned Board decision with its decision dated 27.12.2017 and numbered E: 2011/3511 K: 2017/4404 on the following grounds: "*As a result of the preliminary inquiry made to decide whether it was necessary to initiate an investigation about a complaint that there was a violation of the Act, an investigation should have been initiated to enlighten the claims undoubtedly in lig ht of information, documents and evidence to be obtained. However, the Board decision rejected the complaint at the preliminary inquiry stage without adequate examination; thus the decision is not convenient with the law*."

Upon the annulment decision, an investigation about ABALIOĞLU was initiated. As a result of the investigation, it was decided that there were not any provisions in the agreements ABALIOĞLU made with its dealers that would create exclusivity, ABALIOĞLU did not put into practice any activities to create exclusivity, even under the presumption of exclusive activities, ABALIOĞLU could have benefited from block exemption because its market share was under 40%, the term of agreements did not exceed five years and there were not any obstacles in front of benefiting from block exemption and consequently ABALIOĞLU did not violate the Act no 4054.

Investigation concerning Novartis Sağlık Gıda ve Tarım Ürünleri San. ve Tic. A.Ş.

Decision Date:	Decision No:	Type:
11.04.2019	**19-15/215-95**	**Investigation**

The application in question included the following claims:

NOVARTİS refused Çınar Ecza Deposu ve Dış Tic. A.Ş.'s (ÇINAR) request to continue its agreement to distribute Novartis Sağlık Gıda ve Tarım Ürünleri San. ve Tic. A.Ş.'s (NOVARTİS) medicine (and Alcon Laboratuvarları Ticaret A.Ş., where NOVARTİS holds the majority shares) unfairly, other pharmaceutical warehouses also refused ÇINAR's request for the procurement of NOVARTİS products because of the agreements between NOVARTIS and other pharmaceutical warehouses.

First, the claims were evaluated according to article 4 of the Act no 4054. It was observed from the documents submitted by ÇINAR to the Competition Authority that ÇINAR requested to buy NOVARTIS products from two warehouses but the said warehouses refused to supply products to ÇINAR because of the agreements they made with NOVARTIS. The Authority examined the agreements made by the pharmaceutical warehouses with NOVARTIS, it was observed that the sale of NOVARTIS products by the warehouse party to the agreement to other warehouses is prohibited if and only if it is known that or there is a reasonable doubt that the warehouse requesting the products would sell the contract products outside the borders of the Republic of Turkey or of Turkish Republic of Northern Cyprus. It was understood that the reason was related to health security and medicine pricing policies rather than competition law. Moreover, there were not any documents showing that NOVARTIS and the two pharmaceutical warehouses concerned made agreements to exclude ÇINAR by way of refusal to deal. It was understood that when ÇINAR could not buy products from NOVARTIS, it made contacts with the two pharmaceutical warehouses concerned and did not try to buy products from a third warehouse. Therefore, it was not possible to prove that NOVARTIS made agreements with ÇINAR's competitors in pharmaceutical warehouse business to exclude ÇINAR or complicate its activities. Thus, it was not possible to conclude that there was an agreement or concerted practice that restricted competition within the scope of article 4 of the Act no 4054.

The analysis made within the framework of article 6 showed that refusal to deal with distributors could be regarded as a violation only if such practices are built on theory of harm such as exclusion of competitors in the upstream

market by way of selling single brands or de facto exclusivity. It was concluded that the accumulative three conditions for imposing the obligation to make agreements on the dominant undertaking are not fulfilled because it is not possible to depend on a theory of harm due to the following reasons:

- NOVARTIS products are not indispensable for ÇINAR's warehouse activities
- It is not possible to claim a harm on competition because ÇINAR resells the products it receives and does not provide added value
- It is not possible to create a rational theory of harm with respect to competition in the market and consumers because the inability of a small pharmaceutical warehouse to distribute NOVARTIS products does not affect price and service levels for consumers.

Moreover, it was also concluded that NOVARTIS' refusal to deal was proportional vis a vis ÇINAR's activities.

As a result, it was decided that NOVARTIS and ALCON did not violate the Act no 4054.

- **Examination for Exemption concerning "TT Mobil-Vodafone-Turkcell Facility Consolidation Cooperation Agreement" signed between Vodafone Telekomünikasyon A.Ş. (Vodafone), TT Mobil İletişim Hizmetleri A.Ş. (TT Mobil) and Turkcell İletişim Hizmetleri A.Ş.**

Decision Date:	Decision No:	Type:
11.04.2019	**19-15/203-90**	**Exemption**

The notification was about "TT Mobil-Vodafone-Turkcell Facility Consolidation Cooperation Agreement" signed between Vodafone Telekomünikasyon A.Ş. (Vodafone), TT Mobil İletişim Hizmetleri A.Ş. (TT Mobil) and Turkcell İletişim Hizmetleri A.Ş. Briefly, the agreement includes the following provisions:

- The parties shall share passive mobile infrastructure elements that are used in the provision of mobile electronic communication services,
- The basic objective of the agreement is to create a collaborative environment so that the parties could fulfill the obligations in the relevant legislation, to increase cost efficiency and to use the resources more efficiently,

- active mobile infrastructure and fixed infrastructure shall be excluded,
- "Consolidation Planning Committee", whose opinion shall not be binding, shall be established with the participation of two representatives from each party. The aim of the said committee is to list the facilities that might be subject to consolidation, to keep that list updated, to identify the points where facility consolidation might be made.

The agreement on passive network allocation that regulates the principles of cooperation between competitors is under the scope of article 4 of the Act no 4054 because of competitive concerns that the agreement in question might create coordination with respect to operating infrastructure. Current regulations encourage network allocation. The analysis for individual exemption shows that network allocation will be more efficient as a result of the agreement notified; thus, the agreement fulfills the conditions listed in article 5(1)(a) and (b) of the Act no 4054. The agreement fulfills the conditions in Article 5(1)(c) of the same Act since the transaction has limited effects on the market and will not significantly restrict competition in the market in spite of high entry barriers. The agreement also fulfills the conditions in subparagraph (d) within the framework of other explanations made and the fact that the parties have right to install facilities on their own or with other operators. Taking into account increasing mobile broadband trends and the requirement of a wider infrastructure due to the need for higher capacity for 4,5G and 5G technologies, etc., the agreement has been granted individual exemption.

▪ The Board decision concerning the failure to submit certain information and documents requested from Yozgat Güven Beton Pazarlama Nak. San. ve Tic. Ltd. Şti

Decision Date:	Decision No:	Type:
13.03.2019	**19-12/147-68**	**-**

Competition Authority officials conducted on-site inspection on 05.02.2019 at the premises of Yozgat Güven Beton Pazarlama Nak. San. ve Tic. Ltd. Şti. (GUVEN BETON) according to the Board decision dated 06.09.2018 and numbered 18-30/525-M. The officials found a file of documents, which contained papers showing the breakdown of concrete amounts sold by the parties of the preliminary inquiry. The officials were not able to take the copy of the file because the file was huge, there was not a copier machine at the premises and it was not possible to find photocopy service nearby. It would take a long time to examine the file during the inspection. Besides,

the copies of documents in the file were previously taken from other undertakings concerned. However, according to the fourth question in the record of the on-site inspection, which was signed by an employee of the undertaking concerned, GUVEN BETON should sent the copies of the relevant documents together with a version in Excel format until 13.02.2019.

GUVEN BETON only answered the second question in the record and sent the answer by e-mail. The Competition Authority repeatedly requested by e-mail that other questions should be answered and missing parts should be completed until 15.02.2019. GUVEN BETON replied the abovementioned e-mail on 15.02.2019 however did not send the document requested in spite of the warnings against administrative sanctions.

Within this framework, it was decided that GUVEN BETON shall be imposed administrative fines amounting to ‰5 of its annual gross income accrued at the end of the financial year 2018, according to article 16(1) of the Act no 4054 because of the failure to send certain information and documents listed in the records of the on-site inspection. Moreover, GUVEN BETON shall also be imposed administrative fines amounting to 5 per ten thousand of its annual gross income accrued at the end of the financial year 2018, according to article 17(1)(c) for each day until the requested information and documents were submitted to the Competition Authority starting from 18.02.2019, which is the first working day following the expiry date for the requested information and documents.

- **The request that the Competition Board decision about 3M Sanayi ve Ticaret A.Ş. dated 09.06.2016 and numbered 16-20/340-155 be evaluated again after it was annulled by the decision of Ankara 7th Administrative Court dated 02.11.2018 anulled E: 2017/619, K: 2018/1821**

Decision Date:	Decision No:	Type:
18.04.2019	**19-16/220-99**	**-**

As a result of the preliminary inquiry made in response to the claims that 3M Sanayi ve Ticaret A.Ş. (3M) violated article 4 of the Act no 4054 by resale price maintenance regarding some dealers and applying discriminative discount rates to create disadvantageous conditions for other dealers, it was decided that 3M San. ve Tic. A.Ş. should be sent an opinion as per article 9 of the Act no 4054 stating that it should avoid the

aforementioned practices; otherwise, an investigation should be initiated according to article 41 of the same Act. Afterwards, the complainant filed a lawsuit for the annulment of the Board decision and the Board decision in question was annulled by the decision of the 13th Chamber of the Council of State dated 30.11.2011 and numbered E: 2008/3117, K: 2011/5424. As a result of the investigation conducted then, the Board took a decision dated 25.06.2014 and numbered 14-22/461-203 that the undertaking concerned did not violate the Act no 4054. Following this decision, the complainant filed a case and the transaction was annulled by the decision of Ankara 15th Administrative Court dated 17.12.2015 and numbered E: 2014/1947, K: 2015/2403. In order to comply with the judiciary decision, the Board took the decision dated 09.06.2016 and numbered 16-20/340-155 that 3M shall be imposed 2.115.839,95 TL, which was 0.5% of its gross annual income accrued at the end of financial year 2013 and determined by the Board, taking into account Article 16 of the Act no 4054, amended by the Act dated 23.01.2008 and numbered 5728 and the favorable regulations regarding fines.

Then, as a result of the case filed by 3M for the annulment of the Board decision, within the scope of the file dated 02.11.2018 and numbered E: 2017/619, K: 2018/1821, Ankara 7th Administrative Court decided to annul the Board decision on the grounds that the principle to take into account the favorable provision for determining the fines was not applied. In line with the annulment decision, it is necessary that the administrative fine be determined after comparing the annual gross income of the year previous to the practices (2006) calculated according to the legislation in effect on that date with the annual gross income calculated according to the provision that was put into effect later (2013 and 2015). On the other hand, the Board decision concerned is dated 2019; thus, undertakings' gross income in 2018 was taken into account in the decision. After the analysis made, it was understood that the annual gross income accrued at the end of the financial year 2006 was favorable for the undertaking and taking into account the favorable legislation for 3M, according to Article 16 of the Act no. 4054 and Article 5(1)(b), 5(2) and 5(3)(a) and 7(1) of the Regulation on Fines to Apply in cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position, 3M shall be imposed administrative fines amounting to 0.5% of the annual gross income accrued at the end of the financial year 2006.

- **Competition and Markets Authority decides that Tobii should sell Smartbox**

Tobii AB (Tobii) acquired Smartbox Assistive Technology Ltd (Smartbox) on October 1, 2018. Both of them are producing augmentative and assistive communication (AAC) solutions for the disabled and for people having difficulties in communication. Competition and Markets Authority (CMA) started an investigation after the announcement of the transaction and decided on August 15, 2019 that Tobii should sell Smartbox completely to a new owner, which must be approved by CMA.

CMA defined three relevant product markets in its decision: the supply of AAC solutions in the United Kingdom (hardware, software, access and customer support); the supply of AAC solutions worldwide (upstream) and the supply of eye gaze cameras in AAC applications worldwide (upstream). While defining those relevant markets, CMA decided that solutions with non-dedicated AAC methods and devices (for instance external speakers or use of general-purpose tablets with AAC software) are not included in the relevant product markets.

Depending on the counterfactual analysis, which took pre-merger conditions as a basis, CMA concluded that the merged entity would be able to increase prices, lower quality, reduce the range of products and services. CMA stated in its decision that the parties have a combined market share of 60-70%; they are the most well-known AAC suppliers; apart from the parties, there is one large and one small supplier, and the internal documents show that they benchmark each other in pricing and R&D activities before the merger.

Beside those horizontal unilateral effects, the decision includes three vertical theories of harm. CMA stated that it is possible that access to Smartbox's Grid software would be more expensive for the competitors in the downstream market, it would be possible and profitable to reduce the compatibility of other eye gaze producers' products, even if it is less likely, it is possible that Tobii might supply eye gaze cameras to downstream competitors more expensively.

In addition to those concerns, the decision emphasized that there were no evidence of entry or expansion to offset the competitive concerns, even the biggest buyer NHS does not have a balancing buyer power and the evidence related to Tobii's alleged efficiencies in R&D is insufficient.

Sources:

https://www.gov.uk/government/news/cma-breaks-up-assistive-communication-technology-merger

https://assets.publishing.service.gov.uk/media/5d541fe7ed915d7642d201ed/Tobi_Smartbox_Summary_for_final_report_-.pdf

- **Düsseldorf Court suspends Bundeskartellamt's decision related to Facebook**

With its decision dated August 26, 2019 and numbered VI-Kart 2/19 (V) Düsseldorf Higher Regional Court suspended Bundeskartellamt decision dated February 6, 2019[1] that Facebook abused its dominant position in data processing and collecting.

The court stated in its decision that the users did not become weaker since they could make the data available to Facebook's competitors easily, did not lose their control over the data and consented to data collection and processing. Bundeskartellamt interpreted the obligation on users to consent to data collection and processing for using Facebook services means loss of control on their data and it is not possible to talk about a real consent.

The decision also pointed out that if the users do not understand the terms of data collection and processing, this is not because of Facebook's dominant position but because of users' indifference. Accordingly, the Court ruled that there is not a causal link between Facebook's dominant market position and breach of data protection rules. Since the user is not dependent on Facebook when consenting to data collection and protection and decides autonomously.

In addition, the Court did not see any exclusionary behavior. The decision also highlighted that the measures brought by Bundeskartellamt's decision (not to process third party data) will be ineffective in preventing the exclusion of competitors and Facebook's user terms would not be an obstacle in front of entry or expansion.

The decision did not answer the question whether Facebook's behavior is compliant with personal data protection laws because it was out of the scope.

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[1] https://www.rekabet.gov.tr/Dosya/rekabet-bulteni/rekabet-bulteni-nisan-2019-20190503120948251-pdf, p. 17-18.

Interim decisions are taken when there are serious doubts that the decision in question is legal; thus it is highly possible that Bundeskartellamt's decision will be annulled as a result of the judicial process. Bundeskartellamt brought this interim decision to German Federal Court.

Source:

https://www.lexology.com/library/detail.aspx?g=eb62ca02-bc17-4757-8ede-0dc8af0ec8b7

- **Eurasian Economic Commission Takes First Cartel Decision**

Eurasian Economic Commission, the executive organ of Eurasian Economic Union, has taken its first penalty decision on September 17, 2019 since its establishment. The decision stated that Russian medical device producer Delrus and its Kazakh counterpart Delrus Rk allocated markets geographically. The undertakings concerned and their general directors were imposed fines.

Source:

https://globalcompetitionreview.com/article/1198035/eurasian-authority-issues-first-cartel-decision

- **For the First Time, The Ministry of Economic Affairs overturns the Netherlands Authority for Consumers & Markets' decision to block a merger**

Mona Keijzer, the state secretary for economic affairs and climate policy overturns Netherlands Authority for Consumers & Markets' (ACM) decision to block a merger. This is the first time that a minister has used the power, granted by the Competition Act[2], to approve a deal if public interests outweigh the restriction of competition, since ACM was established in 1998.

[2] Act of 22 May 1997, Providing New Rules for Economic Competition (Competition Act)
"Article 47 Request to the Minister if a license is denied by the Board
- 1. After the Board has refused a license for the implementation of a concentration and following an application requesting such, Our Minister may decide that the license shall be granted if, in the Minister's opinion, this is necessary for important reasons in the public interest, which outweigh the expected impediment to competition.
- 2. An application, as referred to in paragraph (1), may be submitted up to four weeks after the Board's decision to refuse a license has become irrevocable.
- 3. If an application, as referred to in paragraph (1), is made, the consideration of administrative and judicial appeals against the Board's decision shall be suspended until an irrevocable decision is issued on the said application."

According to the press release from the Ministry, acquisition by PostNL of another postal company Sandd has been approved to sustain reliable and affordable mail delivery in a sharply shrinking market. The merger has been approved on condition that there should be an upper limit on tariffs to be applied to customers and other postal companies should access to the merged entity’s network. Moreover, the Ministry requested recommendations from ACM to ensure the existence of other postal companies and access to PostNL’s network.

While ACM gave recommendations in the said issues, the Authority also emphasized that the recommendations did not solve competitive concerns.

Source:

https://globalcompetitionreview.com/article/1208831/economic-minister-overturns-acm-merger-decision

- **The Decision of Ankara 17th Administrative Court dated 26.04.2019 and numbered E: 2018/1498 K: 2019/880**

Whether they are made by complainants or third parties, requests to access to file cannot be refused by supervision departments, the power to decide for access to file is on the Board according to article 9(2) of the Communiqué no 2010/3

The decision is the result of the case brought by Limited Liability Company Yandex for the annulment of the transaction by Supervision and Enforcement Department - II dated 05.04.2018 and numbered E.4420 and the transaction dated 10.05.2018 and numbered 2018/670 rejecting the objection made to Right to Information Assessment Board against the action of. The relevant part of the decision is as follows:

"...*In the matter of dispute, complainant's request to access to file was evaluated and concluded by the Supervision and Enforcement Department -II, however, the power to decide about the request to access to file in dispute is on the Board, as clearly stated in article 9(2) of the Communiqué no 2010/3, thus the action dated 05.04.2018 and numbered E.4420 where the Supervision and Enforcement Department -II evaluated and rejected the complainant's request to access to file is not compliant with the law with respect to power.*

…

On the other hand, the decision of our Court does not mean that the request to access to file should directly be accepted; it is obvious that the complainant's request could be reevaluated by the authorized Board.

- **The Decision of Ankara 16th Administrative Court numbered E: 2018/2279 K: 2019/1004**

Although creation of an association of undertakings and offering card data storage services from a single source by banks can be regarded as a technological innovation, in case other companies offering card data storage services use the same infrastructure, consumers can gain benefits at the same level and banks' practices that foreground Interbank Card Center (BKM) may create exclusionary effects.

The Board took the decision dated 12.06.2018 and numbered 18-19/337-167 that Interbank Card Center's (BKM) service for storing card data could

not be granted individual exemption as it did not fulfill the conditions listed in article 5(1) of the Act no 4054 and BKM should terminate storing card data. BKM filed a case against the Board decision and the Court dismissed the case. The relevant part of the decision can be summarized as follows:

"The defendant administration made an examination after the exemption period for card data storage service offered by the plaintiff company expired by taking into account the reservations and competitors' attitude and behavior. As a result, it is understood that

- BKM's founding members are banks and banks are active generally in the market as payment institutions
- BKM stores card data through banks' infrastructure and in this sense works in an integrated way with banks, therefore, provides services such as not having to share sensitive information with the merchant, updating expired cards automatically and especially verifying directly through the bank via SMS, which consumers find safe,
- However, in practice banks provide this service to BKM, with which they are partners, they do not provide the same infrastructure to other firms offering card data storage services, as a result, BKM is advantageous for payment institutions,
- Competition in card data storage services market has been distorted in favor of BKM, on the other hand, it is understood that although creation of an association of undertakings and offering card data storage services from a single source can be regarded as a technological innovation, in case other companies offering card data storage services use the same infrastructure, consumers can gain benefits at the same level and banks' practices that foreground BKM may create exclusionary effects,
- In this sense, taking into account that competition balance will be lost, there is not a reasonable and acceptable balance between consumer benefit and undertakings' profit, and competitors' burden resulting from use of BKM by banks as an efficient market actor.

It is concluded that the action in question that card storage services offered by the plaintiff should not be granted exemption and the services should be terminated is compliant with the law."

Source:

https://www.rekabet.gov.tr/Safahat?safahatId=97479528-696f-44bb-899f-9ae2bd7a7691

- **The decision of 13th Chamber of the Council of State numbered E: 2018/ 4184, K: 2019/2422**

Waiver from the case is effective in nullity suits only because of personal interest not because of public interest such as being a consumer, citizenship or tax paying. In case the plaintiff waives from the case, annulment provision will not produce results.

An application was made to the Competition Authority with the claim that the economic entity consisted of Tirsan Kardan Sanayi ve Ticaret A.Ş. and Tiryakiler Yedek Parça Sanayi ve Ticaret A.Ş. abused its dominant position by pressuring the suppliers and preventing Manisa Kardan Cemmer Otomotiv Makine Aksamı Sanayi veTicaret A.Ş. from buying goods and entering to the market. As a result of the application, the Board took the decision dated 10.07.2015 and numbered 15-30/445-132 that the undertaking in question was not in a dominant position and it was not necessary to impose administrative fines. This decision was taken to appeal and Ankara 18th Administrative Court decided to annul the decision. Afterwards, a request for appeal was made for this annulment decision. Ankara Regional Administrative Court 8th Chamber of Administrative Cases rejected the appeal. The rejection decision was also appealed. Consequently, 13th Chamber of Council of State took the decision numbered E: 2018/ 4184, K: 2019/2422. The relevant part of the decision is as follows:

"As a result of the evaluations made, in a stage after the transaction in question was found illegal by a ruling, in order to accept that waiving from the case will not be effective, the transaction in question should be related to not only personal interest but also public interest; the case should not be brought for personal interest, in other words, there should be interest relation with the transaction in question depending on reasons such as citizenship, being a consumer, being a villager, taxpaying, residence, belonging to a certain group. Otherwise, as most of administrative transactions concern the public and objective, waiver of those who filed an action for nullity depending on only private interests in this transaction from the action shall not produce results.

After the file was examined, it was understood that plaintiff's council Attorney Perihan Uşkay waived from the case on 07.05.2019 at 11:56 with the e-signed petition submitted to case file through national judiciary informatics system; in the case in dispute, the plaintiff applied to the defendant administration with the claims that the economic entity

composed of the defendant and intervening parties abused its dominant position in the market by means of preventing the defendant from entering to the market, pressured the suppliers and prevented the defendant from buying goods, the plaintiff based its interest relation with the transaction in question on a personal interest by means of making the same claims in the case opened for the annulment of the Board decision taken as a result of the abovementioned application.

In this context, a decision should be taken about the request for waiving from the action according to the petition in question".

Source:

https://www.rekabet.gov.tr/Safahat?safahatId=bafcfce6-0864-48d2-9c03-0c77f997d622

- **The decision of 13th Chamber of Council of State numbered E: 2019/ 425 , K: 2019/2491**

The expression "submitted for your information" written by third persons to parties to the investigation included in the correspondences obtained during on-site inspections or via information request is considered an important evidence that undertakings have acted together.

IATI Turizm Ticaret A.Ş. (IATI) made an application with the claims that Antalya Pegas Otelcilik Turizm İnşaat Taşımacılık ve Ticaret Ltd. Şti. (PEGAS), Odeon Turizm İşletmeciliği A.Ş. (ODEON) ve Alkan Grup Turizm İşletmeleri A.Ş. (TEZ TOUR) acted together and pressured hotel managers and/or employees not to accept customers coming to Antalya via IATI to hotels and excluded IATI. Upon this application, the Board took a decision related to determining whether PEGAS, ODEON and TEZ TOUR and V Turizm Seyahat Acentalığı Taşımacılık İnş. Tic. A.Ş. violated article 4 of the Act no 4054 by means of horizontal and vertical agreements and concerted practices dated 21/11/2016 and numbered 16-40/662-296. TEZ TOUR filed a case for the annulment of the decision. The annulment decision was dismissed at the appeal stage. Afterwards an application was made again for appeal.

Ankara 11th Administrative Court found the evidence within the file that constituted the basis of the Board decision insufficient, and annulled the Board decision on the grounds that there was no common action to prevent IATI's activities, it is seen in the document called "Evidence 5" in the Board decision that a hotel outside the case stated in an e-mail that they would

accept the customers coming via TEZ TOUR but would not accept customers coming via other three undertakings that TEZ TOUR was allegedly acting together, thus, TEZ TOUR did not act together with other three undertakings, almost all of the evidence within the file is unilateral declaration of intention sent by e-mail, apart from those, there was not concrete evidence that TEZ TOUR carried out the practices attributed to it, IATI, which is outside the case, increased its market share and income gradually as of 2013, when the alleged practices started, the plaintiff's claim that IATI was affected by anticompetitive practices did not reflect the truth. Thus, Ankara 11th Administrative Court annulled the Board decision.

Ankara Regional Administrative Court 8th Chamber of Administrative Cases found the observations that constituted the basis of the investigation sufficient. Those observations were given numbers as evidence related to statement by some hotel officials, correspondence between hotels and the firms in question and that correspondence was submitted to the information of the officials of the four firms. The e-mails were obtained during on-site inspections made at the premises of TEZ, ODEON, ANEX and PEGAS. IATI also submitted documents concerning correspondences. The Chamber concluded that the aforementioned four firms made contacts, which were shown by e-mails. Those e-mails can be regarded as agreements, practices or decisions preventing, restricting or distorting competition in the relevant market and accepted Competition Board's appeal request and decided to annul Ankara 11th Administrative Court dated 09.03.2018 and dated E:2017/1883, K:2018/530.

13th Chamber of the Council of State rejected the request to appeal the decision of Regional Administrative Court.

Source:

https://www.rekabet.gov.tr/Safahat?safahatId=092a42fd-4b2f-42a1-9ad8-93be01543624

The case brought against the same Board decision by V Turizm Seyahat Acentalığı Taşımacılık İnş. Tic. A.Ş. produced a similar result.

https://www.rekabet.gov.tr/Safahat?safahatId=5cdccc51-2d64-44f4-b10b-aab079d6e2c9

- **The Decision of the Council of State Administrative Law Chambers Board dated E. 2017/4548 K: 2019/872**

The actions of chambers that have legal personality and a nature of a public institution, resulting from a provision of an act under the scope of their purviews cannot be examined under the scope of the Act no 4054. They can be the subject of a nullity suit at administrative justice.

Within the framework of the preliminary inquiry made in response to the claim that pharmacies act together as a result of decisions and practices of pharmacists' professional organizations at the stage when prison directorates, which buy medicine for prisoners, take discount offers, Gaziantep Pharmacists' Chamber was asked to send information and documents within the framework of article 14 of the Act no 4054 but sent incomplete information. Thus the Board took the decision dated 17.04.2006 and numbered 06-28/347-82 that the Chamber should be imposed administrative fines amounting to 5%, by discretion, to each of the Executive Board Members as of the date when the incomplete information was sent, according to article 16(b) of the Act and the Communiqué no 2006/1. In the annulment action brought, 13th Chamber of Council of State's nonsuit decision was annulled by Plenary Session of Administrative Law Chambers. The decision to comply with the annulment decision was also taken to appeal afterwards, a decision was taken that the annulment decision was complied with and the request for appeal was rejected. The relevant part of the decision is as follows:

"...Within this framework, it is suggested that the practice, which is said to be under the scope of article 4 of the Act no 4054, has resulted from a an article of an act related to the Chamber's purview, the decision about the compliance of the matters in dispute with the legislation and law should be taken following an evaluation according to the Act related to the Chamber's purview, the matter should be evaluated in an annulment action, thus the defendant does not have power to make an examination or take a decision..."

Source:

https://www.rekabet.gov.tr/Safahat?safahatId=2f06e5d0-5160-4edf-8502-08e2cd9d3d31

Algorithmic Pricing What Implications for Competition Policy?

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Authors: Emilio Calvano, Giacomo Calzolar, Vincenzo Denicolò and Sergio Pastorello

Elimination of artificial barriers in front of free movement of goods in the European Union and developments in technological and electronic trade have not only increased the number of potential providers that buyers could reach but also decreased geographical division of markets. While this process, where e-trade is spreading, provides significant gains to beneficiaries, it also causes challenges such as algorithmic pricing for market regulators. Algorithmic Pricing (AP), which has been used by airline companies for a long time, has spread to sectors such as financial markets, hotel and insurance business. It is possible that AP request will continue to increase as the number of transaction in digital environment grows and software technology develops.

Fast spread of AP raises concerns in competition policy and regulation like other areas. The first concern is that AP has a potential to widen the scope of price differentiation significantly. Another concern is that AP might facilitate collusions. However studies whether algorithmic pricing restricts competition and leads to higher prices or whether collusions among algorithms are easier compared to those in environments without algorithms are not sufficient. While some researchers suggest that algorithms will not restrict competition, a new group claims that new AP's pose a huge risk for competition.

This article categorizes algorithms made in line with the developments in artificial intelligence and software technology as adaptive and learning algorithms and aims to contribute to the discussion "algorithmic pricing - competition policies". As a literature or compilation article, the study groups the opinions under three titles and highlights the differences between the capacities of adaptive-learning algorithms.

Basing on the belief that AP will not pose a problem, the optimistic approach claims that AP does not change false positive[3] and false negative[4] frequency and does not foresee a change in current competition policies. This approach overlooks learning algorithms that have a potential to connect

[3] False positive, means evaluating a test as positive which should be negative.
[4] False positive, means evaluating a test as negative which should be positive.

with other algorithms developed and believes that programmers should be in connection to create an anticompetitive situation. Such agreement is very difficult to detect. Those who defend this approach made research starting from first developed algorithms with limited adaptable capacity. Those algorithms did not have capacity to learn from past experience and for self-improvement. However, the case is different for more sophisticated AP's with a learning capacity based on experience. Those algorithms interact with each other and learn to cooperate independently of programmers. If current policies do not change, AP's false negative risk will significantly increase. A second group of researchers, starting from this opinion, suggests that AP programs be tested before launching and inconvenient ones be prohibited. Moreover, it is possible that an algorithm which is found convenient because it does not interact with other algorithms, may later interact with a newly developed algorithm and create anticompetitive conditions. The difficulties for following the first two approaches leads to the emergence of a third group that suggest that traditional policy tools regarding anticompetitive agreements be revised.

Source:

Doi: 10.1007/s11151-019-09689-3

- **Estimating Diversion Ratios in Hospital Mergers**

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Authors: Cecilia Rossi, Russell Whitehouse and Alex Moore

This article compares the results of practitioner referrals methodology, which is based on calculating local market shares according to the number of patients referred to each hospital by practitioners, with demand forecasting for estimating deviation ratio in hospital mergers.

Deviation ratio method is used to show unilateral effects of mergers and acquisitions. The deviation ratio between two firms can be defined as the percentage of sales lost by a firm when another firm increases prices. High deviation ratio between two firms' products (services) shows that those products (services) are close substitutes and if those two firms merge, the merger may produce significant unilateral results.

Practitioner referral approach enables filtering hospitals' expertise areas and facilitates final examination; thus, UK Competition and Markets Authority uses this method frequently in hospital mergers. In order to test the referral approach, a deviation ratio is calculated for each hospital according to the closest competitor and all hospitals within 50 km distance.

The second approach is demand forecasting method, which enables more flexible substitution models, thus potentially more correct deviation ratio calculation possibilities compared to practitioner referrals.

Using data at patient level, two methodologies are applied to each hypothetical mergers with respect to three expertise areas for a period more than three years. The article evaluates the results of two approaches according to 40% threshold deviation ratio set by United Kingdom Competition and Markets Authority. The analysis made found high level of consistency between two approaches and suggested that practitioner referral test be a practical and reliable filter. According to the study, the deviation ratios are between 20% and 60%, the methodology may leave the merger outside the filter in case of problematic mergers on the border, in those circumstances, filtration should be made meticulously with additional evidence. The article foresees that only 2% of the applications will be outside the practitioner referrals and those will be filtered by demand forecasting. The study suggests that practitioner referral analysis is a reliable and useful methodology that can be used for mergers.

Source:

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