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INTRODUCTION

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

In the "Selected Reasoned Decisions" section of this issue, we included four investigation decisions and one exemption decision.

The "News around the World" section of the Competition Bulletin includes decisions from United Kingdom, European Union, Mexico, Poland and Japan.

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

"Economic Studies" section includes a summary of an aricle published by Rand Journal of Economics titled "*Vertical Structure and Innovation: A Study of The SoC and Smartphone Industries*" and another article published by Journal of Antitrust Enforcement titled "*Is Protecting Sunk Investments An Economic Rationale for Antitrust Law?"*

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

With our best regards.

External Relations and Competition Advocacy Department

- **It was Decided that Arçelik and Vestel did not Violate Article 4 of the Act no 4054 by Means of Exchanging Competition Sensitive Information.**

Decision Date:	Decision No:	Type:
02.01.2020	**20-01/13-5**	**Investigation**

As a result of the leniency application by Arçelik, within the scope of the Regulation on Active Cooperation for Detecting Cartels, regarding the claim that Arçelik and Vestel violated article 4 of the Act by means of exchanging competition sensitive information, an investigation was initiated.

It was concluded that the information transfer was made from Arçelik to Vestel, Arçelik's Thracian Regional Manager leaked information to Vestel and Arçelik was unaware of this. The Board made the following observations: Information exchange was made between two parties but one party was not aware, when Arçelik, whose information was given, learnt the situation, it applied to the Authority; Arçelik proved with the evidence it submitted that it was unaware of the situation; Arçelik did not try to affect Vestel's future conduct; it was unaware of such effect; Arçelik did not define its future strategy according to the information submitted to Vestel or Vestel's response to that information; to the contrary, Arçelik continued to set its strategy independently and unilaterally, all of those findings did not constitute a common will, which is a condition required for the existence of an agreement or a concerted practice as per competition law.

Within this framework, it was concluded that there was not an agreement or concerted practice under the scope of article 4 of the Act no 4054. Moreover, the Board decided that market data did not support the environment that is expected to occur in case of an anticompetitive agreement or a concerted practice between two undertakings.

- **Among 36 Undertakings under Investigation due to the Claim that They Violated Article 4 of the Act no 4054 by Means of Customer Allocation, TNT, UPS, DHL EXPRESS and YURTİÇİ KARGO were Imposed Administrative Fines**

Decision Date:	Decision No:	Type:
02.01.2020	**20-01/13-15**	**Investigation**

It was found that undertakings under investigation worked through resale working model in mail/freight transport market. This model is a system where undertakings aim to provide services to their customers fully by means of service procurement in areas where their activities are insufficient, as they do not have an adequate distribution network in domestic or international transport.

Under the scope of the file, undertakings that sell services are called USS and undertakings that resell the service they purchased to their customers are called URS. As a result of the investigation, it was found that USS banned URS from making sales to customers that USS previously worked with and seemed active on their accounts or which they called "current" and which were at that time working with USS. As a result of the evaluation made, it was concluded that the practices under investigation were outside the scope of block exemption because there were not exclusive customer groups defined according to objective criteria and both active and passive sales were banned. Regarding individual exemption assesment, it was understood that the agreements in question did not satisfy the first two conditions of article 5 of the Act; thus, an assessment for the other two conditions was not made because individual exemption conditions are cumulative.

Within this framework, TNT, UPS, DHL EXPRESS and YURTİÇİ KARGO, which were USS, violated article 4 of the Act no 4054 whereas other 32 undertakings which were URS could not be attributed a violation. While calculating the administrative fines to be imposed on undertakings, the fact that undertakings are separate parties, the number of bilateral agreements, the amount of loss occurred or likely to occur, the period of violation and recurrence were taken into account.

- **Nine Undertakings Active in Traffic Signalization Sector were Imposed Administrative Fines as They Violated Article 4 of the Act no 4054 by Means of Bid Rigging**

Decision Date:	Decision No:	Type:
12.03.2020	**20-14/191-97**	**Investigation**

The documents obtained during the on-site inspections in the investigation process showed that competing undertakings shared unit price offers, prepared tender files for each other and the tender file was submitted to the administration by competing firms in many tenders organized by General Directorate of Highways and municipalities for the procurement of traffic signalization systems and led systems.

Within this framework, it was understood that undertakings raised the tender price and decreased competition in tenders in two ways: first is by affecting the approximate cost via colluding while the approximate cost was being determined and second by affecting the tender price via collusive bidding at the bidding stage.

Consequently, it was concluded that MOSAŞ/RAYENNUR economic entity, AAB, NÇT, BUHARALILAR, TANDEM, ASYA TRAFİK, İSHAKOĞULLARI and TANKES violated article 4 of the Act no 4054 by means of bid rigging. The practices of undertakings party to the investigation that violated according to article 4 of the Act no 4054 were assessed under "cartels" category and the base fine rate was set as 2% for all undertakings party to the violation.

- **As a Result of the Investigation Concerning BP, OPET, PO and SHELL and TOTAL, It was Decided that BP, OPET, PO and SHELL Violated article 4 of the Act no 4054 by Means of Determining Their Dealers' Resale Price.**

Decision Date:	Decision No:	Type:
12.03.2020	**20-14/192-98**	**Investigation**

The assessment made regarding BP, PO and SHELL took into account the following facts: the documents obtained showed that undertakings interfered to their dealers' prices; when the maximum prices submitted by undertakings to their dealers and Energy Market Regulatory Board were compared with minimum pump prices charged by the dealers, dealers' pump prices are largely equal to the recommended prices. Within the

framework of the assessment regarding OPET, the maximum price submitted to EMRB and to its dealers, which should have been recommended price, were largely similar to the minimum pump prices charged by dealers; this situation was similar to the conduct of BP and SHELL, which was found to violate competition; in other words to the cases where competition was hindered, distorted or restricted; on the other hand, those rates regarding OPET were different from TOTAL; it was found that TOTAL did not determine the retail prices of its dealers; as a result, OPET's conduct was similar to the cases where competition was violated, hindered or restricted and was not similar to cases where competition was not violated, hindered or restricted; there were not economic or rational reasons showing that this did not result from OPET's incentive or intervention.

Under the file it was decided that OPET violated Article 4 of the Act no 4054 by setting sale prices for its dealers, and those practices of OPET, PO, SHELL and BP found to be infringing were addressed under the "other infringements" category.

- **The Authorized Dealer Agreement to be Signed between Trakya Cam and Nineteen Dealers was not Granted Exemption**

Decision Date:	Decision No:	Type:
25.06.2020	**20-31/382-171**	**Exemption**

In the file, the relevant product market was "sheet glass market" taking into account previous relevant Board decisions and the market share of Trakya Cam, which is a supplier, exceeded 40% market share threshold set in the Block Exemption Communiqué no 2002/2 on Vertical Agreements. It was concluded that the Agreement could not benefit from block exemption.

As a result of individual exemption assessment within the scope of article 5 of the Act no 4054, the notified Agreement was not granted individual exemption on the following grounds: the Agreement was the same type of the agreement, which was subject to the Competition Board's exemption decision and which regulated the ongoing authorized dealership system; in this framework, the assessments to be made to ensure certainty that with the distribution system, whose results can be seen, provided or would provide efficiency gains should base on more concrete data; the undertakings could not make sufficient explanations or submit concrete data that the authorized dealership system provided efficiency gains and improvement and provided those improvement and efficiency gains

objectively to the economy in a general sense and o all consumers; the conditions listed in article 5, subparagraphs a and b were not satisfied.

- **The UK'S CMA Published Its Final Report on Online Platforms and Digital Advertising**

Competition and Markets Authority (CMA) has publised its final report about online platforms and digital advertising on July 1 2020. The study found that Facebook and Google have significant market power in the UK digital advertising market, affecting other markets including internet search, social media and news journalism.

The CMA's main findings on the report are as follows:

- In the UK 90% of the £7.3 billion search advertising market is controlled by Google and over 50% of the £5.5 billion display advertising market is held by Facebook.
- Google's advertising prices are up to 40% higher than its closest competitor, Bing. This increases the cost of advertisers that feel they must advertise on Google and then they could pass on those increased costs to end consumers.
- The market power allows the major platforms to strengthen their dominance. Both companies now have "unmatchable access" to user data, and they use them to target ads to individual consumers and tailor the services they provide.
- The companies use their market power to pressure consumers into giving up their data: Users must accept personal advertising as a condition of using Facebook's service and Google pays £1.9 billion yearly to device manufacturers to ensure that its search tool is the default option on mobile devices.

The CMA concluded in its report that the problems in the digital advertising market are "so wide-ranging and self-reinforcing that our existing powers are not sufficient to address them,". The Authority asked the UK government to create a digital markets unit and empower it to break up big tech companies and enforce a code of conduct among online platforms to resolve competition concerns in that sector.

Sources:

https://globalcompetitionreview.com/cma-proposes-regulatory-reform-combat-big-tech

https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf

- **Phase II Investigation by the EU on GOOGLE/FITBIT Deal**

The European Commission announced on August 4 that they will be reviewing Google's $2.1 billion purchase of Fitbit in-detail. After rejecting data silo remedy Google proposed that would have kept health data collected by Fitbit separate from its other existing datasets, the commission will investigate in Phase II whether the deal will give Google a data advantage in the online search and display advertising markets. Also, the effect(s) of the deal on the digital healthcare sector and whether Google may make it harder for competitors' smartwatches to work with its Android operating system will be examined.

The Phase I investigation has already found that Google is dominant in online search advertising across the European Economic Area and also has a strong market position in the online display advertising services market in at least 19 EU member states.

Since the market for wearable devices is expected to grow significantly in the coming years, it is believed that this will create an exponential growth of data that these devices collect on the health of users. The commission has found in its Phase I investigation that the information generated by Fitbit could be used to tailor the advertisements shown on Google search engine and on other web pages in a better way.

Source:

https://globalcompetitionreview.com/big-data/eu-takes-closer-look-googlefitbit-deal

- **Abuse of Dominance Investigation into the Digital Advertising Services Market by Mexico's Cofece**

Mexico's Federal Economic Competition Commission (COFECE) announced on August 24 that it has started an abuse of dominance investigation to the digital advertising services market to find out if marketplayers comply with competition rules. It was stated that the focus will be on whether companies in the market have bundled their services or increased costs, altered production processes or reduced demand of other market participants.

The investigation is launched one month after the a digital unit has been created by the authority to watch the development of digital markets and assist it with investigations and merger reviews in the sector.

Sources:

https://www.concurrences.com/en/bulletin/news-issues/august-2020/the-mexican-competition-authority-investigates-possible-relative-monopolistic

https://globalcompetitionreview.com/digital-markets/mexico-probes-digital-ad-market

- **The EU Commision Published a Staff Working Document on the Evaluation of the Vertical Block Exemption Regulation**

The Commission Staff Working Document on the Evaluation of the Vertical Block Exemption Regulation was published on 08.09.2020. It was found that although the existing regulation and guidelines are still useful tools, the market has changed significantly since the adoption of the regulation in 2010. This was particularly due to the growth of online sales and new market players such as online platforms. As a result, new types of vertical restrictions such as price parity clauses and restrictions on online sales and advertising have become more widespread.

Since some of the vertical block exemption regulation's provisions may now lack clarity, while others are difficult to apply or are no longer adapted to the "current business environment", to improve legal certainty, the commission said it intended to address these issues in light of recent market developments.

After this document, an impact assessment will be launched followed by a public consultation. The commission intends to publish a draft next year and then the new revised regulation is expected to be in place by 31 May 2022, when the current one expires.

Sources:

https://ec.europa.eu/competition/consultations/2018_vber/staff_working_document.pdf

https://globalcompetitionreview.com/digital-markets/eu-confirms-plans-update-vber

- **JFTC Accepted Amazon Japan's Voluntary Commitments on an Abuse of Superior Bargaining Position Case**

On September 20, Japan Fair Trade Commission (JFTC) accepted Amazon Japan's remedial commitments on a case in which the company was suspected of abusing its superior bargaining position through requesting its suppliers to pay compensation for discounts provided as a result of its price-matching with competitors, forced discounts on products with excessive inventory, and unreasonable product returns. Amazon Japan agreed to

return 19 million US Dollars to its 1400 suppliers and also to reevaluate its co-op fees. The company is also suspectible of keeping the unused portion of payments it charged for marketing programs during the term of contracts and it will return the unused funds as well.

JFTC issues guidelines in December 2018 introduced voluntary remedial commitments. Amazon Japan has been the 5th volunteer commitments case of JFTC ever since. Two and a half years investigation of Amazon Japan by JFTC for suspected abuse of its superior bargaining position in relation to its suppliers, the case was closed by approving the company's commitments to pay back to its suppliers and to cease the questionable practices.

Sources:

https://www.mlex.com/GlobalAdvisory/DetailView.aspx?cid=1221497&siteid=244&rdir=1

https://www.mlex.com/GlobalAdvisory/DetailView.aspx?cid=1232340&siteid=244&rdir=1

https://www.mlex.com/GlobalAdvisory/DetailView.aspx?cid=1026023&siteid=244&rdir=1

- **Record Fine to GAZPROM from Poland's the Office of Competition and Consumer Protection**

Poland's Office of Competition and Consumer Protection has fined Gazprom €6.48 billion following a controversial gun-jumping probe into their failure to notify a joint financing agreement to construct the Nord Stream 2 gas pipeline. The other five companies involved in the project were also fined a total of €52 million.

The Polish competition authority announced on October 7 that it fined Gazprom the maximum fine it can impose; 10% of their annual turnover. It was stated that the Nord Stream 2 project would increase Gazprom's negotiating position across the EU and raise gas prices, because consumers' dependency on a single supplier would increase and Gazprom may offset the cost of the project by increasing prices. Moreover the supply of natural gas to Poland would be threatened and the EU's dependency on Russia for the commodity would increase as a result.

The fine imposed by Poland is the largest a competition authority has ever imposed on a single firm. Also the total fine is the largest imposed in a single case.

Source:

https://globalcompetitionreview.com/gun-jumping/poland-issues-record-breaking-antitrust-fine-gazprom

- **The Decision of the 13th Chamber of the Council of State, substance no 2014/2328 and decision no 2020/1062**

The Board, which is the decision-making body of the Competition Authority, is authorized to take decisions regarding the activities and legal transactions prohibited by the Act no 4054.

The court of first instance dismissed the case filed with the request that the transaction where Okumuş Akaryakıt İnşaat Turizm Gıda Ticaret Ltd. Şti.'s complaint was rejected by the decision of the Competition Authority Supervision and Enforcement Department I taken on the grounds that it was not necessary to take an action under the scope of the Act no 4054 be annulled.

The plaintiff made an appeal and the Council of State overruled the decision of the court of first instance on the grounds that "… *the applications claiming that Article 4 of the Act no 4054 was violated should be decided by the Board as the decision-making body of the Authority.*"

- **The Decision of Ankara Regional Administrative Court 8th Administrative Case Chamber, substance no 2019/2889 and decision no 2020/894:**

All facts and situations listed in the points written in the conclusion of Board decision as well as all legislative provisions related to those should be reviewed with respect to a transaction and those points should be justified.

The court of first instance dismissed the case filed by Trakya Cam San. A.Ş. with the request that administrative fines imposed by the Competition Board on the grounds that it violated Articles 4 and 6 of the Act no 4054 be annulled.

The plaintiff made an appeal. The Regional Administrative Court, revoked the decision stating that "*the dispute was examined within the scope of Articles 4 and 6 of the Act no 4054 and only in terms of the administrative fines issued by the Board decision; regarding the withdrawal of the exemption granted to "Industrialist Customer Purchasing Agreement" by the Board decision no dated 24.01.2013 and numbered 13-07/73-42, in accordance with Article 13 of the Act no 4054, which was laid down in point 3 of the decision, the provisions of the legislation were not indicated; the facts, situations and reasons that were the grounds for the decision in these*

points were not included while describing the matter of dispute, and the decision was not justified in terms of these points ... "

Source:

http://rekabet.gov.tr/Safahat?safahatId=2b5be4a6-33f4-4d5e-bf8d-6dd7023d492d

- **The Decision of Ankara 12th Administrative Court, substance no 2019/1671 and decision no 2020/864:**

Concentration transactions established by the Competition Board only mean an approval in terms of competition law and cannot be accepted as validating transactions under private law rules.

Türk Tuborg Bira ve Malt San. A.Ş. filed a case against the decision of the Competition Board dated 07/02/2019 and numbered 19-06/54-20, regarding the request that the trademark "Tekel Birası" and its registered form be acquired by Anadolu Efes A.Ş., which stated that the transaction was not subject to authorization as the turnover thresholds were not exceeded, although there was no legally valid transfer agreement.

The court rejected the case on the grounds that *"…the issue that the competition authority should examine first is not the status of the contract that is invalid for this or that reason, but to reach a conclusion by making an analysis in light of the data submitted to it and/or completed by requesting information and documents. It is clear that, an approval is given only in terms of competition law when it does not see a competitive problem and allows the transaction as a result of its analysis; it is not possible to accept that it validates different transactions subject to different procedures within the framework of private law rules; the parties could withdraw from the transaction at any stage and may not realize the merger/acquisition before or after the authorization ..."*

Source:

http://rekabet.gov.tr/Safahat?safahatId=0cfefabe-896d-4b44-8d03-d98b77d6feca

- **The Decision of the 13th Chamber of the Council of State, substance no 2014/462 and decision no 2020/1774:**

It is not sufficient to conduct only a preliminary inquiry to take a decision without any doubt by the Competition Board about a complaint regarding a violation of the Act no 4054.

The case filed by the plaintiff with the request that the decision not to initiate an investigation taken as a result of a preliminary inquiry made in response to the complaint that Allergan A.Ş. violated article 6 of the Act no 4054 by not supplying Botox branded product be annulled was rejected.

The plaintiff filed an appeal. In its decision, the Council of State stated that "*because the action subject to complaint was the unilateral conduct of Allergan, it should have been examined within the scope of Article 6 of the Act no 4054 and evaluated in light of the information, documents and evidence to be obtained by the defendant administration by expanding the inquiry and an investigation should have been initiated to clarify the conduct without any doubts*" and made an evaluation for compliance with the law regarding the Board decision, which was the subject of the case, not to initiate an investigation and to reject the complaint at the preliminary inquiry stage that was based on incomplete examination and overruled the decision.

Source:

http://rekabet.gov.tr/Safahat?safahatId=c6c26183-6f8d-43e9-910d-72cc416cacc2

- **Vertical Structure and Innovation: A study of the SoC and Smartphone Industries**

Published By: Rand Journal of Economics, (2020) 51-3

Author: Chenyu Yang

This article studies how vertical integration and R&D subsidy given to the upstream dominant firm in the supply chain affect innovation and welfare in vertically separated industries. The article shows the relation between vertical integration and innovation and welfare on the basis of smart phone production, which is an innovative product. Regarding the production of smart phones, upstream firms mean chip producers, downstream firms mean brand owner firms that carry out mainly designing activities. While chip firms develop the core technology related to performance, brand owner firms combine the technology with innovative designs in new consumer products. Firms calculate and compare potential profits and potential losses to occur in the future due to innovation when they are taking decisions about innovation.

The empirical model in the article, which uses a simulation model, deals with first vertical integration and second the situation where R&D innovation by upstream firm encourages downstream oligopolistic firms for complementary innovation. The model is estimated by using the data from the US smart phone market between 2009 and 2013. The empirical study covers a dynamic fiction where chip and phone producers determine innovation and pricing policies interactively. In each period, the chip producer and its downstream customers first negotiate chip prices via Nash bargaining and then phone producers set the wholesale prices in the Nash-Bertrand equilibrium. Modeling dual bargaining between chip producers and phone producers allows measuring how a change in the market structure affects prices. Chip producers make investments to increase product quality. Technological limits of phone producers depend mostly on chip producers.

The results indicate that better coordination of investments by the merged undertaking increases innovation and welfare. Moreover, subsidizing upstream innovation in the production chain increases overall investments and innovation as well as welfare. The results show that competition agencies should take into account potential positive effect of investments in vertical integration especially in relation to innovative industries.

Source:

https://doi.org/10.1111/1756-2171.12308

- **Is Protecting Sunk Investments An Economic Rationale for Antitrust Law?**

Published By: Journal of Antitrust Enforcement (2020, 0, 1-41)

Authors: Darryl Biggar ve Alberto Heimler

In recent years, the economic foundation of antitrust law is being called into question. After noting this fact, the study authored by Darryl Biggar and Alberto Heimler and published in the 2020 issue of the Journal of Antitrust Enforcement advances an alternative hypothesis. The focus of the hypothesis is "relationship-specific investments made by market players". A technical term rarely encountered in the doctrine, the concept of "relationship-specific investment" was defined by Paul L. Joskow in his previous academic studies. According to Joskow, "Relationship-specific investments are investments which, once made, have a value in alternative uses that is less than the value in the use originally intended to support a specific trading relationship".[1]

D. Biggar and A. Heimler state that there are four candidate hypothesis – which are worth discussing – for forming the foundation of competition law. The authors Biggar and Heimler list these four hypothesis and, in the following sections of the study, they explain their thoughts on each:

a. The Textbook Total Welfare Hypothesis:

   This is referred to as the hypothesis which asserts that competition law's primary objective is the promotion of total economic welfare, comprised of the sum of "producers' surplus" and "consumers' surplus". It is noted that in the recent years this has become the approach on which practitioners from many countries agree.

b. The Consumer Welfare Hypothesis:

   This is referred to as the hypothesis which asserts that competition law's primary objective is the promotion of consumer welfare, understood as "consumers' surplus".

[1]Paul L. Joskow: *Vertical Integration; December 2, 2003 (Revised) Forthcoming, Handbook of New Institutional Economics, Kluwer*.

c. The Exploitation Hypothesis:

This is referred to as the hypothesis which asserts that competition law's primary objective is preventing firms that have acquired durable market power from "exploiting" their trading partners.

d. The Protection of the Competitive Process Hypothesis:

This is referred to as a theory that has been advocated by an increasing number of economists in recent years. According to the authors, even though some commentators advocate the discourse that "competition law should protect the competitive process," this does not have any grounds in welfare economy and therefore cannot be used to rank priorities among the desired outcomes. Based on the widespread support it has enjoyed, the authors voice heavier criticism concerning the protection of the competitive process hypothesis. As an example, they claim that the hypothesis remains silent on the following four issues:

- Does protecting the process of competition imply that a competition authority should prohibit, or promote, price discrimination?
- Does protecting the process of competition imply that we should force the owner of a bottleneck facility to sell to rivals at cost?
- Is it better according to the protection of the competitive process hypothesis to allow a merger to monopoly with substantial cost efficiencies, or is it better to prevent a monopoly arising, irrespective of such cost efficiencies?
- Is it better according to the protection of the competitive process hypothesis to allow a dominant buyer of agricultural products to cut the prices it offers to producers (farmers) or is it better to prevent it from doing so?

The authors Biggar and Heimler express their view that it would be beneficial in many cases to take competition law's role to protect relationship-specific investment (from being left inactive by the parties) into account, and they go on to state that this view is an extension of the conventional total welfare hypothesis, presented above under the title (a). Sunk investments and the threat of hold-up are defined in the third section of the study. Accordingly, one or more of the parties must tolerate sunk costs in order to ensure a durable commercial partnership. An example given involves the fact that undertakings must make significant investments in coal mines in coal-exporting countries such as Australia. Another example states that an undertaking wishing to make sales though the channels

offered by Amazon must incur some costs for research and development. Sunk investments offered as an example are subject to the thread of "hold-up" by the other party, which refers to the fact that the party with relatively higher power can change the terms and conditions of the trade. Due to this threat, the relatively weaker trading partner may choose to avoid making valuable investments and the production potential will remain unused.

According to the article, among the hypothesis presented under four main titles, the total welfare hypothesis listed under point (a) should be adopted after it is extended to include the concept of protecting relationship-specific sunk investments.

Source:

https://academic.oup.com/antitrust/advance-article/doi/10.1093/jaenfo/jnaa042/5917720?searchresult=1

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