Turkish Competition Authority
REKABET KURUMU

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INTRODUCTION

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We are proud to present to you the Competition Bulletin for the first three months of 2018, which includes news on developments in competition law, industrial organization and competition policy.

In the "Selected Reasoned Decisions" section of this issue, we included 3 investigations, 1 exemption assesment and 1 merger/acquisition decision which were conducted under the relevant articles of the Act No. 4054 on the Protection of Competition.

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

"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 in the Journal of Competition Law & Economics titled "Mergers and Difference-in-Difference Estimator: Why Firms Do Not Increase Prices?" and another article published in the Journal of Industry, Competition and Trade titled "Manufacturer Mergers and Product Variety in Vertically Related Markets".

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 13 Banks which provide Loans to Corporate Customers**

Decision Date:	Decision No:	Type:
28.11.2017	**17-39/636-276**	**Investigation**

The investigation was conducted in response to the leniency application by Bank of Tokyo-Mitsubishi UFJ Turkey A.Ş. (BTMU) about the claim that 13 banks providing loans to corporate customers in Turkey shared information about current loan agreements such as interest rates and terms as well as competition sensitive information related to other financial transactions.

BTMU, Citibank A.Ş.(CITI), Deutsche Bank A.Ş. (DB), HSBC Bank A.Ş. (HSBC), ING Bank A.Ş. (ING), Istanbul Turkey Branch of JPMorgan Chase Bank N.A. incorporated in Columbia Ohio (JP), Merrill Lynch Yatırım Bank A.Ş. (BOFA), Istanbul Main Branch of Société Générale (S.A.) incorporated in Paris France (SG), Standard Chartered Yatırım Bankası Türk A.Ş. (SC), Sumitomo Mitsui Banking Corporation (SMBC), Istanbul Main Branch of The Royal Bank of Scotland Plc. incorporated in Edinburgh (RBS), Türk Ekonomi Bankası A.Ş. (TEB) and UBS AG (UBS) were parties to the investigation.

As a result of the evaluation of the documents obtained within the scope of the file, it was decided that information exchange between BTMU and ING related to price, amount, term and/or participation to the relevant loan transaction and information exchange between BTMU and RBS related to price constituted an anticompetitive concerted practice/agreement. Therefore, it was found that BTMU, RBS and ING violated Article 4 of the Act no 4054. With regard to CITI, DB, HSBC, JP, BOFA, SG, SC, SMBC, TEB and UBS, there were not any findings about an infringement.

According to the file, the violation periods were as follows: for RBS, less than a year; for BTMU, more than two years; for ING, nearly two years. During the investigation process, BTMU made active cooperation with the Authority and provided the communications for detecting the violation, terminated its anticompetitive practices and responded comprehensively to all information requests. The behavior of BTMU, RBS and ING violating Article 4 of the Act no. 4054 was regarded under the category "other violations" as per the Leniency Regulation. Since ING was imposed fines according to the Board decision dated 08.03.2013 and numbered 13-13/198-100 due to the violation of Article 4 of the Act no. 4054, its current violation was regarded as recurrence.

Within the rate determined and taking into account the turnover of the parties related to corporate and commercial loans in Turkey in 2016, ING was imposed TL 21.112.960,50 and RBS was imposed TL 66.429,75 administrative fines.

BTMU was granted full immunity from fines according to the sixth subparagraph of Article 16 of the Act regarding the facts that it submitted the Authority the communications for detecting the violation, ended its practices constituting such violation and provided comprehensive responses to all information requests.

- **Investigation concerning Trakya Cam Sanayii A.Ş.**

Decision Date:	Decision No:	Type:
14.12.2017	**17-41/641-280**	**Investigation**

The decision was taken within the scope of the investigation about the claim that Trakya Cam Sanayii A.Ş. (TRAKYA CAM) violated Articles 4 and 6 of the Act no 4054. According to the claims in the file, TRAKYA CAM started to operate its new dealer system (reduced dealer system) although it was not granted exemption according to Trakya Cam/Düzcam Exemption decision dated 02.12.2015 and numbered 15-42/704-258.

In Trakya Cam/Düzcam Exemption decision, the Board decided that the distribution system restricted competition within the scope of Article 4 of the Act no. 4054 and could not be granted exemption as it failed to fulfill the conditions listed in Article 5. The distribution system planned to create 18 different exclusive distribution regions via Authorized Dealer Agreements, assign a dealer to each of those and impose exclusive purchasing and non-compete obligations. According to the decision, assigning dealer managers to exclusive dealers and installing software would decrease intra-brand competition. The complaints in the file argued that the dealer system was put into effect actually.

Depending on the documents obtained during the on-sight inspection, it was observed that as of the beginning of 2016, TRAKYA CAM restructured its distribution system and reduced the number of its dealers to 18, establishing a new dealer system. The documents showed that TRAKYA CAM named wholesalers to which it provided products directly for resale as "Authorized Domestic Seller" (ADS) in its internal correspondence. The number of ADS's to which TRAKYA CAM made direct sales was 93 in 2014, 85 in 2015 but only 18 in 2016. The reduction in the number of dealers to 18, as stated in the exemption application, raised the suspicion that the

dealer system that the Board did not grant exemption was implemented as suggested by the complainants.

Within this framework, the investigation analyzed whether the dealers were granted exclusive territories under the scope of TRAKYA CAM's practices that were the subject of the file. It was concluded that TRAKYA CAM's reduced dealer system operating as of the beginning of 2016 included territory exclusivity which the Board deemed as an infringement of Article 4 of the Act no. 4054, taking into account the following facts: there was a remarkable reduction in dealers' sales out of their territories in 2016; the statements in the documents obtained indicated that a system of territorial exclusivity started and the ability of customers who purchased products from exterritorial dealers before 2016 was restricted in 2016.

As per Trakya Cam/Düzcam Exemption Decision, installing software in dealers together with assigning a dealer manager would restrict intra-brand competition. During the on-sight inspections, it was found that "dealer managers" were assigned to the dealers through a research company called DİPA. Dealer managers reported regularly to TRAKYA CAM about information concerning stock, the amount and volume of sales to sub-dealers and city-basis sales as well as the market. The documents obtained during on-sight inspection showed that TRAKYA CAM reached some information through dealer managers, which means it circumvented the outcomes of Trakya Cam/Düzcam Exemption Decision related to software installation. Such information exchange by dealer managers about dealers could decrease intra-brand competition.

As a result, it was concluded that TRAKYA CAM's new dealer system that started in 2016 had the same features as the dealer system to be established according to the authorized dealer agreement that was deemed contrary to Article 4 as per Trakya Cam Exemption Decision; within this framework, TRAKYA CAM created de facto exclusive territories for its dealers and imposed exclusive purchasing and non-compete obligations; dealer managers were actively working, which might decrease intra-brand competition.

Beside the new dealer system, TRAKYA CAM's agreements with industrial customers were analyzed. Those agreements contained provisions prohibiting the resale of sheet glass products as a plate to industrial customers. Although the said provision was granted exemption in Trakya Cam/Isıcam Exemption decision, previous conditions which formed the basis of the decisions, changed. Under current conditions, it was decided that exemption given to "Industrial Customers Purchasing Agreement"

according to Board Decision dated 24.01.2013 and numbered 13-07/73-42 should be withdrawn as it reduced arbitrage ability of TRAKYA CAM's customers and reduced competition significantly.

TRAKYA CAM, the dominant firm in flat sheet market, allocated exclusive territories to and imposes active sale prohibitions on authorized dealers in a way to reduce intra-brand competition, which was deemed as a competitive constraint that might cause consumer loss by means of preventing the entry of more efficient and innovative distributors and reducing price and service alternatives for customers. Therefore, the practices in question were assessed within the scope of restricting marketing to the prejudice of consumers, as stated in subparagraph (e) of Article 6 of the Act no. 4054; consequently, it was concluded that TRAKYA CAM violated also Article 6 of the Act no. 4054.

TRAKYA CAM was imposed TL 17.497.141,63 administrative fines because of violating Articles 4 and 6 of the Act no. 4054 for more than one year.

- **Investigation concerning Volkan Metro**

Decision Date:	Decision No:	Type:
19.07.2017	**17-23/384-167**	**Investigation**

The decision was related to the claim that Volkan Yolcu Taşımacılığı Seyahat Nakliyat Tic. A.Ş. (VOLKAN), which is the operator of Edirne intercity bus terminal and Öz Edirne Birlik Mustafa Altunhan (ÖZ EDİRNE), which carries out agency business in Edirne intercity bus terminal prevented competition in intercity passenger transportation market by means of refusing to rent offices, forcing to make agency agreements and terminating current agency agreements.

According to the file, VOLKAN, Gökhan Turizm Salim ALTUNHAN (GÖKHAN TURİZM) and ÖZ EDİRNE were within the same economic entity controlled by Mustafa ALTUNHAN and VOLKAN held a dominant position in the market for operating intercity bus terminal of Edirne province. As a result of the dominant position assessment regarding the market for domestic passenger transport agency services in Edirne province, it was observed that the agencies of all firms dealing with passenger transport from and to Edirne were operated by Mustafa ALTUNHAN. Mustafa ALTUNHAN held a dominant position in the market for domestic passenger transport agency services due to the structure including ÖZ EDİRNE, VOLKAN and GÖKHAN TURİZM.

Within the scope of the decision, the following practices were deemed as refusal to deal: the operator of the terminal refused to rent offices and

forced bus firms to franchise agencies and ended contractual relationships by terminating agency agreements. After detecting refusal to supply conduct, whether Mustafa ALTUNHAN abused its dominant position in the relevant market he controlled, by means of refusal to supply, was analyzed within the framework of three issues.

First, it was concluded that the product or service that was the subject of refusal was indispensable taking into account the following facts: according to current regulations, it is difficult to fulfill the necessary legal requirements to provide alternative places and it is not probable that Edirne Municipality would authorize an alternative terminal that would make a terminal under its property inefficient and create traffic density, building and operating costs of an alternative terminal would be high while there was a terminal with idle capacity. Accordingly, there are not any actual or potential substitutions for undertakings operating in the market for highway passenger transport services; thus, Edirne terminal is objectively necessary for efficient competition.

Secondly, the possibility of eliminating efficient competition in the downstream market by means of refusal to deal was analyzed. In this regard, it was concluded that VOLKAN's practices decreased competition in the market for domestic passenger transport agency services in Edirne province and market for highway passenger transport and excluded potential competitors by refusing to rent offices to potential entrants. "The possibility to eliminate efficient competition in the downstream market" clause was fulfilled as competition was impeded in downstream markets.

Lastly, whether it was possible that refusal to deal would cause consumer loss was analyzed. It was observed that after Kayapalı Nilüfer Turizm Seyahat Ot. İşl. Tic. Ltd. Şti. was excluded from Edirne bus terminal, intra-brand competition was restricted, limiting the preferences for consumers traveling through the lines under investigation. Moreover, innovative services to be performed by potential competitors carrying passengers on intercity lines were also hindered. Besides, it became possible for VOLKAN to gain more profits than usual from agency services. Depending on those findings, it was concluded that VOLKAN's refusal to deal practices caused losses for consumers traveling on intercity lines in Edirne as there was not actual competition in intercity routes departing from Edirne and potential competition was suppressed.

It was understood that VOLKAN have neither a legal interest to be protected nor objective necessity with respect to its practices that were the subject of

the file. Moreover, there were not efficiency gain arguments and reasonable grounds.

Consequently, it was concluded that VOLKAN and ÖZ EDİRNE held a dominant position in the markets for intercity passenger terminal operation and domestic passenger transport agency services and abused their dominant position by means of refusal to deal; thus, violated Article 6 of the Act no. 4054. Accordingly, VOLKAN was imposed TL 733.246,94, and ÖZ EDİRNE was imposed TL 31.986,89, corresponding to, by discretion, 2,25% and 1,5 %, respectively, of their annual gross income accrued at the end of financial year 2016 determined by the Board.

- **The Request for Withdrawal of Exemption from Tuborg Pazarlama A.Ş.'s Exclusivity Agreements in Off-premise Beer Market**

Decision Date:	Decision No:	Type:
09.11.2017	**17-36/583-256**	**Exemption**

The relevant decision was related to the request for the withdrawal of the individual exemption granted as per the Board Decision dated 18.03.2010 and numbered 10-24/331-119 to exclusive agreements of Tuborg Pazarlama A.Ş. (TUBORG) in the off-premise beer market.

During the period between 2005 and 2010, after the block exemption granted to Efes Pazarlama ve Dağıtım Ticaret A.Ş. (EFPA) and TUBORG was withdrawn by the Board decision dated 22.04.2005 and numbered 05-27/317-80, expected positive outcomes in the market were not realized. On the contrary, the concentration increased, TUBORG lost market share and EFPA strengthened its dominant position by gaining market share. Consequently, the Board decision dated 18.03.2010 and numbered 10-24/331-119 was taken and TUBORG was granted individual exemption for single brand restrictions not exceeding five years in the agreements to be signed with off-premise sales points and on-premise sales points. However, EFPA claimed that the essential conditions constituting the basis of the exemption decision should be reevaluated taking into account the developments in the market on the grounds that during 2016-2017 period (first 6 months) TUBORG gained market shares rapidly and consistently and the situation in the market changed significantly from the structure in 2010.

According to Article 13(a) of the Act no. 4054, in case there are changes in any event constituting the basis of the exemption decision, the exemption may be withdrawn. The findings in the file showed that the market structure was very different from the structure in 2010; therefore, the market did not

reflect the evaluations made on that date. In fact, TUBORG reached a level so that it could compete with EFPA with respect to market share and sales, availability rates and financial power.

TUBORG's exclusivity agreements no longer fulfilled the condition in Article 5(c) that competition should not be eliminated in a significant part of the market taking into account the following facts: TUBORG's market share has increased rapidly and consistently in time; the rapid decrease in the market shares of EFPA, which was found to be dominant in the previous decisions, TUBORG consistently increased its market share in the narrow off-premise beer market, TUBORG maintained the number of its off-premised sales points, TUBORG increased its investments recently and it had a strong financial structure to support those structures. Thus, it was found convenient that individual exemption shall be withdrawn from TUBORG with respect to off-premise beer market according to Article 13(a) of the Act no. 4054 since the conditions constituting the basis of individual exemption decision were changed.

On the other hand, although the relevant agreements were not under the scope of the Communiqué no. 2002/2 and were granted individual exemption in 2010 TUBORG decision, considering that TUBORG's market share in off-premise beer market as of the end of 2016 was under 40%, an assessment was made with respect to block exemption as per the Communiqué no. 2002/2. It was concluded that exclusivity agreements by TUBORG with off-premise sales points did not fulfill the conditions laid down in Article 5(c) of the Act no. 4054, as stated above, and the relevant agreements could not benefit from block exemption under the scope of the Communiqué no. 2002/2.

- **UN RO-RO İşletmeleri A.Ş.'s acquisition of all of the shares in Ulusoy Deniz Taşımacılığı A.Ş., Ulusoy Gemi İşletmeleri A.Ş., Ulusoy Ro-Ro İşletmeleri A.Ş., Ulusoy Ro-Ro Yatırımları A.Ş., Ulusoy Gemi Acenteliği A.Ş., Ulusoy Lojistik Taşımacılık ve Konteyner Hizmetleri A.Ş. and Ulusoy Çeşme Liman İşletmesi A.Ş.**

Decision Date:	Decision No:	Type:
09.11.2017	**17-36/595-259**	**Merger**

The analysis regarding the market shares, the position of the undertaking in the market, entry barriers as well as actual and potential competition conditions revealed that UN RO-RO İşletmeleri A.Ş. (UN RO-RO) holds a

dominant position in the market for ro-ro transportation market, which covers "ro-ro lines between Turkey and Europe including ro-ro lines departing from Istanbul, Izmir and Mersin". It was concluded that, following the acquisition in question, there would be two players left in the market instead of three; the concentration rate in the market would be higher; UN RO-RO would obtain a significant market power compared to its competitors as a result of the acquisition in question. Therefore, the notified transaction would restrict competition through unilateral effects created by strengthening the dominant position.

Moreover, the two-player structure to be formed following the transaction might restrict competition by means of coordinated effects because it would be easier for the competitors to estimate each other's activities and act accordingly in such market structure.

Buyer power, which can offset anti-competitive effects restricting competition significantly, does not exist in the market. The bargaining power of transporters who buy ro-ro services is limited in front of ro-ro transporters. In addition, potential competition that can exert competitive pressure in the market is weak. Although a few firms attempted to enter the market for ro-ro services between Turkey and Europe in the past, those undertakings were not successful. As a result of this failure to enter to the market, the duopoly in the market has been preserved for long years, which indicates that entrance and maintaining activities in the market is difficult.

In addition, price increase is possible due to the concentration to be created following the transaction. The concentration simulation made by the parties' estimates that the average price of Çeşme-Trieste line operated by ULUSOY, which is the transferred party, will increase by 14% whereas the average price of the buyer UN RO-RO's three lines departing from Istanbul and Mersin will increase by 2.7%. On the other hand, a very small increase of 0.2% is estimated in the lines operated by ALTERNATIVE, which is not a party to the transaction. The calculations made by Economic Analyses and Research Department estimate that the average price of Çeşme-Trieste line operated by ULUSOY will increase by 10.9%. The increase estimated for average prices of Pendik-Trieste, Mersin-Trieste and Pendik-Toulon lines operated by the acquiring party UN RO-RO will be 2.1% whereas the increase estimated for average prices of Alsancak-Sète and Haydarpaşa-Trieste lines operated by ALTERNATIVE, which is not a party to the transaction will be 0.2%.

With respect to "ro-ro port management services market", the analysis revealed that UN RO-RO will have (....) % market power in the market for

port management services for ro-ro ships and the change in the HHI will be 1293. Those values indicates a possible concentration in the market according to the principles laid down in the relevant Guidelines. The vertically integrated structure will be strengthened as a result of the transaction and this also increases competition concerns. The potential competition limited due to entry barriers is far from eliminating those concerns. Within this framework, after the transaction UN RO-RO will be dominant in the market for port services for ro-ro ships in Turkey (Mersin, Istanbul, and Izmir), Italy (Trieste) and France (Toluon and Sète) capturing area.

With respect to "shipping agency services market", as stated in the previous Board decisions, there are not entry barriers and the number of players is high. According to the data of the Ministry of Transport, Maritime Affairs and Communication, there are 1176 shipping agencies in Turkey. Therefore, it was concluded that the notified transaction would not result in creating or strengthening a dominant position in the market for shipping agency services.

It was decided that the the notified transaction would not result in creating or strengthening a dominant position in the market for shipping agency services but would strengthen U.N. RO-RO's dominant position and thus significantly restrict the competition in the ro-ro transportation market and also would create dominance in the market for ro-ro port management which means the competition in these markets would significantly lessen and therefore the notified acquisition shall not be cleared.

- **French Competition Authority fined Brenntag €30 Million for Obstructing an On-going Investigation**

The French Competition Authority (FCA) fined Brenntag, German chemical distributor, for failure to provide complete and timely answers to questionnaires it issued during the investigation into alleged unilateral and vertical anticompetitive practices. The authority applied for the first time the clause of France's commercial code introduced in 2008, allowing for the imposition of fines up to 1% of their global turnover in cases of procedural obstruction.

Brenntag which has been the subject of various complaints filed by its competitors on the French market for which the FCA opened several proceedings beginning from 2002, some of which have already led to the imposition of fines. However the FCA stated that has not yet been able to conclude its investigation into unilateral and vertical practices (i.e., predatory pricing and exclusive dealing) due to the company's failure to provide information which hindered the FCA's ability to adequately assess the French national commodity chemical market.

The FCA noted that Brenntag ignored information requests and provided incomplete and imprecise information in response, often with a one- or two-year delay. Brenntag also refused to communicate decisive elements required by the FCA to assess the functioning of the market despite the additional extensions of time granted (e.g., accounting extracts, invoices, explanation of methodology used to compute data, etc.).

On the other hand, Brenntag counter-argued that the FCA's requests for information were disproportionate and unreasonable. It further stated that certain information was unavailable and that, in any case, the legal criterion for an obstruction required evidence of an intentional element.

This relatively high fine has raised questions as to whether it is proportional and whether FCA decided to move towards more severe punishments for procedural infringements.

Sources:

http://www.mondaq.com/x/670782/Antitrust+Competition/European+Union+French+Competition+Authority+Fines+Brenntag+30+Million+For+Obstruction

https://globalcompetitionreview.com/article/1152102/france-hands-down-first-obstruction-fine

- **The Federal Antimonopoly Service of Russia found that LG engaged in algorithm-driven price coordination**

Federal Antimonopoly Service of Russia (the FAS) decided that the Russian subsidiary of LG monitored its resellers' prices for its smartphones through a special software algorithm and forced retailers to comply with its price recommendations.

FAS initiated proceedings against the company in 2016 on the grounds of illegal coordination of economic activities. The investigation revealed that LG's anticompetitive conduct lasted from 2014 to 2017 and led to fixing and maintaining prices for some smartphones. According to Russia's competition act, in order for unlawful coordination to be established, (i) the coordinator must influence at least two market participants, (ii) its actions must lead to one of the anticompetitive consequences specified in the Act and (iii) the coordinator must operate in a different market from the other companies in the agreement. According to Act such coordination is per se illegal; FAS need not prove the adverse effects of the agreement on competition.

The FAS has not yet announced the fine on LG for which the maximum penalty could amount to 5 million roubles (€72,000).

Sources:

https://chelorg.com/2018/02/26/fas-found-that-daughter-lg-coordinated-the-prices-of-smartphones-in-russia/

https://globalcompetitionreview.com/article/1166162/algorithm-facilitated-lg-price-coordination-russian-enforcer-says

- **German court escalated RPM fine by 400%**

Düsseldorf's Higher Regional Court has substantially increased the fine that German competition Authority –Bundeskartellamt- had levied on Rossmann, in its ruling for the appeal by Rossman against the Bundeskartellamt's original decision. Bundeskartellamt head Andreas Mundt stated that the enforcer welcomed the Court's ruling.

Bundeskartellamt fined Rossmann €5.25 million in December 2015 in a far-reaching investihation concerning grocery and drugstore companies. Rossmann appealed against its fine to the Düsseldorf Higher Regional Court. In the other cases the fine decisions became final. Based on evidence from its investigation of a horizontal cartel among roasted coffee and

confectionery makers, the enforcer searched 15 sites in January 2010 on suspicions of vertical price agreements between Melitta Kaffee and its retailers. The investigation revealed that Melitta had agreed with five retailers, including Rossmann, to fix the prices of filter coffee and in turn Rossman applied resale price maintenance (RPM) in its sale of Melitta products.

Bundeskartellamt, employs similar procedures as those of the EU commission and can issue a fine of up to 10% of a company's entire worldwide turnover. The Authority took a lenient approach in its decision and based the fine on the global turnover that Rossmann's coffee business had created, which was taken as the part of the turnover affected by the antitrust infringement.

Upon the appeal, Düsseldorf's Higher Regional Court has levied the fine by 400%, from from €5.25 million to €30 million, which means the Court used a different and stricter methodology for setting fines. The Court's ruling is not yet publicly available, but competition law professionals state that the Regional Court could have based the fine on entire global turnover, instead of company's coffee business.

Rossmann may still take the Court's ruling and Bundeskartellamt's decision to Germany's highest court, Federal Court of Justice, for appeal.

Sources:

https://globalcompetitionreview.com/article/1166283/german-court-hikes-rpm-fines-by-400

https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/resale-price-maintenance-food-retail-sector-fine-proceedings-largely-concluded-beer-segment

- **The Paris Court of Appeal overturned the effect of the 2013 dawn raids order**

The Paris Court of Appeal has annulled a decision by the French Competition Authority (FCA) that ordered searches of electrical retailer Darty's offices. The Court ruled that FCA's officials had breached Darty's rights of defence by blocking company executives from calling their lawyers at the start of the office search and required FCA to return all seized documents to Darty and refrain from using either the originals or copies as part of the authority's wider probe into alleged resale price maintenance by companies in the home appliances sector.

The Court's ruling stems from a referral back from France's high court, Cour de Cassation. The Cour de Cassation referred the case back to the Paris Court of Appeal to decide on the challenge regarding the executives' right to call their lawyers at the start of dawn-raid.

Source:

https://globalcompetitionreview.com/article/1167781/dawn-raids-overturned-by-french-court

- **UK to amend merger control to protect national security**

UK Government announced proposals in its October 2017 Green Paper which anticipated new rules to protect the UK's national security, in particular in the context of foreign investment. The proposals if carried into effect would lead to an amendment under the existing merger control regime contained in the Enterprise Act 2002.

In this respect, the Government published draft legislation in March 2018 to bring into effect some of the proposed short-term changes, together with a response to the consultation and draft guidance explaining the changes.

The draft legislation introduces lower thresholds for merger notifications in three sectors relevant to national security: the military and dual-use sector, and parts of the computing hardware and advanced technology sectors. According to proposal, the Secretary of State would intervene and could prohibit the merger on national security grounds in the abovementioned sectors if either:

- the UK turnover of the target exceeds £1 million (reduced from the normal £70 million); or
- the target has an existing UK share of supply of 25 per cent or more (this would remove the need for an increase in market share); or
- the transaction would create or enhance a UK share of supply of 25 per cent or more (i.e. the existing "share of supply test").

The government received 27 responses to its public consultation conducted for which the government said some respondents raised concerns that additional merger scrutiny on competition grounds could raise costs. It is argued by some competition law professionals that lowering the thresholds will affect all transactions in the three sectors, and not just those deemed a risk to national security.

Sources:

https://www.ashurst.com/en/news-and-insights/legal-updates/uk-to-amend-merger-control-rules-to-protect-national-security/

https://globalcompetitionreview.com/article/1166730/uk-to-amend-merger-control-on-national-security-grounds

- **Decision of the 13th Chamber of the Council of State dated 29.12.2017 and numbered E. 2011/961, K. 2017/4523**

Kinship and cooperation based on mutual interest are not sufficient indicators for making an assessment of single undertaking.

In the case in question, two separate legal entities were imposed administrative fines due to late notification since they implemented a transaction of concentration but failed to notify the transaction to the Board in spite of the fact that it was subject to notification. The Council of State found the imposition of administrative fines due to late notification in compliance with the law, but on the following grounds, ruled that considering the two legal entities a single undertaking and finding them jointly and severally liable for the fine was unlawful:

"*In the case in question, Ajans Press and Interpress legal entities were considered to be a single undertaking based, in general, on kinship, on their cooperative activities, and on the protocol signed between the two parties.*

As stated in the Board decision "familial ties" is an indication for a single undertaking characterization, yet usually is not sufficient for that characterization on its own. As a matter of fact, neither is it made clear what the degree of familial ties should be. In this context, the fact that the managers and owners of Ajans Press and Interpress are cousins in the case in question is found to be insufficient grounds for a single undertaking characterization.

An examination of the cooperative activities between the parties revealed that the cooperation was implemented within the bounds of an interest-based relationship, which aimed at ensuring cost advantages and which was not unilateral, i.e. which involved mutual expectations. Indeed, this point is also made clear by the statements of the parties and by the e-mails sent. Under the circumstances, it becomes clear that the cooperation based on mutual interests was not sufficient for a single undertaking assessment, either.

An examination of the e-mail sent between the parties, titled "PROTOCOL," shows that the text was not a mandate; it was prepared as an agreement, in a format that would be signed separately by the officials of both companies. As a rule, the requirement for "being able to take independent decisions," which is the most important element of an undertaking as defined in the law, clearly calls for a single economic decision-making mechanism. However, the protocol in question had the nature of an

understanding concerning the mutual obligations and responsibilities without abstracting each official from his own business, both company officials personally managed their own companies and the file did not include any document or information suggesting otherwise; therefore, it is concluded that Interpress and Ajans Press are not a single economic unit that take decisions jointly."

- **Decision of the Plenary Session of the Administrative Law Chambers dated 04.10.2017 and numbered E. 2014/3462 K. 2017/2907**

The Provisional Article 1 of the Regulation on Fines, which states "provisions of this Regulation shall also be applicable to the investigations that were initiated prior to its entry into force, where the investigation report has not been notified" is a norm that does not bear legal consequences for or against and therefore is not relevant for the substantive penal law in this respect; but those provisions of the Regulation which may have probable consequences for the persons concerned must be applied even if the investigation report has been notified.

In the case in question, the court found the Board's decision of abuse of dominant position in compliance with the law; however, it decided, on the following grounds that, unlike the Provisional Article 1 of the Regulation on Fines, the provisions of the Regulation were applicable for the files whose investigation reports were sent:

"Among the provisions of temporal application, substantive penal law has provisions which state that if an Act that was not in effect at the time the crime was committed, it should not be applied for the perpetrator while if the Act put into force following the crime is to the advantage of the perpetrator, it should be applied. In determining if a certain point of law is relevant to substantive penal law, the relevant provision must include regulations which definitively affect the penalty imposed in a way that could change the amount and/or period of the penalty in question. In points of law relevant to procedural or criminal execution law, the rule of immediate application is recognized.

The aforementioned Regulations does not specify a new misdemeanor or sanction, it does not include provisions that would change the final sanction with the exclusion of the ten per cent limit which is also included in the Act, and only includes the criteria on the setting of the administrative fine specified by the Act. Its provisions aim to solidify the discretionary power

of the authority for each concrete case with the same characteristics in the future. As such, since the provision of the Regulations in question does not bear legal consequences for or against and therefore is nor relevant to the substantive penal law and is simply a regulation concerning administrative procedures law, it is legally possible to apply it for investigations launched after the date it came into force regardless of the date of the violation. It is therefore clear that the subject of bearing legal consequences for or against the perpetrator must be assessed by the authority imposing the administrative fine on a case by case basis and when setting the fine, the Authority must have set forth the rate of the fine so as to allow judicial review.

At this junction, as an exception of the aforementioned state of affairs, it was decided that the provisions of the Regulation would not be applied to the investigations for which the investigation reports were notified, in order to ensure that those cases which might bear negative consequences are eliminated and the principle of legal certainty is realized. However, those provisions of the Regulations which might bear consequences in favor of the persons concerned must be applied even after the notification of the investigations report. This is because the rules set forth by the Regulations were based on the provisions in Article 17 of the Act on Misdemeanors, which were envisaged in order to increase the level of objectivity of the fines in the Act."

- **The Decision of Ankara 15th Administrative Court dated 16.11.2017 and numbered E. 2017/412 K. 2017/3045**

The report prepared by an independent lawyer in order to check compliance with competition law is within the right of defense and benefits from lawyer-client privilege.

The Court decided that the report prepared for the undertaking by independent lawyers for determining the competition compliance level is within the scope of lawyer - client privilege and this document obtained during on-sight inspection should be given back on the following grounds:

"Article 36 of the Constitution of the Republic of Turkey stipulates that everyone has the right of allegation and defense and fair trial either as plaintiff or defendant before the courts through lawful means and procedure.

According to Article 36 of Legal Profession Act no. 1136 lawyers are forbidden to disclose the matters they are submitted or they learn either

due to their profession or their tasks under Turkish Bar Association or bodies thereof.

Article 130(2) of the Code of Criminal Procedure no. 5271 states that "In case the lawyer, bar president or the lawyer representing him, whose office is being searched, make an objection with respect to things to be seized during the search by claiming that those are related to the professional relationship between the lawyer and the client; that stuff is put into a different envelope or package and sealed by those present and a decision is requested from a judge of a criminal court of peace at the investigation stage and from a judge of a judge or the Court at prosecution stage. As soon as the competent judge determined that the thing seized belong to the professional relation between the lawyer and the client, the thing seized shall be returned to the lawyer and the official reports about the proceeding shall be removed.

...

Considering the above-mentioned legislation, it is provided that the Board might request any information from all public institutions and agencies, undertakings, associations of undertakings and scrutinize any documents during on-sight inspections at the premises of undertakings and take their copies where necessary. Besides, it is understood that there are not any provisions in the competition legislation that the documents found during on-sight inspections within the premises of an undertaking shall be handled under the scope of lawyer-client privilege. However, it is observed that the Board has recognized this privilege parallel to universal legal rules and EU practice and highlighted this in some of its decisions.

In this context, the Board recognizes lawyer-client privilege provided that two conditions are fulfilled simultaneously:

- The documents subject to privilege should belong to the relationship between the undertaking and a lawyer who does not work as a permanent employee for the undertaking; in other words, who works independently,

- The documents subject to lawyer-client privilege should be related to the use of right of defense.

In the concrete case, it was not disputable that the documents called Enerjisa Audit Report seized during on-sight inspection were not prepared by in-house lawyers but by a lawyer partnership consisted of independent lawyers and they were related to the professional relationship between independent lawyers and the company.

The dispute was related to whether the documents subject to lawyer-client privilege were related to the use of right of defense.

According to the reasoned Board decision in dispute, the definition of the documents to be covered by lawyer-client privilege was as follows: the correspondence between an independent lawyer, who does not have a labor relation with his client, and his client for the purposes of using right of defense is deemed as professional correspondence and benefits from protection. This protection covers the correspondence made with the independent lawyer for the purposes of right of defense and the documents prepared for consultancy from the independent lawyer. Within this framework, for instance, while an opinion by the independent lawyer about whether a specific agreement violates the Act no. 4054 benefits from the protection, the correspondence about how the Act no. 4054 might be violated cannot benefit from the protection.".

The title of the documents to be returned was Enerjisa Audit Report. It was highlighted that the report included commercial secrets and was under lawyer-client privilege, and the document was about the sample competition supervision by independent lawyers in company's offices in different cities. The content of the report was about determining which conduct was contrary to competition law, the company's compliance with competition legislation and recommendations for preventing competition infringements.

In this case, the following conclusions were made: The audit report prepared by independent lawyers after auditing the company was deemed as "a document prepared for consultancy from the independent lawyer. The recommendations in the report for compliance with competition law and preventing competition infringement were within the scope of right of defense, taking into account the explanation highlighted in the reasoned decision that "the opinion of an independent lawyer whether a specific agreement violates the Act no. 4054 benefits from the protection". Thus, the two conditions for lawyer-client privilege required in consistent Board decisions were fulfilled. Therefore, the documents in question should benefit from lawyer-client privilege; however they were not returned. The transaction in dispute, which is the failure to return the documents, is inconsistent with the law.

On the other hand, the defendant administration highlighted that the said documents were not taken as a basis. However the fact that the documents which were found to be under right of defense and lawyer-client privilege

were not used as a basis in the investigation should not have prevented their return; thus, this claim by the defendant was not considered."

- **The Decision of 13th Chamber of the Council of State dated 04.12.2017 and numbered E. 2011/3935 K. 2017/3552**

Oral statements by undertaking officials are under the scope of right of defense and cannot be regarded as wrong and misleading statements.

An undertaking official, in his statement recorded during on-sight inspection, said that they established a common publication platform and agreed about prices orally. Later, the same official came to an on-sight inspection within the premises of another undertaking and said that there were open-ended explanations in his previous statements, which might result in misunderstandings; thus, submitted another statement claiming that there was neither a common platform nor an oral agreement. As a result, the said undertaking was imposed administrative fines due to wrong and misleading information. The Court ruled that the decision was contrary to law on the following grounds:

Article 14 on "Requesting information" and Article 15 on "On-sight inspection" of the Act no. 4054 provides that the Board may request information and documents it deems necessary for carrying out the duties it is assigned by the Act. It is necessary that the Board should carry out on-sight inspections in a sound and reliable way. Therefore, information submitted should be sufficient and more importantly true, correct and reliable.

Within this framework, statements which do not depend on a document and which could be regarded as defense, by an undertaking subject to a preliminary inquiry with a claim of competition infringement, are not under the scope of information defined in Articles 14 and 15 of the Act. The Board has exclusive power to access to information and this power covers issues outside the statements by an undertaking or undertakings under preliminary inquiry or investigation that might be related to defense about the subject of the preliminary inquiry.

Within the framework of information and assessments, it was understood that information given by the plaintiff company official cannot be regarded as "information" as defined in Article 14 on "Requesting information" and Article 15 on "On-sight inspection" of the Act no. 4054. Consequently, it was decided that... administrative fines imposed on the undertaking

according to Article 3 of the Board decision because of submitting wrong and misleading information was inconsistent with the law.

- **Mergers and Difference-in-Difference Estimator: Why Firms Do Not Increase Prices?**

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Author: Juan Luis Jime'nez Jordi Perdiguero

Evaluation of merger applications by competition authorities requires complex analysis for future behavior by the parties by taking into account industry structure. There are three outstanding tools for measuring the impact of mergers on prices: Case studies, simulation of mergers and comparisons of prices before and after the concentration. Difference-in-difference estimator, defined as the comparison of prices before and after a merger, offers a more flexible framework and it has a potential to avoid endogeneity problem that arises when carrying out comparisons among heterogeneous groups; thus, it is more and more preferred in making analyses. It is also a very practical method as it enables the analysis of mergers and acquisitions by means of only price data unlike the simulation method which takes into account market's both supply side and demand side behavior as well as possible efficiency gains. The said estimator calculates results related to non-time-varying features by subtracting post-merger results from pre-merger results and thereby eliminates selection bias resulting from unobservable variables. As a result, it is possible to produce reliable estimations for merger impact by means of non-time-sensitive linear selection impact assumption.

This study analyzes a new problem stemming from interpreting difference-in-difference estimator. The study shows why it is not convenient to use the results of difference-in-difference estimator for analyzing the level of competition in the market when we do not have sufficient information about reasons underlying the price level. Firms do not need to change their price levels after a merger especially if they operate in a competitive market or they have made a secret agreement. Therefore, they should be careful in interpreting the results of difference-in-difference estimator in case there are concerns about competition level especially before the merger even if there is no change in pricing. This is especially important in oligopolistic sectors like oil. The merger in question will not increase prices for cooperating firms.

The article models and analyzes acquisition by a local petrol company DISA of the assets of Shell, a multinational petrol company, in Spanish Canary Islands. The analysis uses an econometric modeling based on difference-in-

difference method and conjectural variation method. The econometric results of difference-in-difference model points out that the merger does not have a significant impact on pricing. However, empirical results about the variation method shows that agreed price equilibrium created before and after the concentration process leads to that result. In short, in markets with competitive concerns due to a tacit agreement, the use of difference-in-difference model may not detect price variations correctly.

Source:

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- **Manufacturer Mergers and Product Variety in Vertically Related Markets**

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Authors: Chrysovalantou Milliou and Joel Sandonis

One of the latest concerns of antitrust authorities about manufacturer mergers is how will the merging firms affect the decisions of firms for developing new products and product variety. The authorities clearly express this concern recently in US Horizontal Merger Guidelines (2010) by emphasizing that it is necessary to focus on mergers' effects not only on cost-based efficiency but also on product variety. Highlighting this issue, this article analyzes the relationship between manufacturer mergers and product variety. The analysis deals with the incentives of two competing firms producing final products to invest in a new product and the effects of a manufacturer merger on those. Assuming that manufacturers sell their products through multi-product retailers instead of selling directly to the consumers, the article asks the following questions: How are investments made to new product entries affected by competition concentration in the market? What is the relationship between product variety and vertical trade conditions? Does a manufacturer merger change the decisions about new product investments? Does a manufacturer merger harm consumers and decrease welfare? In order to answer the questions, a model is made by assuming that initially two manufacturers produce two horizontally differentiated products and distribute them to consumers through competing multi-product retailers. In the model, manufacturers first decide whether they will merge and secondly whether they launch new products to the market after bearing the relevant fixed costs. Then they determine products' wholesale prices and retailers determine the prices they will

demand. Depending on this projection and using benefit maximization program, equilibrium wholesale price is found and the effects of the merger are analyzed.

The results of the analysis are as follows: Wholesale prices are affected by both the number of products in the market and the merger. In case manufacturers distribute their products through multi-product retailers, although the manufacturer merger increases prices, it also increases product variety. Only if there are vertical relations, product variety is increased due to the merger. In case manufacturers sell their products directly to the consumers, the merger does not result in increased product variety. Under such circumstance, a manufacturer merger affects not only the number of products to be launched in the market but also vertical trade conditions, which determines distributors' - retailers' and final prices' efficiency. Consequently, although a manufacturer merger increases product variety, the increase in product variety is not sufficient to offset the loss in consumer and social welfare resulting from rise in wholesale prices.

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