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 last 3 months of 2017, which includes news on developments in competition law, industrial organization and competition policy.

In the "Selected Reasoned Decisions" section of this issue, we included 1 investigation, 4 exemption assesments, 1 preliminary investigation and 2 administrative fine decisions which were imposed on the undertakings in relation to 2 different preliminary investigation.

The "News around the World" section of the Competition Bulletin includes news from EU-Portugal, Russian Federation, Italy, Japan and Australia.

"Selected Decisions under Administrative Law" section contains only one decision taken by the 13th Chamber of Council of State (Decision Date 15.10.2017, Decision No E. 2014/2458 K. 2017/2511) regarding Turkish Competition Authority's decision about Türkiye Petrol Rafinerileri A.Ş. (Decision date 17.01.2014, Decision No 14-03/60-24) as it was deemed an important decision.

"Economic Studies" section includes a summary of an aricle published in the Journal of Antiturst Enforcement titled "*The Settlement Procedure in the European Commission's Cartel Cases: An Early Evaluation*" and another article published in the OECD Economics Department Working Papers titled "*Regulation, Institutions and Productivity: New Macroeconomic Evidence from OECD Countries*".

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

With our best regards.

Department of External Relations, Training and Competition Advocacy

- **Investigation about the Protocol on the Purchase of Pharmaceuticals by Persons covered by Social Security Institution from Pharmacies Member of Turkish Pharmacists' Association**

Decision Date:	Decision No:	Type:
13.07.2017	**17-22/362-158**	**Investigation**

The decision in question was taken as a result of the investigation initiated, following the annulment decision of the Council of State, in order to determine whether articles 4 and 6 of the Act no. 4054 were violated by means of the Protocol on the Purchase of Pharmaceuticals by Persons covered by Social Security Institution from Pharmacies Member of Turkish Pharmacists' Association (2012 Protocol) and practices depending on the Protocol through exclusive distribution and allocation of prescriptions according to an order-limit pattern among pharmacies. The said investigation was conducted about TPA Izmir 3rd region pharmacists' chamber, Adana Pharmacists' Chamber, Bursa Pharmacists' Chamber, Adıyaman Pharmacists' Chamber, Antalya Pharmacists' Chamber, Uşak Pharmacists' Chamber and Giresun Pharmacists' Chamber.

First of all, SSI's activities within the framework of protocols signed with TPA are not regarded as activities of an undertaking under the scope of the Act no. 4054 in the decision. Secondly, TPA and affiliated pharmacists' chambers are deemed as associations of undertakings according to the Act no. 4054. The following points were taken into account while evaluating the practices regarding ordered prescription distribution within the framework of protocols signed between TPA and SSI:

- TPA is a party to the protocol
- The role and responsibility of TPA Central Committee in the functioning of the system
- TPA Central Committee itself will impose the sanctions against pharmacies that do not comply with the system
- Regional pharmacists' chambers are obliged to comply with the decisions of TPA Grand Congress and Central Committee and in this sense TPA is like a superior board of pharmacists' chambers.

One of the basis of 2012 Protocol signed between TPA and SSI is article 39(j) of the Act no. 6643 and it is clear that TPA is authorized for the issue as per the said article. Moreover, in several court decisions, it is clearly

stated that the protocol signed between SSI and TPA should comply with both legislation provisions, which the two parties are subject to, and other relevant legislation and legal rules. From this point of view, the content of the said protocol and the transactions TPA makes on the basis of this protocol should not be contrary to the Act no. 4054.

The prohibition on market allocation laid down in article 4(1)(b) of the Act no. 4054 applies to pharmacies as they are deemed as undertakings under the Act no. 4054. Allocation of certain prescription groups among pharmacies according to "equal sharing" principle is contrary to the Act no. 4054. In the general preamble of the Act no. 4054, it is stated that the players in a competitive market work more efficiently by competing on the basis of price, quality and product variety, and economic efficiency obtained as a result will benefit consumers. The sale of medicine by pharmacies at the retail level may bring price competition; however, price competition between pharmacies is restricted to a narrow elbowroom, although not eliminated completely, because the prices of human medicine is determined directly by public authorities and the discounts on the determined prices are limited to certain amounts by the protocols signed between TPA and SSI. Thus, competition at the level of retail sale of human medicine moves substantially to provision of services. It is stated that ordered prescription distribution system regulated in Articles 3 and 7 of the protocols dated 2012 and 2016 and annex 4 thereof intends to prevent abuses in the listed prescription groups and ensure rational use of medicine. Medicine is provided by the next pharmacy according to the sequence and quota determined. In the order and quota system made for each prescription group, since the amount of prescriptions to be provided by pharmacies is determined, there is no reason for pharmacies to compete for offering services. Pharmacies do not have concerns that they will lose their customers in terms of medicine subject to ordered prescription distribution, so they do not have incentives to increase the quality of their services.

From the first complaint until now, the Board has not initiated an investigation about ordered prescription distribution and not imposed any administrative fines on TPA or regional pharmacists' chambers not because the Board found that those practices complied with the Act no. 4054 but because those practices were based on secondary legislation such as Budget Implementation Instructions or Health Implementation Communiqués before 2007 and based on protocols signed between SSI, a public authority that cannot be deemed as an undertaking within the framework of the Act no. 4054 and TPA as of the establishment of SSI.

Taking into account overall Board decisions, it is observed that the Board has not taken a favorable approach to ordered prescription distribution although it is based on secondary legislation. Moreover, the Board made evaluations related to prescription distribution within the scope of the protocol that the practice was inconvenient in respect of the Act no. 4054 and it was decided that opinion letters about these findings and evaluations should be sent to public authorities that were related to the legislation, which formed the basis of the practices. Fulfilling its tasks for competition advocacy within the framework of the Act no. 4054, the Board informed the relevant public authorities and institutions that allocation of prescriptions was contrary to the letter and spirit of the Act no. 4054.

As a result, it was decided that as SSI is not regarded as an undertaking with respect of the subject of the file, the Protocol on the Purchase of Pharmaceuticals by Persons covered by Social Security Institution from Pharmacies Member of Turkish Pharmacists' Association signed between SSI and TPA and the related practices were not under the scope of the Act no. 4054, thus it was not possible to impose administrative fines on the associations of undertakings under investigation as per article 16 of the same Act. However, in accordance with the provision of the decision of the Council of State Administrative Law Chambers that "[...] the protocol to be made between Turkish Pharmacists' Association and [...] Social Security Institution should comply with legislative provisions that both parties are subject to as well as other legislative and legal provisions related to the subject", the Presidency was assigned to send an opinion to TPA, SSI as well as the Ministry of Health and Ministry of Labor and Social Security as they are also interested that the Act no. 4054 and the relevant legislation should be taken into account in the Protocol on the Purchase of Pharmaceuticals by Persons covered by Social Security Institution from Pharmacies Member of Turkish Pharmacists' Association between SSI and TPA and the related practices.

- **Exemption Examination about Four New Types of Off-premises Point of Sale Agreements by Efes Pazarlama ve Dağıtım Ticaret A.Ş.**

Decision Date:	Decision No:	Type:
03.07.2017	**17-20/320-142**	**Exemption**

The decision was taken as a result of the request of Efes Pazarlama ve Dağıtım Ticaret A.Ş. (EFPA) for negative clearance/exemption to four new types of Off-premises Point of Sale Agreements prepared by means of

making amendments to the Off-premises Point of Sale Agreement, which was granted negative clearance by the Board decision dated 17.11.2011 and numbered 11-57/1474-530.

The agreements in question are as follows:

- Full Exclusive Off-premises Point of Sale Agreement
- Partially Exclusive Off-premises Point of Sale Agreement
- Off-premises Point of Sale Agreement with quantity commitments and
- Standard Off-premises Point of Sale Agreement (together).

Full Exclusive Off-premises Point of Sale Agreement was submitted with four alternatives. The said agreement contains exclusivity provisions in favor of EFPA, in other words, imposes an obligation to sell only one brand on off-premises points of sale by means of preventing the sale of competing beer products; prohibits placing competing beer products in refrigerators, makes it possible to impose penal clauses in case competing beer products are sold, provides for that cash discounts or discounts with cash based - contribution will be granted on condition that EFPA beer products are sold exclusively. Within this framework, the agreements in question were not granted negative clearance certificate as they were under the scope of article 4 of the Act no. 4054, it was decided that EFPA could not benefit from block exemption within the scope of the Block Exemption Communiqué on Vertical Agreements no. 2002/2 as the threshold specified in article 2(2) was exceeded and all alternatives of the said agreement did not fulfill all of the conditions in article 5 of the Act no. 4054 so it could not be granted individual exemption.

Partially exclusive off-premises points of sale agreement contains exclusivity provisions in favor of EFPA; prohibits placing competing beer products in refrigerators, makes it possible to impose penal clauses in case competing beer products are sold, provides for that cash discounts or discounts with cash based-contribution will be granted on condition that EFPA beer products are sold exclusively, contrary to the Board decision dated 10.04.2008 and numbered 08-28/321-105. Within this framework, the agreement in question was not granted negative clearance certificate as it was under the scope of article 4 of the Act no. 4054. It was decided that EFPA could not benefit from block exemption within the scope of the Block Exemption Communiqué on Vertical Agreements no. 2002/2 as the threshold specified in article 2(2) was exceeded the said agreement did not fulfill all of the conditions in article 5 of the Act no. 4054 so it could not be granted individual exemption.

Off-premises Points of Sale Agreement with Quantity Commitment proposes that off-premises points of sale shall commit to sell EFPA's beer products at an amount of liters laid down in the agreement but there is not a ban on selling competing beer products. The agreement in question was not granted negative clearance on the following grounds:

- Quantity commitment could be applied retrospectively and in an individualized way by means of cash contribution and discounts,
- Although purchase rates of points of sales are specified as much as the sales of EFPA in the previous year, they could be effected from a possible contraction in the beer market,
- EFPA may increase the targets with the incentive to increase its sales and points of sales may accord to those targets, which may result in amount forcing in practice and thus in actual exclusivity.

Subsequently, it was decided that EFPA could not benefit from block exemption within the scope of the Block Exemption Communiqué on Vertical Agreements no. 2002/2 as the threshold specified in article 2(2) was exceeded and the said agreement did not fulfill all of the conditions in article 5 of the Act no. 4054 so it could not be granted individual exemption.

Standard Off-premises Point of Sale Agreement does not include any restrictions related to the sale of competing beer products. Therefore, the agreement in question shall be given negative clearance certificate according to Article 8 of the Act No. 4054.

- **Exemption Examination about Partially Exclusive On-premises Points of Sale Agreements by Efes Pazarlama ve Dağıtım Ticaret A.Ş.**

Decision Date:	Decision No:	Type:
03.07.2017	**17-20/321-143**	**Exemption**

The decision was taken as a result of the request of Efes Pazarlama ve Dağıtım Ticaret A.Ş. (EFPA) for individual exemption to Partially Exclusive On-Premises Point of Sale Agreements, which was prepared by means of making amendments to the Fixed Term Agreement signed with Standard Points, which was granted negative clearance by the Board decision dated 23.05.2012 and numbered 12-27/796-224.

As a result of the analysis of the articles in the notified agreement, the following issues are found:

- The agreement includes exclusivity provisions in favor of EFPA, in other words imposes an obligation on on-premises points of sale to sell single brand in terms of draft beer by means of preventing the sale of competing draft beer products
- The agreement gives opportunity to apply penal clauses in case competing draft beer products are sold
- It provides for granting cash or cash based discounts on condition that EFPA's draft beer products are sold exclusively
- It imposes an obligation that all service, offer and other visual equipment of EFPA's draft beer products should be kept exclusively during the term of the agreement, contrary to the Board decisions dated 22.04.2005 and numbered 05-27/317-80, dated 23.05.2012 and numbered 12-27/796-224.
- It is forbidden for on-premises point of sale to keep or use service, offer and/or other visual equipment related to competing beer or heavy alcohol products aside from glasses and coasters that are necessary for service and offer.

As a result of the analysis made, Partially Exclusive On-premises Point of Sale Agreement to be signed between EFPA's dealers and distributors was not granted negative clearance certificate as it is under the scope of article 4 of the Act no. 4054. Moreover, the agreement could not benefit from block exemption within the scope of the Block Exemption Communiqué on Vertical Agreements no. 2002/2 as the threshold specified in article 2(2) was exceeded regarding EFPA. Partially Exclusive On-premises Point of Sale Agreement did not fulfill the conditions in article 5 of the Act no. 4054 so it was not granted individual exemption either.

In the application in question EFPA requested that the 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) be withdrawn in terms of bulk beer market if EFPA's Partial Exclusive On-premises Points of Sale Agreement could not be granted exemption. However, the request was rejected on the following grounds: the request is independent from the notified agreement and the subject of the file; it is related to past Board decisions about the sector; the results of the Board decision to be taken concern TUBORG directly; it requires a review of Board decisions about the sector by taking into account current market conditions and a comprehensive research. Another request of EFPA was the annulment of the arrangement made within the framework of the Board decision dated 10.04.2008 and numbered 08-28/321-105 allowing TUBORG and other beer producers/importers to keep their products in 20% of EFPA refrigerators in

on-premises points of sale under certain conditions. However, it was decided that it was not necessary to make any proceedings about the said request, as the Board decision in question did not adopt such rule.

Within the scope of the file, TUBORG requested that exclusivity right granted to EFPA in relation to the agreement to be signed with hotel chains working with tendering procedure, military facilities and restaurant chains (Agreement Signed with Central Purchasing Points) in line with the Board decision dated 23.05.2012 and numbered 12-27/796-224. However, the request was also rejected on the following grounds: the request is independent from the notified agreement and the subject of the file; it is related to past Board decisions about the sector; the results of the Board decision to be taken concern EFPA's interest; it requires a review of Board decisions about the sector by taking into account current market conditions and a comprehensive research.

- **Exemption Examination about Determining Credit Card Interchange Fees**

Decision Date:	Decision No:	Type:
08.06.2017	**17-19/294-130**	**Exemption**

The relevant decision was taken as a result of the exemption inquiry made in response to the request for granting exemption to determining credit card interchange fees under the body of Inter-bank Card Center (ICC).

In the application that includes a request by ICC for exemption for an indefinite term, it was suggested that the formula, which was granted an individual exemption as per the Board decision dated 21.08.2013 and numbered 13-48/672-288, should be applied in the same way.

Although determination of joint credit card interchange fees with a decision of CCI's Board of Directors is under the scope of article 4 of the Act no. 4054 as the freedom of competing banks to determine their price policies individually is restricted and consequently interchange fees turn into a single price, which limits competition in the card payment systems, it benefited from individual exemption within the scope of article 5 of the Act no. 4054 according to past Board decisions.

In light of previous Board decisions, the practices of ICC regarding the application for exemption fulfill the conditions listed in sub-paragraphs (a) and (c) of article 5 of the Act no. 4054 as economic development is ensured in payment systems and competition conditions in merchant - bank and bank - cardholder relations are not restricted except for determining a joint

commission. Similarly, taking into account that the interchange fee includes real costs and the system operates on the basis of sharing costs in accordance with Board decisions, it was concluded that conditions listed in sub-paragraphs (b) and (d) of the same article are fulfilled.

As a result of the evaluations made, determination of joint credit card interchange fees by a decision of CCI's Board of Directors is under the scope of article 4 of the Act no. 4054. However, due to intrinsic conditions of card payment systems market, determination of credit card interchange fees by CCI according to the formula specified by the Board and keeping the said fee valid unless there is a change of ± 5% was granted individual exemption within the scope of article 5 of the Act no. 4054 on the following conditions: (i) the data used by BKM will be monitored annually within the framework of independent monitoring procedures (ii) exchange rates will be published on CCI website by "showing annual rates and past 12-month rates, separating sub-items of funding and operational costs and indicating the number of funding days and funding interest rate separately, (iii) the periods when those data are set/valid (monthly or annually) are published on ICC's website for each data separately. It was decided that the term of the said exemption period shall terminate at the end of three years as of the reasoned decision is notified to CCI.

- **Exemption Examination for BKM TechPOS Project**

Decision Date:	Decision No:	Type:
09.08.2017	**17-26/405-182**	**Exemption**

The decision was taken as a result of the examination made in response to the request for extending the period of exemption for BKM TechPOS project realized by Interbank Card Center (ICC), which was granted 3-year individual exemption by the Board decision dated 16.01.2014 and numbered 14-02/42-20, during the process of transition to the new model (two years) and granting negative clearance certificate or individual exemption to the new model that is developed with the innovations within the scope of the project and will be applied after the transition period.

The Board decision dated 16.01.2014 and numbered 14-02/42-20 pointed out that ICC's economic activities that may affect competition by its partners/members which are also competitors in the banking sector would be contrary to article 4 of the Act no. 4054, TechPOS project was an activity of an association of undertakings within the scope of article 4 of the Act no. 4054, thus TechPOS project could not be granted negative clearance certificate. In line with the said Board decision, the evaluation mentioned

above is also valid for the current model to be applied during the transition period. Moreover, as stated in the said Board decision, TechPOS project where CCI is in an intermediary position may affect actual and potential competition between the producers of POS devices in the market for developing applications for new generation POS devices and between banks in the area of developing new payment systems and technological applications. On the other hand, although amendments were made to the new model, the amendments will not be able to eliminate such effects of TechPOS project and the same risks are valid for the new model. In this sense, TechPOS, which can be regarded as a decision of association of undertakings and which can affect competition between banks and competition between POS device producers was not granted negative clearance certificate.

As a result of the inquiry for individual exemption, the following conclusions were made:

- By including more parties and payment devices to the system and reducing the number and cost of transaction between the parties, the model may enable improvements in the provision of the services in question; moreover the new model may create cost advantages with respect to relatively weaker POS device producers that wish to enter to the market and undertakings making agreements with merchants and in this way it fulfills the condition listed in subparagraph (a) of article 5 of the Act no. 4054
- The new model fulfills the conditions in subparagraph (b) because TechPOS provides benefits for different consumer groups: the number of card accepting devices will increase, merchants will not be limited to agencies which makes merchant agreements only with producers, the system will be extended so as to cover devices that are not under the scope of the Act no. 3100 so more merchants will be included in TechPOS, as the number of banks that the merchants work with increases, cardholders will benefit from campaigns and opportunities granted on a card-basis, relatively weaker agencies and producers that make merchant agreements will have more favorable conditions for competition.
- As the scope of TechPOS project is extended so as to cover devices that are not under the scope of the Act no. 3100 and as other card accepting devices such as mPOS and kiosk are included, more business will participate to the system, which may increase competition between card accepting devices; therefore the condition listed in subparagraph (c) is fulfilled,

- At this stage, TechPOS does not restrict competition unduly to fulfill the first two conditions of exemption and thus condition listed in subparagraph (d) is fulfilled

Consequently, both the current model to be applied during two-year transition period and the new model to be applied afterwards were granted individual exemption as they fulfill all of the conditions listed article 5 of the Act no. 4054. However, as it is stated in the previous decision, since the market is developing and ICC is a powerful player comprised of banks, to monitor the circumstances in the market, it was found appropriate to extend the current individual exemption period for two years, which is specified as a transition period in the notification and to grant the new model to be applied at the end of that time individual exemption for two years.

- **Exemption Examination about the Withdrawal of Block Exemption from BSH Ev Aletleri Sanayi ve Ticaret A.Ş.'s Brand Exclusive Dealing Contract**

Decision Date:	Decision No:	Type:
22.08.2017	**17-27/454-19**	**Preliminary Inquiry**

The decision in question was taken as a result of the preliminary inquiry conducted in response to the claim that BSH Ev Aletleri Sanayi ve Ticaret A.Ş. (BSH) restricted internet sales by its dealers.

Regarding internet sales, the following provisions are laid down in "Exclusive Dealing Contract" signed between BSH and its dealers: "In respect of BSH's contract business, the dealer's rights to establish branches and distribution firms tied to itself, open retail sales branches and create more than one resellership are reserved. BSH holds exclusive rights and powers related to internet sales and marketing/electronic trade of contract products and the dealer cannot display, sell or market contract products on the internet without pre-authorization of BSH in writing. BSH explained that the provision in question was amended in 2015, updated version of the article is "BSH holds rights and powers related to internet sales and marketing/electronic trade of contract products and the dealer cannot make active sales of contract products on the internet pre-authorization of BSH in writing. Moreover, in the contract it is stated "...the dealer cannot display, sell or market, even without displaying, any products except for contract products or mediate for their sales by any means. According to the said provision, the dealer could only sell BSH's products in its store. A document obtained during on-sight inspection showed that BSH listed some of the

dealers that made sales on platforms such as www.n11.com and warned them.

According to the decision dated 06.10.2015 and numbered 15-37/573-195 regarding BSH's "Brand Exclusive Dealer contract" the said contract is a vertical agreement including an exclusivity provision, is contrary to article 4 of the Act no. 4054 and thus the contract cannot be granted negative clearance certificate. Afterwards, the contract was evaluated with respect to block exemption under the scope of the Block Exemption Communiqué no. 2002/2 on Vertical Agreements (Communiqué no. 2002/2); it was found that BSH's market share in all of the markets defined within the framework of the file is under 40%. Non-compete obligation in the notified vertical relationship does not exceed the five-year period laid down in article 5 of the Communiqué no. 2002/2 and there are not any restrictive provisions covering technology chain stores in the contract. Moreover, the Board decision dated 19.02.2015 and numbered 15-08/107-44 points out that BSH's exclusive dealing contract (Siemens Exclusive Dealer contract), whose content is the same as the notified contract, benefits from exemption under the scope of the Communiqué no. 2002/2, there are not any substantial differences between the contract in the said Board decision and notified contract; thus it was decided that "Brand Exclusive Dealer contract" signed between BSH and the dealers shall benefit from block exemption within the scope of the Communiqué no. 2002/2.

According to Article 13 of the Act no. 4054, in case the conditions listed in the article are fulfilled, exemption or negative clearance decisions may be withdrawn or certain activities of the parties may be prohibited. According to Article 6(1) of the Communiqué no. 2002/2, the Board may withdraw the benefit of the block exemption granted as per the Communiqué, in case it is established that the contract has effects incompatible with the conditions of Article 5 of the Act. Therefore, the Board may withdraw the benefit of block exemption granted by the Communiqué if a vertical agreement is far from fulfilling the conditions that enables it to be granted exemption with respect to the effects it creates in the market at the implementation stage, although it is prepared in accordance with the Communiqué.

Within this framework, if it is concluded that BSH's Exclusive Dealer Contract does not fulfill one of the conditions listed in article 5 of the Act, the exemption granted to the said Contract may be withdrawn. Consequently, BSH's conduct resulting in direct or indirect restriction of the sales of durable consumer goods by its dealers on the internet was examined in respect of exemption.

It was understood that the provision in question does not fulfill the condition of ensuring new developments and improvements in the production or distribution of goods and in the provision of services. It was concluded that Brand Exclusive Dealer Contract signed between BSH and its dealers is under the scope of article 4 of the Act no. 4054, the contract creates effects incompatible with the conditions listed in article 5 of the Act no. 4054, thus the block exemption granted to the contract by the Board decision dated 06.10.2015 and numbered 15-37/573195 within the scope of the Communiqué no. 2002/2 should be withdrawn as per article 13 of the Act.

At this point, it was decided that it is not necessary to initiate an investigation about BSH as per article 41 of the Act no. 4054 considering the existence of important competitors with respect to the products concerned, the nature of the products and the fact that BSH did not impose concrete sanctions on dealers because of online sales. Moreover, the Presidency shall be assigned to send an opinion to the undertaking as per article 9(3) of the Act no. 4054 that Brand Exclusive Dealer Contract should be implemented after being amended and becoming compatible with block exemption or being evaluated within the framework of individual exemption following an application to the Authority and the undertaking should avoid conduct that creates or is likely to create anticompetitive effects.

- **The Decision Taken in Relation to the Examination Whether Adıyaman Chamber of Industry and Commerce Submitted False and Misleading Information**

Decision Date:	Decision No:	Type:
03.07.2017	**17-20/310-136**	

The decision was taken as a result of the examination whether information submitted by Adıyaman Ticaret ve Sanayi Odası (ATSO) was misleading or false under the scope of article 16(1)(c) of the Act no. 4054. ATSO submitted the information within the framework of the preliminary inquiry conducted as per the Board decision dated 06.12.2016 and numbered 16-42/695-M in response to the claims that LPG stations operating in Adıyaman district violated article 4 of the Act no. 4054 by fixing prices.

During the preliminary inquiry, information about the news "Problems with the Fuel Sector in Our City" published on the news website Kahta Gündem was requested. ATSO answered that they did not have any information about the meeting mentioned in the news. Moreover, ATSO Chairman of the Board (...) stated in the meeting with rapporteurs that there were not any

meetings at ATSO's premises under his knowledge. However, at the investigation stage, photographs used in the said news as well as documents exactly the same as the news report and findings showing that the meeting was held according to a decision of ATSO Board of Directors and the meeting was included in event schedule for members and e-bulletin were obtained. Moreover, in the response letter related to the information request sent to ATSO following on-site inspection, it was stated that the meeting mentioned in the news was held at ATSO's premises and the names of attendees were given. Therefore, answers ATSO gave during preliminary inquiry and during investigation were inconsistent.

Within the scope of the file, as a result of the findings that the meeting regarding the information requests were held at ATSO's premises, it was concluded that the response to the request for information from ATSO during the preliminary inquiry and information given during the meeting with ATSO Chairman of the Board (...) were false and misleading as per article 16(1)(c).

On the other hand, analyzing the gross income of 2016 sent by ATSO, it was observed that in case the relative fine rate specified in article 16(1) of the Act no. 4054 is applied and administrative fines amounting to %0.1 of ATSO's annual gross income is imposed, the amount of administrative fine would be under the minimum fine specified in the first paragraph of the same article. Therefore, while calculating the administrative fine to be imposed on ATSO, the fact that administrative fine to be given according to subparagraph c of article 16 of the Act no. 4054 cannot be lower than 18.377 TL, which was laid down in the Communiqué no. 2017/1, was taken into account. Within this framework, ATSO was imposed 18.377 TL, which was the lower threshold for administrative fines for the year 2017.

- **The Decision Concerning Hindrance of On-Site Inspection by Çekok Gıda San. Ve Tic. A.Ş.**

Decision Date:	Decision No:	Type:
03.07.2017	**17-20/318-140**	

As a result of the preliminary inquiry about whether undertakings operating in wholesale of fresh fruits and vegetables were engaged in anticompetitive activities, a decision was taken not to initiate an investigation and about obstruction of on-site inspection by Çekok Gıda San. ve Tic. A.Ş (ÇEKOK).

Within the scope of the preliminary inquiry, the rapporteurs arrived at ÇEKOK on 17.05.2017 at 10:48, they showed corporate identity cards and

gave information about the powers granted as per articles 14 and 15 of the Act no. 4054 to experts working under the Board as well as administrative fines laid down in articles 16 and 17 of the same Act. However, they could start on-sight inspection at 12:24 with a delay of approximately 1.5 hours. The explanation of the undertaking written in on-site-inspection report is that their firm's name was not specified in the authorization certificate, they could allow inspection only if a clear document was submitted or a written request was made for the required information and documents, they could also help in case the content of the inspection to be made in ÇEKOK was shared; however, they had hesitations about the inspection because they had doubts about the authenticity of authorization certificates and corporate identity cards.

The on-site inspection in ÇEKOK was made with 1.5 hour-delay because the officials working for the undertaking prevented the inspection. It was concluded that the abovementioned conduct by the officials could be regarded as hindrance of on-sight inspection. Within this framework, as per article 16(1)(d), the undertaking was imposed 3.120.136,61 TL administrative fines, amounting to 0,5% of its gross revenues accrued at the end of the financial year 2016.

- **European Court of Justice upholds Telefónica/Portugal Telecom decision**

The European Court of Justice dismissed the appeal brought by Telefónica against a judgment of the General Court (GC) regarding a non-compete agreement and confirmed that Telefónica and Portugal Telecom's agreement not to compete in the Iberian market amounted to a market sharing agreement with the object of restricting competition and therefore was a hardcore restriction of competition – despite Telefónica's claims that it was pushed into the clause by Portugal's government.

In 2010, Telefónica and Portugal Telecom (PT) concluded an agreement by which Telefónica acquired sole control over the Brazilian telecom company Vivo. Telefónica and PT had previously jointly held the shares of Vivo. This agreement included a non-compete clause prohibiting the companies from conducting business in the telecommunications sector that "*can be deemed to be in competition with the other in the Iberian market*", excluding economic activities already performed by the companies.

In 2013, the Commission found that the non-compete clause amounted to a market sharing agreement with the object of restricting competition and fined Telefónica and PT EURO 67 million and EURO 12 million respectively. The GC upheld the Commission's finding. Telefónica appealed GC's judgment to ECJ.

ECJ's judgment confirms that the non-compete clause entered into by the parties qualified as a by object infringement. Non-compete clauses agreed upon in the context of a transaction could qualify as ancillary restraints only if they are essential for the implementation of that transaction.

Sources:

https://www.stibbe.com/en/news/2018/january/court-of-justice-dismisses-appeal-by-telef%C3%B3nica-on-non-compete-clause-in-telecoms-transaction

https://globalcompetitionreview.com/article/1151873/ecj-upholds-telef%C3%B3nica-portugal-telecom-decision

- **Uber/Yandex merger deal got clearance from Russia's Federal Antimonopoly Service**

Russia's Federal Antimonopoly Service (the FAS) has conditionally cleared the deal between the US-based Uber and its rival Yandex.Taxi to form a

joint venture of which 59.3% owned by Yandex, 36.6% by Uber. Yandex-Uber joint venture is required not to prevent its passengers, drivers and partners from working with other ride-hailing services

The merger is expected to be completed in January 2018. After the completion, consumers will be able to use both the Yandex.Taxi and Uber apps to book rides, whereas the driver-side applications will be integrated in order to enable both to accept bookings from each other.

Sources:

https://www.bloomberg.com/news/articles/2017-11-24/uber-s-plan-to-merge-russian-business-with-yandex-approved

https://globalcompetitionreview.com/article/1151102/russia-approves-uber-yandex

- **Italian Competition Authority fined the Big Four Accounting Firms Euro 23 Million for bid-rigging.**

The Italian Competition Authority found that the world's four largest professional services firms (Deloitte, KPMG, Ernst & Young and PwC) coordinated bids for a government tender that related to EU funds.

The Italian Competition Authority stated that the Deloitte, KPMG, Ernst & Young and PwC auditing networks had 1colluded" to win contracts worth a total of 66 million euros being offered by Consip SpA, the entity created by Italy's finance ministry to centralize public purchasing; "nullifying" the bidding process and "neutralising competition from outside the cartel" and fined them more than EURO 23 million.

Sources:

https://globalcompetitionreview.com/article/1149930/big-four-ordered-to-pay-eur23-million-for-italian-bid-rigging

https://www.law360.com/articles/982811/italy-fines-big-four-accounting-firms-23m-for-collusion

https://www.reuters.com/article/us-italy-antitrust/italy-antitrust-fines-big-four-accounting-firms-total-of-23-million-euros-idUSKBN1D72DE

- **Japan's Supreme Court Affirms Extraterritoriality of the Antimonopoly Act**

The Supreme Court of Japan ruled that the country's antitrust law applies to conduct outside Japan so long as it harms competition within the country, even if the original sale of the cartelised product occurred in a foreign nation.

Japan's Antimonopoly Act does not explicitly state whether the Act applies to allegements that were committed overseas. The Court's decision was based on article 1 of the Act, which states the purpose of the Act is to "*promote democratic and wholesome development of the national economy as well as secure the interests of general consumers*" by promoting fair and free competition. Therefore, it was concluded by the Supreme Court that the location where the acts were committed does not affect the application of the Act, as long as they harm the competition in the Japanese market.

Sources:

https://globalcompetitionreview.com/article/1151805/japan%E2%80%99s-supreme-court-says-effects-enough-for-jurisdiction

http://www.loc.gov/law/foreign-news/article/japan-supreme-court-affirms-extraterritoriality-of-antimonopoly-act/

- **Australian Competition and Consumer Commission initiated a market investigation regarding online platforms**

Australia's government has asked the country's competition and consumer protection authority (ACCC) to examine the effects that online platforms such as Facebook and Google are having on competition across the media and advertising sectors. In particular, the inquiry will analyze the impact of digital platforms on the supply of news and journalistic content and the implications of this for media content creators, advertisers and consumers.

"*The ACCC goes into this inquiry with an open mind to and will study how digital platforms such as Facebook and Google operate to fully understand their influence in Australia… We will examine whether platforms are exercising market power in commercial dealings to the detriment of consumers, media content creators and advertisers… The ACCC will look closely at longer-term trends and the effect of technological change on competition in media and advertising, We will also consider the impact of information asymmetry between digital platform providers and advertisers*

and consumers… As the media sector evolves, there are growing concerns that digital platforms are affecting traditional media's ability to fund the development of content… Through our inquiry, the ACCC will look closely at the impact of digital platforms on the level of choice and quality of news and content being produced by Australian journalists." said the ACCC Chairman Rod Sims.

It is stated that the ACCC is expected to produce a preliminary report early December 2018, with a final report due early June 2019.

Sources:

https://globalcompetitionreview.com/article/1151514/accc-investigates-online-platforms

https://www.accc.gov.au/media-release/accc-commences-inquiry-into-digital-platforms

- **13th Chamber of the Council of State's decision dated 15.10.2017 and numbered E. 2014/2458 K. 2017/2511**

The phrase " issues such as" included in article 5(2) of the Regulation on Fines is in compliance with the law. In case the proposed fine amounts are distributed too widely in the member votes to reach quorum, the fine most detrimental to the undertaking is added to the closest fine until quorum is reached. Competition Authority has jurisdiction in the regulated fields as well. When assessing excessive pricing, the conditions of the concrete case are examined, excessive pricing is an abuse even when it does not lead to excessive profits; whether or not the undertaking is losing money has no bearing. Anti-competitive market foreclosure must be shown to be likely in tying practices.

To begin with, this decision of the 13th Chamber of the Council of State includes a discussion on whether the phrase "issues such as" included in article 5(2) of the Regulation on Fines are in compliance with the law. The relevant section of the decision states:

"When the abovementioned provisions of the legislation are considered together, it is seen that, with respect to the setting of administrative fines, the relevant article of the Act no 4054 provides an arrangement based on article 17.2 of the Act no 5326. This arrangement puts forward certain criteria to consider when setting administrative fines and includes the phrase 'issues such as' so as not to put a restriction on these parameters. The same phrase is repeated in article 16.2 of the Regulation, which specifies the conditions to be considered when setting the base rate of fines. As such, the provision of the Regulation under discussion is not violation of the principle of legality, nor would it give rise to any uncertainties.."

Afterwards, the Chamber addresses the concept of quorum. In the meeting held with the participation of 7 members, 5 members voted for a violation while 2 voted against. Concerning the amount of the fine, four members voted to impose a fine at 1%, with one of them citing differing grounds, one member voted to impose a fine at a higher rate, one member voted to fine at a rate of .5%, and one voted to impose no fines at all. The section this subject is discussed points out that Article 229 of the Code of Criminal Procedure no 5271 would apply by analogy to the decision taken as the Board. Accordingly, quorum should be reached by adding the vote most detrimental to the defendant to the closest vote. In the case in question, quorum was reached with the parallel votes of 5 members and thus there was no violation of the law. The relevant section of the decision is as follows:

"Article 51.1 of the Act no 4054, titled 'Meeting and Decision Quorum,' provides that in its final decisions, the Board shall convene with the participation of at least a total of five members including the Chairman or the Deputy Chairman, and shall render decisions via the parallel votes of at least four members. Accordingly, it is clear that Competition Board decisions may be taken with the "parallel" votes of at least 4 members. Therefore, if at least four members vote for the existence of an infringement, the Board decides that an infringement exists and administrative fines should be imposed. However, the Act does not clarify what 'parallel' votes mean in relation to reaching the quorum for setting the amount of the administrative fines, after an infringement decision is taken. Consequently, an analysis must be conducted into how to calculate quorum where (parallel) votes to impose administrative fines on the undertaking investigated differ in terms of the amount of the fine to be imposed.

By law, where the decision to impose an administrative fine may only be taken by the Board, if the votes of the Board members are distributed in such a way as to make it impossible to reach the specified quorum for the amount of the fine, the amount of the fine must be determined by adding the vote most detrimental to the person on whom the administrative fine is to be imposed to the vote closest to it until quorum is reached.

As a matter of fact, the regulation of article 229 of the Code of Criminal Procedure stating that in case the votes are too widely distributed the vote most detrimental to the defendant should be added to the closest vote until majority is reached addresses the issue of how to reach quorum in decisions taken as a Board. Thus, the regulation therein concerning the procedures of taking decisions in a committee should be implemented by analogy by all administrative boards empowered to impose administrative fines.

The facts in the file may be summarized as follows: as a result of the investigation launched on the Authority's own initiative and in response to the complaint claiming that TÜPRAŞ abused its dominant position within the framework of article 6 of the Act no 4054 by means of its pricing and contractual practices, a total of 7 members including the Chairman of the Board Nurettin Kaldırımcı and Board members Kenan Türk, Murat Çetinkaya, Reşit Gürpınar, Fevzi Özkan, Tahir Saraç and Metin Arslan attended the meeting where the relevant Board decision was taken. An abuse of dominant position under article 6 of the Act no 4054 was identified, with the dissenting votes of Murat Çetinkaya and Reşit Gürpınar. The second article of the Board decision, imposing an administrative fine at 1%, by discretion, of the gross annual revenues of the undertaking in question as generated by the end of the FY2013 was taken by majority vote, with the

dissenting votes of Nurettin Kaldırımcı, Reşit Gürpınar ve Metin Arslan and with dissenting grounds by Murat Çetinkaya. Nurettin Kaldırımcı voted to set the rate of the fine at .5%, Metin Arslan voted to set the fine at a higher rate and Reşit Gürpınar voted to impose no fines at all.

Under the circumstances, it was decided with the majority votes of 5 members that TÜPRAŞ violated article 6 of the Act no 4054 through its pricing and contractual practices and should be imposed an administrative fine. However, the votes were widely separated with respect to the amount of the administrative fine to be imposed. Kenan Türk, Fevzi Özkan and Tahir Saraç voted to impose a fine at 1% of the gross revenue, while Nurettin Kaldırımcı voted to set the fine at .5%, Metin Arslan voted for a higher amount and Reşit Gürpınar voted to impose no fines at all. As a result, a total of 5 members voted in parallel, namely that the relevant undertaking should be imposed administrative fines, while disagreeing onthe amount of the fine to be imposed. In this situation, the amount of the fine must be determined by adding the vote that is most detrimental to the undertaking in question to the closest vote, until quorum is reached. In light of this general rule for adding votes, it is clear that quorum has been reached for the second section of the Board decision imposing fines on the aforementioned undertaking at 1% of its gross revenues calculated by the Board and generated as of the end of the FY2013.'

Another point discussed in the Chamber decision was whether Competition Board had jurisdiction to examine the subject at all. The relevant part of the Chamber decision includes the following assessment:

" ..Before addressing the solution of the dispute, we should first assess the boundaries of the power held by EMRA and Competition Authority in relation to the detection and sanctioning of competition infringements.

In this context, it is obvious that having a particular market subject to regulation by a regulatory and supervisory authority should not exempt the activities in that market from the application of the Act no 4054. Under the Act no 4054, the Competition Board is charged with preventing those agreements, decisions and practices which prevent, distort or restrict competition in all markets for goods and services, as well as the abuse of dominance by dominant undertakings in the market, and to ensure the protection of competition by performing the necessary regulations and supervisions. Even though the aforementioned regulatory and supervisory authorities are obligated to ensure a competitive market structure in their disposals related to the markets, the identification and administrative sanctioning of the competition infringements that may occur in those

markets fall under the jurisdiction of the Competition Board, barring any exemptions specified by law or secondary legislation…"

The Chamber decision's assessment of the excessive pricing claims includes the observation that the practice of excessive pricing itself was under competitive supervision, that it was in compliance with the law to make the price comparison with Platts İtaly, that similarly domestic market ex-refinery sale prices could be compared with exports market prices, that the Economic Value Test aimed to determine whether the pricing was excessive, that the assessment could not focus on a standard period and profit margin, that sensitivity to oil prices was at the highest level, and that excessive pricing would be abuse for consumers even if it did not lead to excessive profits. The relevant sections of the decision are as follows:

" On the other hand, TÜPRAŞ was the sole player in the Turkish refinery market. A geographical price comparison was not conducted since rivals operating in different geographical markets had different sources of crude oil supplies, logistical conditions and legal regulations, all of which would lead to unreliable results. Instead, a comparison was made with the Platts Italy CIF Med prices, which has the power to set worldwide pricing and whose prices are used as reference points for physical oil trade around the world. All of the above, taken together with the provision of article 10 of the Petroleum Market Law no 5015, which states that '...prices shall be set in light of the conditions of the closest accessible global free market...' as well as the fact that in the pricing tariff presented to EMRA TÜPRAŞ stated that Mediterranean region prices would be taken as a reference, shows that basing the comparison on the closest international prices was not in violation of the legislation.

The basic framework for identifying instances of excessive pricing is determined by the Economic Value Test (EVT), presented in the 'United Brands' decision of the Court of Justice of the European Union (CJEU). The main goal of the EVT is to assess the pricing practices of the dominant undertaking from the perspective of whether they lead to excessive pricing. This decision of the CJEU does not restrict the kind of comparisons that might be made, but clarifies that other methods for identifying excessive pricing may be found. In this respect, for the dispute comprising the subject matter of the lawsuit, comparing TÜPRAŞ's domestic RSPs with export market prices is not in violation of the law.

An examination of the European Union practice and the Competition Authority practice shows that a standard period or profit margin is not set concerning the excessive pricing practice, and neither is the case-law

consistent in an instructive way. In this context, since each concrete case must be assessed on its own merits and since in the present case, the consumer had extreme sensitivity to petrol prices, the court did not find any contradiction to the law in the infringement decision, which was based on the fact that TÜPRAŞ RSPs were significantly higher than Platts Italy CIF Med prices between 11.10.208-01.01.2009, that average RSP in this period was above Platts Italy CIF Med prices by 14.5% in gasoline, by 15% in diesel fuel, and that the difference of around 5% in the annual comparisons nearly tripled between 11.10.2008 and 01.01.2009."

Lastly, the Chamber addressed the tying practices and included the following assessment on the subject:

"Previous decisions by the Competition Board on tying practices stated that anti-competitive market foreclosure was not necessary for every case and that, depending on the case, the sole presence of a tying practice could be seen as a violation. In spite of these decisions, when the aforementioned provisions of the legislation, explanations and Competition Authority practices are taken together, it becomes clear that for a tying practice to be considered a violation under the Act no 4054, the following requirements must co-occur: the practice must be executed by an undertaking holding dominant position in the product market, the tying and tied products must be two separate products, and the tying practice must be likely to lead to anti-competitive market foreclosure.

In some tying cases the undertaking may have dominant position in more than one product. As the number of such products subject to tying increases the likelihood of anti-competitive foreclosure increases as well.

It is clear that TÜPRAŞ repeatedly warned POAŞ that in case POAŞ refused to buy a certain amount of rural diesel from TÜPRAŞ, it would not sell the products other than rural diesel at the requested amounts. As a matter of fact, TÜPRAŞ did indeed limit supplies of other products to POAŞ in October 2009 since POAŞ did not buy a sufficient amount of rural diesel. Similarly, after 2006 TÜPRAŞ repeatedly warned ALPET not to buy predominantly black oil products (fuel oil, heating oil, asphalt) and to buy similar amounts of both black and white oil products. In February 2008, allocation of all products to ALPET was dropped to 20% of their total demand since ALPET's white oil products purchases in December 2007 and January 2008 were below the desired amount. Consequently, it is easily observed that tying products and tied products were clearly identified and different products were tied together.

On the other hand, as a result of the tying practice aimed at POAŞ in 2009, POAŞ agreed to increase its purchases of rural diesel from TÜPRAŞ since POAŞ, unable to obtain an alternative supply source within a reasonable time frame, failed to sell certain products and to meet its national inventory obligations by mid-October. Only after this development were the supply restrictions on POAŞ removed. Similarly, as a result of the tying practice aimed at ALPET, the latter was forced to significantly increase its white oil product (gasoline and diesel fuel) purchases from TÜPRAŞ in 2008 in comparison to the previous months. Consequently, both POAŞ and ALPET were forced to switch their purchase programs to TÜPRAŞ instead of towards alternative sources of supply. This situation clearly presents the anti-competitive impact of the relevant practices of TÜPRAŞ."

- **The Settlement Procedure in the EUROPEAN Commission's Cartel Cases: An Early Evaluation**

Published By: Journal of Antiturst Enforcement, 2007, Vol. 5 No. 3

Author: Kai Hüschelrath and Ulrich Laitenberger

European Commission aims at promoting the speed and efficiency of Cartel investigations by practicing EU Settlement Procedure in 2008. Although there are many different studies which evaluate the effects of the Procedure, none of them is based on a detailed empirical analysis. This article is prepared with the purpose of assessing the impact of the EU Settlement Procedure in the cartel investigations process in accordance with the empirical results.

After the legal regulations related to the settlement procedure and enforcement are mentioned, hypotheses are produced for possible determinants of cartel investigations. These determinants and their sub-indices also create the explanatory variables of the regression model, which are used in the study. 84 investigations, which were finalized by the European Commission between 2000 and 2014, are used as a data set in analysis. The effects of these variables on the duration of cartel investigations after and before the settlements are estimated. The analysis shows a statistically significant reduction in the duration of settled cases of about 8.7 months. This data indicates that settlement procedure has achieved its primary aim. In general, EU Settlement Procedure enables to close the investigations faster in cartel cases by eliminating or reducing several procedural steps required by the standard procedure such as full access to the file, drafting and oral hearing. When the resources saved are transferred to other investigations, fight against cartels can be more effective and deterrent. In order to increase the effectiveness in the settlement, it is important to choose appropriate cases and avoid hybrid cases. The article makes inferences by mentioning the possible impacts of the procedure on the companies to increase effectiveness of the settlement procedure and to fight against cartels actively.

Finally, the article concludes that further empirical analyses are necessary for an evaluation of the effects of the settlement procedure on welfare, taking into account the discussions about determination of fines, the operability of the leniency program, the probability and success of appeals as well as overall deterrence in cartel investigations.

Source:

https://doi.org/10.1093/jaenfo/jnw015

- **Regulation, Institutions and Productivity: New Macroeconomic Evidence from OECD Countries**

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Author: Balázs Égert

Although there is a lot of empirical research on the factors effecting multi-factor productivity (MFP) at the firm and industry level, surprisingly very few research has been conducted on the determinants of MFP at the macroeconomic level. This paper, which aims to fill this gap in the literature, discusses the determinants of country-level MFP with product and labor market regulations and the capacity of institutions. First, invariant and variant variables as well as sub-indices of those variables are determined in the study.

Trade openness, innovation intensity, product market regulations, labor market regulations and control variables (human capital and output gap) are variant variables. Invariant variables in the paper are categorized under the headings product market regulations, procedures related to entrepreneurship and institutions. The reason why product market regulations are referred as variant variables and invariant variables is related to sub-indices titles. Sub-indices included in variant variables related to product market is regulations in electricity, transport and communication sectors and entry barriers and public ownership in those sectors. Sub-indices related to invariant variables are state control, barriers to entrepreneurship and barriers to trade and investment.

After invariant and variant variables to be used in the empirical analysis are determined, coefficients in the model are estimated by using dynamic least square method. The results show that in the last 30 years, in OECD countries, anticompetitive product market regulations are associated with lower MFP levels and that high innovation and more competitive environment result in higher MFP. Moreover, it is understood that the effects of product market regulations on MFP may depend on the level of labor market regulations. Factors such as institutionalized agencies, a more business friendly environment and lower barriers to trade increase the positive effects of R&D expenditures on MFP. Lastly, the study emphasizes that MFP differences between countries can be explained to a large extend

by variation in labor market regulations, barriers to trade and investment and institutions between countries.

Source:

http://www.oecd-ilibrary.org/docserver/download/579ceba4-en.pdf?expires=1517321648&id=id&accname=guest&checksum=CFDB80C63A9CFB1A755834214F1F1C1A

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