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INTRODUCTION

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We are proud to present to you the Competition Bulletin for the second three 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 three investigations conducted under article 6 of the Act No. 4054 on the Protection of Competition and two investigations conducted under article 4.

The "News around the World" section of the Competition Bulletin includes news from EU, United Kingdom, US, China, Mexico and the Nederlands.

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

The last section, "Economic Studies", includes a summary of an aricle published by the EU Commission titled "Economic Impact of Competition Policy Enforcement on the Functioning of Telecom Markets in the EU" and another article published in the Journal of European Competition Law & Practice titled " How to Measure Local Competition".

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

- **Autogas Investigation on Aygaz A.Ş.**

Decision Date:	Decision No:	Type:
16.11.2016	**16-39/659-294**	**Investigation**

The relevant decision was taken as a result of the investigation launched in response to the Ankara 16th Administrative Court's annulment decision, in order to determine whether Aygaz A.Ş. violated the Act no 4054 by maintaining resale prices of its autogas dealers, .

Within the framework of the file, the claims of Aygaz engaging in resale price maintenance for autogas dealers were assessed in two groups, namely: a) the claim that the price difference between the pump sale prices of Mogaz and Aygaz brand stations were maintained, and b) the claim that pump prices for Aygaz brand stations were maintained.

Concerning the first claim, it was stated that the expressions included in the evidence acquired during the preliminary inquiry process and listed in the decision as Document-1 suggested that there might have been an intervention by AYGAZ on the sales prices of the fuel station titled TMZ. However, no other information or document was found indicating that AYGAZ fixed the price difference between the pump prices of Mogaz and Aygaz brand stations and intervened in the resale prices of the dealers with this object in mind. On the other hand, there is no evidence in the file indicating that AYGAZ forced or otherwise put pressure and imposed sanctions on those dealers which deviated from the price it wanted to implement, in respect of either TMZ or any other dealer.

Therefore, based solely on Document-1, the Board has been unable to conclude that AYGAZ fixed the price difference between the pump sale prices of Aygaz and Mogaz brand stations. Even if it were accepted that AYGAZ intervened on the sale prices of TMZ within the scope of Document-1, it was concluded that this intervention was an isolated instance aimed at a single station, and not a systematic issue.

The investigation also assumed an intervention by AYGAZ on the sale prices of TMZ and assessed how restrictive such an intervention would be on competition. Accordingly, in Ankara AYGAZ had a total of 78 stations in 2012, 60 of which were Aygaz branded and 18 were Mogaz branded; while in 2013 AYGAZ had 85 stations total, with 66 Aygaz branded and 19 Mogaz branded. Therefore, even under the assumption that the relevant market was defined as the Ankara province, this possible isolated intervention on a

single station would be unlikely to lead to significant anti-competitive effects in the market.

As for the second claim of the file, which is the claim that AYGAZ determined the pump prices for AYGAZ stations, assessments were made concerning the agency status of the stations titled BULGAZ and ERYILDIZ, as well as concerning the AYGAZ stations in Ankara and Konya.

Due to the fact that the documents concerning BULGAZ and ERYILDIZ acquired within the framework of the investigation covered a period of time in which both dealers were in an agency relationship with AYGAZ, it was determined that AYGAZ setting pump prices of the dealers in question within the framework of the AYGAZ-BULGAZ and AYGAZ-ERYILDIZ relationship did not fall under article 4 of the Act no 4054.

When assessing the AYGAZ stations in Ankara, the Board first examined the margin distribution system in detail within the framework of the Act no 4054, in order to see whether the practices mentioned in the claim constituted an instance of vertical price fixing.

The dealership contract AYGAZ signed with its dealers specifies a "Total Distribution Margin" (TDM) between AYGAZ and the dealer, and sets the ratios at which the aforementioned TDM would be allocated. In addition, the dealer or AYGAZ can also make some discounts, either individually or jointly. It was found that the "margin allocation" system is the most-preferred operating model in the agreements AYGAZ signed with autogas dealers and is also implemented in a largely similar manner by other distribution companies active in the autogas market.

In light of the vertical relationship between AYGAZ and its dealers, the practices in question were addressed under the practice of resale price maintenance (RPM). However, it was concluded that RPM did not occur, since the determined prices were maximum prices and there was no profit margin enforced on the dealer in the contractual percentage allocation of the difference between the maximum prices set and the autogas costs between the parties.

In the assessment concerning the AYGAZ stations in Konya, it was first assessed whether AYGAZ fixed resale prices for its Konya dealers, with the conclusion that the correspondence related to the dealers in Konya resulted from a practice based on a margin allocation system, similar to the maintenance of the pump sale prices of the AYGAZ dealers in Ankara. Within this context, the Board decided that no information, documents or finding were uncovered suggesting the existence of RPM under article 4 of the Act

no 4054. As a result, it was concluded that AYGAZ did not violate article 4 of the Act no 4054.

- **Investigation on Booking.com B.V. Concerning the "Best Price Guarantee" Practice**

Decision Date:	Decision No:	Type:
05.01.2016	**17-01/12-4**	**Investigation**

The relevant decision was taken as a result of the investigation launched in order to determine whether Booking.com B.V. (BOOKINGCOM) and its Turkish office Bookingdotcom Destek Hizmetleri Limited Şirketi (BOOKINGDOTCOM) violated articles 4 and 6 of the Act no 4054 with their "best price guarantee" practice within the scope of the booking services they provide.

Under the framework of the file, the relevant product market was defined as "online accommodation booking platform services market," with "Turkey" defined as the relevant geographical market.

In order to assess the online accommodation booking platform services market, a sample of 60 facilities were selected and data from these facilities were evaluated. It was found that out of the 60 accommodation facilities in the sample, 59 worked with BOOKINGCOM, 51 with EXPEDIA, 47 with HRS and 27 with AGODA as online platforms.

BOOKINGCOM and its rivals provide services to the accommodation facilities on the one hand and to the consumers looking for accommodation on the other, which makes the online accommodation booking platform services market a two-sided market. Evaluation of the market share of BOOKINGCOM saw that the market displayed a rather rapid growth, that between 2010 and 2014 BOOKINGCOM's market share tended to increase yearly unlike its competitors, while its closest rival EXPEDIA lost market power every year in contrast to BOOKINGCOM.

The decision stated that those agreements with "Most Favored Customer" (MFC) clauses, also known in the literature as price parity clauses, may be addressed either under article 4 of the Act no 4054, in particular under the "Complicating and restricting the activities of competing undertakings..." provision, or within the framework of article 6 of the Act, under abuse of dominant position through "exclusionary practices". In light of the fact that similar assessments would be made regardless of which article of the Act is deemed appropriate, MFC practices of BOOKINGCOM were addressed under article 4 of the Act no 4054 within the scope of the investigation conducted.

The agreements signed between BOOKINGCOM and accommodation facilities place a price and quota parity obligation on the facilities concerned, with the section titled "Minimum Allocation and Parity". Additionally, in line with the "Best Price Guarantee" practice included in the same agreements, accommodation facilities guarantee to BOOKINGCOM that a better price for an equivalent room will not be offered online.

It was assessed that the MFC provisions implemented by BOOKINGCOM reduced competition in the online accommodation booking platform services market in terms of commission rates taken, and foreclosed the market to competitors. Due to the relevant provisions, competing platforms are unable to get better prices and terms for rooms or larger quotas from accommodation facilities in return for lower commission rates, which restricts their opportunities to compete with BOOKINGCOM.

The provisions under examination also restrict competition by complicating entry into the online accommodation booking platform services market and creating barriers to entry to the market. In the market where indirect network effects are also present, those accommodation facilities which conclude agreements with BOOKINGCOM are unable to reflect lower commission rates they pay as lower room prices or better terms. This undermines the economic incentive mechanism that would allow these facilities to work with new entrants who are trying to reach a critical volume threshold in order to become an efficient rival in the market.

In terms of the activities of the accommodation facilities, MFC provisions restrict intra-brand competition, preventing facilities from selling the same hotel room at different prices through different channels. Prevention of price differentiation by accommodation facilities mean that they are unable to meet their costs efficiently and, in particular, prevent them from adapting to specific market conditions.

Since price and quota parity provisions also cover direct sales by accommodation facilities, the facility may be unable to sell vacant rooms at low prices to customers arriving at the reception or through its own website or call center. The relevant provisions also prevent accommodation facilities from offering unexpectedly vacant rooms at cheaper prices through competing platforms, where they can update prices faster when compared to the traditional channel. As a result of all of these considerations, it was found that inter-brand competition between accommodation facilities may be restricted as well. Due to the MFC practice, accommodation facilities are forced to make any discounts at all channels, which may undermine their incentives to cut prices.

Within this framework, it was concluded that the provisions examined in the contracts BOOKINGCOM signed with accommodation facilities had restrictive effects on competition under article 4 of the Act no 4054, and it was concluded that an individual exemption under article 5 of the Act no 4054 may not be granted to the contracts BOOKINGCOM signed with accommodation facilities, which include "price and quota parity" and "best price guarantee" provisions. Therefore it was decided that administrative fines of 2,543,992.85 should be imposed on BOOKINGCOM in accordance with paragraph three of article 16 of the Act no 4054 as well as with articles 5.1(b), 5.2, 5.3(a) of the "Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position."

- **Investigation on the Turkish Pharmacists' Association concerning the Provision of Drugs from Abroad**

Decision Date:	Decision No:	Type:
06.11.2016	**16-42/699-313**	**Investigation**

The relevant decision was taken as a result of the investigation launched in order to determine whether the Turkish Pharmacists' Association (TEB) and the Turkish Pharmacists' Association Commercial Enterprise violated article 6 of the Act no 4054 by their practices in the area of providing those drugs which are not licensed, produced at sufficient quantities or imported, from abroad.

The decision focuses on the period in which private pharmaceutical warehouses were authorized to provide drugs from abroad within the framework of the protocol TEB Commercial Enterprise signed with the Social Security Institution (SSI), as well as on the period following the removal of these authorizations.

On 15.12.2015, 15th Chamber of the Council of State issued a stay order for the provisions added to the Pharmaceutical Warehouses Regulation allowing these warehouses to provide drugs from abroad. Following this order, the warehouses which were authorized by the Ministry Health to provide drugs from abroad but whose operations were complicated because they failed to signed a protocol with SSI lost their authorizations. This situation reinforced the TEB Commercial Enterprise's status as the single undertaking authorized to provide drugs from abroad.

In fact, before the aforementioned stay order, private pharmaceutical warehouses were authorized by the Ministry of Health, but it was found that

these were not active in the market since they could not conclude protocols with the SSI. The failure to sign a protocol with the SSI on the part of the private pharmaceutical warehouses led to the suppliers believing that TEB Commercial Enterprise was the sole authorized distributor. On these grounds, suppliers refused to fulfill drug demands from private pharmaceutical warehouses, even if they did not have a contractual relationship with TEB Commercial Enterprise.

On the other hand, it has been also observed that the SSI's failure to sign protocols with private pharmaceutical warehouses prevented those warehouses operating on a proxy statement from receiving service fees. Another barrier preventing the activities of private warehouses emerged as a result of the use of the alternative payment model. Within the framework of this model, the SSI negotiated special price discounts with suppliers and made significant savings in foreign drug costs. The SSI signed protocols with the suppliers on special price discounts and indicated TEB as the distribution channel in these protocols. Even though the SSI claims that the indication of TEB should not be assessed as exclusivity, both suppliers and private warehouses perceive article 3.1.11 of the protocol as stating that provision of drugs from abroad may only be done by TEB.

As can be seen, before the stay orders the failure of SSI to sign protocols with pharmaceutical warehouses created an administrative barrier to entry into the foreign drug market, and following the orders in question the authorizations of the pharmaceutical warehouses granted by the Ministry of Health were removed. Within this context, it was determined that TEB Commercial Enterprise held dominant position in the foreign drug market.

When examining claims concerning abuse of dominant position, the Board considered the period of time between the grant of authorization to the private pharmaceutical warehouses for provision of drugs from abroad (18.07.2014) and the removal of the authorizations following the court decisions (30.04.2016).

It was determined that of the agreements TEB signed with suppliers which were valid during the period when private pharmaceutical warehouses were authorized, four had exclusivity arrangements in the form of exclusive supply obligations. While it was observed that in the other commercial relationships TEB had with suppliers based on a written or non-written agreement, the suppliers were working exclusively with TEB. The information and findings acquired within the framework of the file indicate that TEB Commercial Enterprise intended to conclude exclusive agreements with suppliers.

With a market share of around [85-95]% during the period examined, TEB Commercial Enterprise was almost the sole player in the market, as a result of which exclusive agreements TEB signed with suppliers made it even harder for private pharmaceutical warehouses to enter the market, whose entry opportunities were already restricted to a large extent by the administrative actions of the SSI.

Competition Board considered the fact that for each drug supplied from abroad, the supplier was generally the sole provider. This shows that suppliers can have significant market power on a drug-by-drug basis and that alternative sources of supply are limited for each drug. Consequently, the nature of the products concerned and the positions of the suppliers of these products makes the loss of even a single potential source of supply critical for pharmaceutical warehouses in terms of entering the remaining in the market. On the other hand, the position of pharmaceutical warehouses in relation to TEB is also important in the assessment of the issue. Where competing buyers are significantly smaller than the buyer concluding advantageous exclusive agreements with the suppliers, there is a higher risk of market foreclosure. This situation presents TEB's exclusive agreements as a factor that increases the actual and potential foreclosure effects. Efficiency and reasonable grounds defenses were not accepted within the framework of the file.

As a result, it was concluded that TEB held dominant position in the relevant market; that the agreements made or ongoing during or before the period private pharmaceutical warehouses were authorized as well as the documents and findings acquired during the investigation concerning the authorization period were sufficient to prove that TEB was engaged in practices aimed at foreclosing the market; and that therefore it TEB Commercial Enterprise violated article 6 of the Act no 4054 by concluding exclusive agreements with foreign drug suppliers. Thus, it was decided in accordance with the provisions of paragraph three of article 16 of the Act no 4054 as well as of articles 5.1(b), 5.2, 5.3(a) and 7.1 of the "Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position," an administrative fine of 18,062,307.32 TL should be imposed on Turkish Pharmacists' Association Commercial Enterprise, at 1.5% by discretion of its gross annual revenue generated as of the end of the financial year of 2015, as determined by the Board.

- **Vacuum Glass Tube Market Investigation on Aslanlar Metal Alüminyum P.V.C.**

Decision Date:	Decision No:	Type:
23.02.2017	**17-08/100-43**	**Investigation**

The relevant decision was taken as a result of the investigation launched in order to determine whether two of the three undertakings manufacturing vacuum glass in Turkey, namely Aslanlar Metal Alüminyum P.V.C. Plastik İmalatı İth. İhr. San. ve Tic. Ltd. Şti. (ASLANLAR METAL) and Solar-San Vakumlu Cam Tüp Üretim San. ve Tic. A.Ş. (SOLAR-SAN) violated article 4 of the Act no 4054 by colluding to restrict the supply of vacuum glass tubes and/or increase sale prices.

Two pieces of evidence were acquired within the framework of the file. The first piece of evidence is referred to as Document-1 in the decision and includes the short messages sent to Ortadoğu Alüminyum ve PVC Plastik İmalat San. ve Tic. Paz. Ltd. Şti. (ORTADOĞU ALÜMİNYUM) by the SOLAR-SAN official, while Document-2 includes those sent by the ASLANLAR METAL official. In those documents, undertakings under investigation are observed make proposals to ORTADOĞU ALÜMİNYUM separately and with a 10-month period in-between, concerning the restriction of supply in the vacuum glass tubes market and/or price maintenance. It is not possible to infer from the evidence that ASLANLAR METAL and SOLAR-SAN were in collusion to restrict supply or maintain prices and sent the short messages to ORTADOĞU ALÜMİNYUM within the framework of this collusion. For this reason, market behavior of the relevant undertakings were examined.

As a result, the following observations were made concerning the four month period following 31.05.2014, which is the date of Document-1:

- Undertakings being investigated did not make a reduction in their established capacities,
- Undertakings being investigated showed a reduction of 7.66 and 14.64 points in their capacity utilization rates when compared to the previous four months,
- Undertakings being investigated showed a reduction of 11.82% and 16.18% in their outputs when compared to the previous four months,
- Undertakings being investigated showed a reduction in their cumulative stocks, i.e. undertakings sold from their final product inventories in addition to their production
- Undertakings being investigated showed reverse movements in their sales amount when compared to the previous four months.

- There was a decrease in the sales prices of ASLANLAR METAL and in the sales of SOLAR-SAN to buyers other than its partners.

At this point, it was assessed that the reduction in the cumulative inventory of the undertakings and the reversal in the sale amounts in the relevant period eliminated the suspicion that the reduction in the capacity utilization rates and production was an instance of supply restriction stemming from a collusion between the undertakings. Likewise, the monthly weighted average sale prices of the undertakings investigated display a downward trend in this period. In light of these explanations, it was decided that the undertakings investigated were not in a collusion to restrict the supply and/or increase the prices of vacuum glass tubes during the period related to Document-1.

On the other hand, the following observations were made in relation to the four-month period following 18.03.2015 and 23.03.2015, which are the dates of the short messages presented in Document-2:

- There was no change in the established capacity of ASLANLAR METAL, while SOLARSAN increased its established capacity, which was halved in January of 2015, to the previous level as of May, 2015,
- Monthly average capacity utilization rates of the investigation parties were on the rise when compared to the previous four months,
- Outputs of the investigation parties were on the rise when compared to the previous four months,
- There was an increase in the cumulative inventory of ASLANLAR METAL in comparison to the end of the previous four-month period, while cumulative inventory of SOLAR-SAN decreased in comparison to the end the previous four months; in other words, the cumulative inventories of the undertakings investigated changed in opposite directions,
- Sale amounts of the parties investigated increased when compared to the previous four months and monthly weighted average sale prices displayed significant increases, particularly for the months of March and April,
- During the months of March and April when the monthly weighted average sale prices of the undertakings under investigation increased, a similar increase was observed in the unit production costs of the undertakings.

In light of the above observations, it was decided that the undertakings investigated did not engage in practices aimed at restricting the supply of

vacuum glass tubes in the period following the short messages listed in Document-2.

Within the framework of these explanations, it was concluded that ASLANLAR METAL and SOLAR-SAN did not violate article 4 of the Act no 4054.

- **Mey İçki Investigation**

Decision Date:	Decision No:	Type:
16.02.2017	**17-07/84-34**	**Investigation**

The decision concerned was taken as a result of the investigation launched in response to the claim that Mey İçki San. ve Tic. A.Ş. (MEY İÇKİ) obstructed the operations of competing undertakings by putting pressure on rakı points of sale by means of concessions and certain practices, and violated the Act no 4054 by abusing its dominant position.

After examining the market share, brand (Yeni Rakı) and portfolio power of MEY İÇKİ as well as the barriers to entry, scale and scope economies and product availability levels in the market, it was concluded that MEY İÇKİ maintained its dominant position in the rakı market.

Within the framework of the violation claims, the discounts (and in a more general sense, concessions) by MEY İÇKİ and their effects on the purchases of the points of sales have been assessed. An examination of the practices under purchasing agreements showed that instead of standard targets and discounts, Agreement Bid Forms (ABF) included personalized targets and discounts specifically designed for each point of sale.

In case an undertaking like MEY İÇKİ sets personalized sales targets that increase significantly annually and aim nearly the entirety of the sales potential of the point of sale, if the point of sale feels itself bound to these targets, this may obstruct the access of competitors to the points of sale and may lead to de facto exclusivity. Discount rates specified in the agreement text are not directly reflected on the price for each purchase made by the point of sale from MEY İÇKİ. Instead, the points of sales progress is calculated periodically and the discount they earned are paid in lump.

In case of MEY İÇKİ, it has been observed that the realization of target rakı purchases in the agreement are above 50% for the agreements signed with at-home consumption channel (off-premise points of sale) and on-premise consumption channel (on-premise point of sales). The fact that MEY İÇKİ

pays the discounts as initial lump-sum payments or as periodic lump-sum payments depending on the realization of the target plays a role in the fact that points of sales mostly achieve the target purchase amounts specified in the agreement.

Thus, the high level of targets specified for points of sale in practice, the lump-sum payments, periodic calculation of progress payments and retroactive periodic progress payments as well as the fact that points of sale largely realize their agreement targets show that MEY İÇKİ's purchase agreements have turned into de facto target discounts.

When assessing MEY İÇKİ practices in terms of their effects, it was observed that a portion of the discounts implemented by MEY İÇKİ for points of sales are personalized target discounts and could be set according to the location of the customer. MEY İÇKİ practices are aimed at the final points of sale, which is the market where the product reaches the consumers. Discounts given to points of sales and concessions such as free of charge products aimed at excluding competitors target those points of sales which are important for the success of the rivals in the market and which realize large amounts of rakı sales.

The fact that MEY İÇKİ practices are aimed at important customers instead of all customers increases the risk posed by this practice to lead to restrictive effects on competition. Where potential competitors do not incur fixed costs, implementing exclusivity not for all points of sale but for the number of points of sale that would prevent potential rivals from reaching minimum scales of efficiency would make entry into the market harder. Similarly, MEY İÇKİ's exclusivity oriented practices would restrict competition by artificially increasing barriers to entry and expansion in the market.

Under the scope of the file, concrete documents were acquired indicating exclusionary behavior and practices by MEY İÇKİ and it was concluded that MEY İÇKİ caused market foreclosure effects against its competitors both by means of discounts and its practices and behavior related to visibility.

Within this framework, it was decided that MEY İÇKİ; which holds dominant position in the rakı market, has violated article 6 of the Act no 4054 by engaging in the following practices:

- It provided discounts and other financial advantages to the on- and off-premises points of sales depending on the POS's realization of the rakı purchase targets, set at more than 80% of the total rakı purchases of the POS within a certain period,

- It provided periodic purchase targets for points of sale without purchasing agreements with MEY İÇKİ and provided discounts and other financial advantages depending on whether these targets were achieved,
- It provided discounts and financial advantages to points of sales in return for having shelf and visibility arrangements in the traditional channel points of sale to the advantage of MEY İÇKİ.

Consequently, it was decided that an administrative fine of 155,782,969.05 TL, should be imposed on MEY İÇKİ, at 4.21875% of its annual gross revenues as of the end of the financial year July 2015–June 2016 as determined by the Competition Board.

- **European Commission fines Google €2.42 billion over abuse of dominance in search engine market through providing illegal advantage to own comparison shopping service**

The European Commission finalized its seven-year competition investigation on June 27th and decided that Google had abused its dominant position as a near-monopoly in online search by giving illegal advantage to its own shopping services. Google was found to provide systematic prominent placement to its own comparison shopping service whilst demoting rival comparison shopping services in its search results. Commission stated that Google introduced this practice in all 13 EEA countries where Google has rolled out its comparison shopping service, starting in January 2008 in Germany and the United Kingdom. It subsequently extended the practice to France, Italy, the Netherlands, and Spain, Czech Republic, Austria, Belgium, Denmark, Norway, Poland and Sweden till the end of 2013.

The EU's competition commissioner, Margrethe Vestager said: "Google's strategy for its comparison shopping service wasn't just about attracting customers by making its product better than those of its rivals. Instead, Google abused its market dominance as a search engine by promoting its own comparison shopping service in its search results and demoting those of competitors. What Google has done is illegal under EU antitrust rules."

The decision also obliged Google to end the conduct within 90 days, to make changes and "refrain from any measure that has the same or an equivalent object or effect" or face penalty payments of up to 5% of the average daily worldwide turnover of Google's parent company, Alphabet. Google thereby was obliged to provide "equal treatment to rival comparison shopping services and its own service. This remedy is expected to have potentially far-reaching implications such as once it is implemented, rivals that see their products suddenly bumped up the rankings can claim in follow-on litigation that this is prima facie evidence that they were victims of Google's discriminatory activity or the other way is also possible if companies find that despite all their efforts their position didn't improve after implementation, then the case would be weaker.

Sources:

http://europa.eu/rapid/press-release_IP-17-1784_en.htm

https://www.ft.com/content/9554a8bc-5b12-11e7-b553-e2df1b0c3220?mhq5j=e1

http://globalcompetitionreview.com/article/1143732/google-findings-and-remedy-open-the-door-to-damages-claims

- **Dow/DuPont merger got conditional clearance from US DOJ**

The Dow Chemical Co. and DuPont reached an agreement with the US Department of Justice to clear the $130 billion (€116 billion) merger. Thereby US DOJ announced on 15th June that Dow Chemicals and DuPont could complete their merger if they divest multiple crop protection assets and two petrochemical products.

The merger analysis concluded that without the divestitures, the proposed merger between two agrichemical global giants would likely reduce competition in an already high concentrated sector and would potentially harm U.S. farmers and consumers.

According the agreement with the parties, an approved buyer will take control of the DuPont's market-leading Finesse and Rynaxypyr insecticide businesses, which have combined annual US sales of more than $100 million. The acid copolymers and ionomers business must also go to a government-approved divestiture buyer.

Dow and DuPont announced their merger of equals in December of 2015, antitrust agencies around the world decided to take a deeper look at the merger, which comes in an already concentrated industry that has been displaying increasing consolidation recently. US clearance comes soon after European Commission's conditional clearance, which required the companies to divest many of the same products as the DOJ. Besides the US and EU clearance, competition authorities in Brazil, China, Australia have also cleared the proposed merger. The company officials told they are working with regulators to obtain all remaining approvals and expect the deal to close in August.

Sources:

http://globalcompetitionreview.com/article/1143000/us-doj-conditionally-clears-dow-dupont-merger

https://www.justice.gov/opa/pr/justice-department-requires-divestiture-certain-herbicides-insecticides-and-plastics

- **China and Mexico clear ChemChina's acquisition of Syngenta**

The global agrochemical and seed industry is witnessing a profound change in recent years, with mega mergers and attempted mergers consolidating the sector even further. These recent mega merger deals can be listed as Dow-DuPont, ChemChina-Syngenta and Bayer-Monsanto which would decrease the number of global players in the sector from the so called big six (Monsanto, Dow, DuPont, Bayer, BASF and Syngenta) to four if all cleared.

Mexico's Federal Commission for Economic Competition (COFECE) required Syngenta to divest five products to have its deal with ChemChina approved on 11th of April, whereas China's Ministry of Commerce unconditionally cleared the state-owned company's (ChemChina) $43 billion (€40 billion) takeover of the Swiss agrichemical rival (Syngenta) one day after on 12th of April. COFECE stated that without the conditions, the takeover would have reduced the number of options farmers and could result in higher prices for pesticides and herbicides. The authority's official said: "ChemChina would have been able to consolidate its leadership in certain local markets, and competitors would have found it difficult to enter because of barriers such as research and development capabilities"

ChemChina's acqusition of Syngenta has been cleared in 19 jurisdictions so far, mostly with structural remedies. Canada and Australia along with China have approved the deal without conditions. The takeover is still awaiting clearance in India.

Sources:

http://globalcompetitionreview.com/article/1139250/china-and-mexico-clear-chemchina-syngenta

http://www.reuters.com/article/us-syngenta-ag-m-a-chemchina-idUSKBN17D208

- **The Netherlands Authority for Consumers and Markets (ACM) issued the highest-ever abuse of dominance fine.**

ACM fines Dutch commercial railway provider Nederlandse Spoorwegen (NS) a record-breaking €41 million for predatory pricing allegement. ACM concluded that NS illegally submitted a loss-making bid in a 2014 tender to win a politically important bid in order not to share a regional rail network with any of its rivals. The tender was a contract to operate on the rail

networks in the country's Limburg region from 2015 to 2025. ACM found that the costs incurred by NS would be higher than its expected revenues from the contract which resulted in unfair competition for the other bidders: they could not match or surpass NS' bid without suffering losses themselves, even if they were as efficient as NS. ACM concluded that NS was motivated to hinder its competitors as the contract was being used by the Dutch government as a potential pilot project in which multiple railway providers would operate on the same track, leading to multiple future tenders in other regions the operator currently dominates.

ACM cancelled the contract in 2015 in pursuit of opening a formal investigation that was based on internal NS emails that flagged the company's pricing had been predatory. ACM Chairman said: "*The Dutch railway market can only function well if all market participants play by the rules. Over the past 20 years, regional tender processes in the Dutch public-transport sector have resulted in increased passenger volumes and in better service. Passengers ultimately benefit from better service. ACM believes a substantial fine is in order here*."

Sources:

https://www.acm.nl/en/publications/publication/17397/Dutch-Railways-NS-abused-its-dominant-position-in-regional-tender-process/

http://globalcompetitionreview.com/article/1143745/dutch-enforcer-issues-highest-ever-abuse-of-dominance-penalty

- **UK's Competition and Markets Authority (CMA) fined light fitting company for online RPM**

The CMA ended its investigation into suspected anti-competitive agreements between The National Lighting Company (NLC) and its resellers and fined NLC £2.7 million for requiring retailers to use a minimum price when selling its products online.

NLC supplies light fittings to a range of retailers who then sell them on. CMA found that NLC employed resale price maintenance (RPM) for its online sales, which required resellers to retail the goods at, or above, the price NLC set. CMA concluded that this practice is illegal and resulted in customers missing out on the best possible prices and cannot shop around for a better deal on that supplier's products. It was also found that NLC tried to avoid detection by not committing agreements to writing.

In May 2012, the UK's Office of Fair Trading – the CMA's predecessor – sent one subsidiary of NLC (Endon) a letter suggesting the company may have been imposing minimum resale prices on online retailers, and warning it of the gravity of resale price maintenance. In May 2016 the CMA also sent an advisory letter to other subsidiary (Saxby) of NLC indicating it may have been involved in anti-competitive agreements with retailers, and advised it to consider conducting a self-assessment to ensure it was complying with the law. The companies acknowledged the warnings but failed to address the conduct; the enforcer opened formal investigations in August 2016.

The CMA calculated the NLC's fine based on penalties for the Saxby and Endon infringements. The CMA increased the Endon infringement's fine by 25% for its failure to comply with the warning letter, and a further 10% due to the involvement of the company's senior management in the illegal conduct. The group received a 30% fine discount for the agreement it entered into with CMA in February 2017. The company official said though, the practices were never aimed at harming consumers but merely sought to protect brick-and-mortar retailers from "*significant damage being done to them by the free riding of certain internet resellers*."

Sources:

https://www.gov.uk/cma-cases/light-fittings-sector-anti-competitive-practices

http://globalcompetitionreview.com/article/1143303/cma-fines-light-fitting-company-for-online-rpm

- **13th Chamber of the Council of State decision dated 20.10.2016 and numbered E. 2012/1229 K. 2016/334**

In case of split vote during the determination of the fine amount, the rate of fines shall be determined by adding the most unfavorable vote against the undertaking to the closest vote until quorum is achieved.

In the present case, there were no problems related to the quorum for the violation finding itself, however in the second stage involving the amount of fines that should be imposed, the Board members were split as to the amount of the fine required. The decision includes the following statements on the subject:

" Article 51.1 of the Act no 4054 on the Protection of Competition, titled "Meeting and Decision Quorum," states 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 it shall render decisions via the parallel votes of at least four members. Therefore, it becomes clear that if a minimum of four members votes for the existence of a violation, the Board will decide that there has been a violation and administrative fines should be imposed. However, the Act does not clarify what is meant by the phrase "parallel votes" in relation to reaching the quorum for setting the amount of administrative fines, once a violation is found. Consequently, an analysis must be conducted into the question of how to calculate quorum if the (parallel) votes cast for imposing administrative fines on the undertaking are split in relation to the amount of the actual fine to be imposed.

Where the law prescribes that the decision to impose administrative fines may only be taken by the Board, if the votes of the Board members are split such that they cannot meet the quorum regarding the amount of the fine specified by law, the fine amount must be determined by adding the vote that is most unfavorable against the person receiving the administrative fine to the closest vote until quorum is reached.

As a matter of fact, article 229 of the Code of Criminal Procedure 5271 regulates that where the votes are split, then the most unfavorable vote against the accused shall be added to the vote which is closest to this opinion, until the , majority is achieved, and this regulation also addresses the question of how to handle quorum for decisions taken as the Board; therefore, by analogy, this regulation related to the procedure of taking

decisions as a Board should also be applied by administrative boards authorized to impose administrative fines."

- **Ankara 8th Administrative Court decision dated 19.07.2017 and numbered E. 2015/2488 K. 2017/172**

It is illegal to authorize an acquisition if the commitments made fail to address the competitive problem in the relevant market.

In an acquisition in the yeast market, the parties undertook certain commitments and the transaction was authorized subject to those commitments. In its decision, the court made the following assessment concerning the commitments in question and the failure thereof.:

"Even though the defendant authority claims that it received commitments to prevent unfair competition and abuses of dominant position, these arguments of the defendant were disregarded due to the following facts: the commitment to sell 2000 Gıda, owned by Öz Maya would not prevent Öz Maya to found a new distribution company following the sale and this new company could continue 2000 Gıda's relationship with previous customers; the commitment to launch a compliance program for the whole staff involved the internal structure of the company and would not constitute a mechanism affecting the market; the commitment not to acquire any undertaking of the company which exports fresh yeast to Turkey would not prevent the acquiring company from importing to Turkey; the commitments to limit the invoice prices of fresh baker's yeast brands sold in Turkey (for dealers) by setting four different price caps, to maintain the market presence, price positions and separate distribution networks of Dosu Maya brands and to enlarge their geographical presence, and to eliminate exclusivity from dealership contracts would not ensure the adoption of a competitive policy by Öz Maya and Dosu Maya, which are companies operating within the body of the same Group."

- **13th Chamber of the Council of State decision dated 08.05.2017 and numbered E. 2016/3340 K. 2017/1435:**

The first instance court decision which found that the Board decision conducted an insufficient exemption examination and failed to assess all of the conditions listed in article 5 of the Act is upheld.

The Council of State upheld the following analysis of the first instance court concerning the exemption assessment of the agreement between the Turkish Football Federation (TFF) and Krea İçerik Hizmetleri ve Prodüksiyon A.Ş (Digitürk).

"On 08.10.2015, the Administrative Court took an interim decision on the subject. In the interim decision, the Court stated that Article 5.1 of the Act no 4054 lists certain conditions in sub-paragraphs (a), (b), (c) and (d) which must all be fulfilled for granting exemption from article 4 provisions and asked whether an assessment was carried out separately for sub-paragraphs (a), (b), (c) and (d) in the aforementioned agreement between TFF and Digiturk to determine whether these conditions were met. If such an assessment was carried out, the Court asked the Authority to individually explain the conditions specified for exemption together with their grounds. On 06.11.2015, the defendant authority responded to the interim decision of 08.10.2015, stating that the Board had conducted the individual exemption assessment in its decision dated 30.04.2012 and numbered 12-23/659-181 in relation to sub-licensing, shortening of the agreement duration, and initiation of a separate tender for broadcast rights over alternative technologies with an aim to eliminate competitive concerns, that the Board did not address exemption conditions individually, and that the Board concluded that the fulfilment of aforementioned conditions would ensure the fulfilment of all of the individual exemption conditions, as well. Competition Board may only exempt agreements between undertakings, concerted practices and decisions of associations of undertakings from the application of article 4 of the Act no 4054 where all of the conditions listed in article 5 of the same Act are fulfilled, which specify: that the agreement must ensure new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services, that it must benefit the consumer from the above-mentioned, that it must not eliminate competition in a significant part of the relevant market, and that it must not limit competition more than what is necessary for achieving the goals set out in sub-paragraphs (a) and (b). The Board may only tie the grant of an exemption to the fulfillment of certain conditions and/or obligations if the above-mentioned conditions are already met. In the present case, an examination of the information and documents included in the file showed that the Board granted individual exemption under article 5 of the Act no 4054 but failed to analyze and assess whether all of the conditions set out in article 5.1 of the Act no 4054 for exemption from the application of article 4 were fulfilled in relation to the extension agreement signed between TFF and Digiturk, instead deeming sufficient the fulfillment of the condition to completely or partly transfer and share the Package A broadcast rights - especially live game broadcast rights - owned by Digiturk to competing undertaking(s) and to undertakings broadcasting via alternative technologies via sub-licensing at reasonable market terms (without prejudice to the preferences of the buyer). Consequently the Court has decided that the Board decision comprising the subject matter of the case was not in compliance with the law and annulled the transaction in question."

- **Council of State Plenary Session of the Administrative Law Chambers Decision dated 22.12.2016 and numbered E. 2014/4703 K. 2016/3569:**

The non-operational status of the acquired undertaking does not prevent the imposition of fines due to late notification. Any notification made after 35 days following the share transfer is a late notification.

The Plenary Session of the Administrative Law Chambers of the Council of State found Competition Board's assessment in an acquisition transaction, previously approved by the 13th Chamber of the Council of State, which concluded that the non-operative status of an acquired undertaking would not prevent the imposition of administrative fines due to late notification, to be in compliance with the law. The decision in question includes the following statements:

"... the transaction involved the acquisition of 95% of the shares of Borares from Ada Energy, which held the shares, by the plaintiff Batıçim. The share transfer was concluded with a notarial sales contract on 23/03/2010 and the ownership and control of the shares were transferred to the acquiring plaintiff company. It was declared that the acquired Borares was currently non-operational, that it just had an incomplete license application at the EMRA, and with the application made to the Competition Board asking for the authorization of the acquisition, that the transfer of control would await the authorization of the Competition Board, and that until the license application of the acquired company was completed successfully no structural changes would be made in either Borares or Batıçim Enerji. In spite of this, the share transfer contract concluded between the parties legally completed the acquisition and the control over the shares was transferred to the plaintiff. Therefore the fact that Borares was yet non-operational in the relevant market and that it did not have any assets did not affect the undertaking nature of the company or the substance of the acquisition transaction. On the other hand, article 4.1 of the Communiqué no 1997/1 specifies that where the acquiring undertaking has a total market share of more than 25% in the whole country or a portion thereof in the relevant market or where its total turnover is more than 25.000.000-TL, it must get authorization from the Competition Board. In the present dispute, the acquisition transaction was subject to approval by the Competition Board due to the total turnover of Batıçim Enerji. It was determined that 95% of the shares of Borares was acquired by the plaintiff Batıçim with the share transfer contract of 23/03/2010, roll no. 07806, however the application for Board authorization was made to the defendant authority on 29/04/2010. Therefore the acquisition was implemented without the authorization of the Competition Board. Consequently, since the

acquisition transaction in question, which was subject to authorization, was implemented without the approval of the Competition Board, in violation of the Act no 4054, the Board decision comprising the subject matter of the present case was in compliance with the law in its section imposing administrative fines on the plaintiff company at 0.1 per cent of the turnover as generated at the end of the previous financial year of 2009..."

- **Council of State Plenary Session of the Administrative Law Chambers Decision dated 22.12.2016 and numbered E. 2014/4829 K. 2016/3646**

A 10-year lease agreement constitutes a transfer of a revenue-assignable property and imposing administrative fines in case of implementation without Authority approval is in compliance with the law.

The Plenary Session of the Administrative Law Chambers of the Council of State found the Competition Board's assessment in an acquisition transaction, previously approved by the 13th Chamber of the Council of State, which concluded that an administrative fine should be imposed since a 10-year lease of a revenue-assignable property was considered to be an acquisition and the transaction was not notified, to be in compliance with the law. The decision in question includes the following statements:

"... as a matter of fact, article 2 of the Communiqué no 1997/1 lists the transfer of assets among instances of merger or acquisition. In this respect, the important point for the property transfer is whether the transferred property is a revenue-assignable facility in terms of its ability to operate in the relevant market. An examination of the lease agreements comprising the subject matter of the dispute shows that these were concluded on 25/11/2008 for a term of 10 years starting from 01/11/2008. In the agreements in question, the lessor was listed as Yimpaş Yozgat İhtiyaç Maddeleri Paz. ve Tic. A.Ş. for… stores and Yimpaş, Gıda San. ve Tic. A.Ş. for… store. In the notified transaction, 12 stores previously operating under the Yimpaş brand was transferred under the control of the plaintiff company together with the fixed assets and equipment within. These stores had the potential to create revenue in the markets in question due to their various properties such as area and location. By acquiring the stores owned by Yimpaş, the plaintiff also acquired the customer portfolio and market share of these stores, which ensures that the lease transaction concerned was an acquisition under article 2 of the Communiqué no 1997/1... Therefore, the transaction was subject to Board authorizations since the turnover threshold was exceeded... In the application made by the plaintiff, which was entered into the Authority records on 23/01/2009, the authorization of the Board was requested for the lease of the

aforementioned stores from Yimpaş, implemented in the year 2008. Consequently, the transactions carried out by the plaintiff... were subject to authorization under the Communiqué and, since the transaction was implemented without the authorization of the Competition Board... imposition of administrative fines on the plaintiff company is found to be in compliance with the law..."

- **Economic Impact of Competition Policy Enforcement on the Functioning of Telecom Markets in the EU**

Published By: EU Commission

Author: James Allen, Paolo Buccirossi, Tomaso Duso, Fabio Fradella, Alessia Marrazo, Mattia Nardotto, Salvatore Nava and Jo Seldeslachts

The study examines the ex-post evaluation of competition policy enforcement in the European telecommunication markets with both qualitative and quantitative analyses. In the study which examines all competition policy decisions taken by the European Commission and national competition authorities in last 15 years, qualitative analysis is employed for the development of competition policy enforcement has been assessed in light of the main changes in the functioning of the telecommunication markets. The functioning of the market is discussed by using both competition and performance indicators. The analysis determines the main changes in the competition policy enforcement and in the telecommunication markets, and compares them with the competition and performance trends in the telecommunication markets. Basic outlook is that enforcement activities may increase the degree of competition and market performance in the telecommunication markets.

The work also presents a quantitative analysis on the impact of the merger, anti-trust and state aid decisions accepted by the European Commission in the telecommunication sector in 2000s. The analysis uses the "differences in differences" model to empirically research the causal relationship between the performance and decisions of telecom markets as measured by means of price, penetration, over-population and investment. In general, the results indicate that the specific decisions made in the past contribute to better functioning of fixed and mobile markets while shedding light into future decision-making processes.

Source:

http://ec.europa.eu/competition/publications/reports/kd0417233enn.pdf

○ How to Measure Local Competition?

Published By: Journal of European Competition Law & Practice

Authors: Raphaël De Coninck and Mikaël Hervé

European Commission is increasingly interested in local competition analyses, which are discussed comprehensively in the scope of national mergers. Commission's interest in local competition assessment can be seen in the examination of local markets, and in various merger examples in which a customer-oriented approach is preferred to the traditional firm-centered approach. This article addresses the economic principles underlying the new methodology of the Commission are discusses how they can be further developed.

The article first stresses that many experimental analyses can be carried out in order to evaluate the possible impact of a transaction in the local markets better and more directly, in addition to market definition and market share calculation. For example, loyalty card data such as market card data in supermarkets can be used in order to evaluate geographical footprint of each store. Geographical customer location and sale databases sent by the parties to the European Commission in mergers implemented with a local firm may also be utilized for other purposes. In brief, the article stresses the importance of using various empirical analyses in order to evaluate the probable effect of the transaction in the local markets better and more directly, in addition to local market definitions and market share calculations.

Source:

https://academic.oup.com/jeclap/article/8/6/402/3855080/Mergers-How-to-Measure-Local-Competition

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