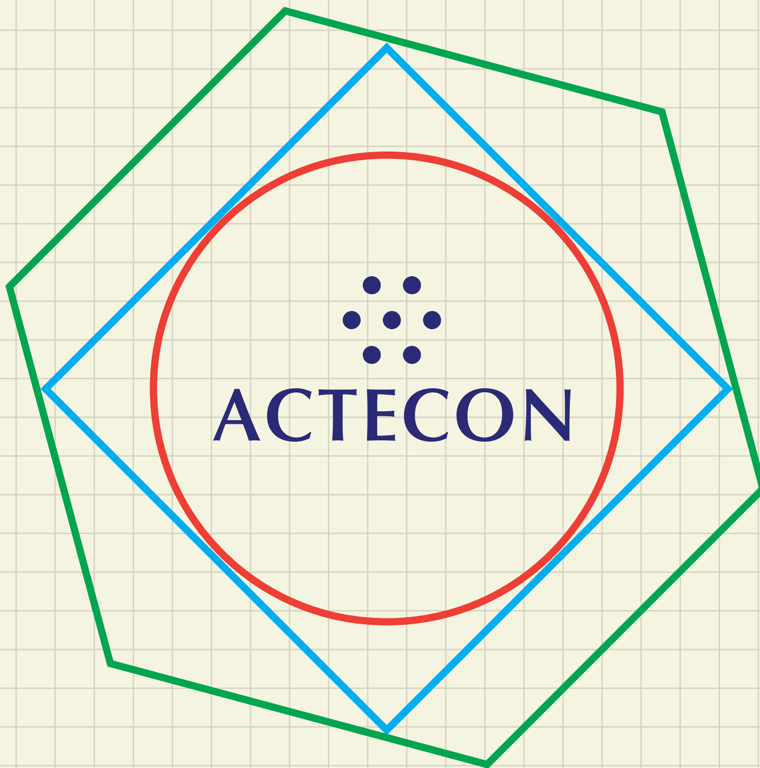
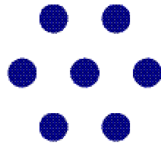
The Output

Selected Essays 2017





ACTECON

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FOREWORD

Competition law is a relatively new area of law in Turkey, as compared with the EU. It has grown dramatically in terms of its importance for the businesses over the past years. It continues to evolve and improve taking into account the economic conditions, globalization challenges, as well as practice of the European Commission. In fact, the EU competition law and practice has always been the “source of inspiration” for Turkey.

The 2017 year was the 20th anniversary of the Turkish Competition Authority and has been busy for both the Authority and the European Commission. Cartels (automotive sector) and numerous investigations into various sectors (in relation to patent settlement agreement in pharma, distribution practices and luxury brand image justification, resale price maintenance, excessive pricing etc.), abuses of dominance (Booking.com, Intel’s rebates), record fines (e.g. Google, Alcoholic beverage producer in Turkey), merger control issues (fines for providing inaccurate information, mergers in the Big Data world – reconsidering the substantive test, etc.).

In this booklet we have selected and compiled a series of short articles written by ACTECON team members providing insights into the various competition law issues that took place in 2017 in Turkey and the EU (Chapter I – Chapter IV). You may also find Chapter V providing some updates on the International trade issues. Additionally, there have been a number of legislative developments and reports both in the EU and Turkey, which we summarize in Chapter VI.

In 2018 we will celebrate the 15th anniversary of ACTECON, one of the oldest and prominent competition law boutiques of Turkey.

Sincerely,

ACTECON

December 2017

Att. Bahadır BALKI — ***M. Fevzi TOKSOY, PhD***

Partner — ***Managing Partner***

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CHAPTER I
ANTICOMPETITIVE PRACTICES

1. WARNING TO DIGITAL ENTREPRENEURS: REGULATED INDUSTRIES CAN BITE...

By M. Fevzi Toksoy

The suspension of Booking.com's services in Turkey has been seen as an attack on individuals' online freedom and digital entrepreneurship as a whole. Such claims seem to be inaccurate because undertakings, irrespective of their legal form, location and mode of operation (digital/ 'traditional'), are equally subject to, among others, (i) competition law; (ii) the respective regulatory framework, and (iii) rules on (un)fair competition. If an undertaking is found to be in violation of any of these, then naturally respective measures shall be taken by the state to deal with the consequences of the infringement. The case of Booking.com should be seen from this perspective. Access to the website has been restricted temporarily by the Turkish court on the grounds of unfair competition, and technically, the Information and Communication Technologies Authority (BTK) has implemented the order of the court. At the same time, these decisions are part of an increasing pattern whereby conflicts between regulated business and digital networking platforms in many different industries are playing out in the legal and regulatory arenas. Booking.com is a typical example. Others include Uber, Airbnb, and PayPal. Let's examine the Booking.com situation.

TURSAB vs. Booking.com

Booking.com has been the subject of two recent decisions. The Turkish Competition Authority (TCA) ruled on competition law and now a Turkish court has ordered the suspension of activities. Both decisions are the result of complaints by the Turkish Travel Agencies Association (TURSAB). TURSAB has pursued every possible platform to challenge Booking.com in behalf of travel agencies in Turkey, though in fact it may have the opposite effect and negatively impact tourism in Turkey.

(i) The Court decided to suspend activities and issued an injunction on 29 March 2017. This is a result of the lawsuit TURSAB filed in 2015 against Booking.com alleging unfair competition towards Turkish travel agencies, such as misleading customers, putting pressure on hotels, raising commissions; and tax evasion in Turkey: e.g., despite operating in Turkey, invoices were sent to the Netherlands, where Booking.com is based. Istanbul's 5th Commercial Court of First Instance ruled in favor of TURSAB, and instructed BTK to

freeze Booking.com's reservation processes and search facilities for hotels in Turkey as a precaution against unfair competition. Hence, travellers will have to arrange their trips via travel agencies. Making reservations for hotels in Turkey from abroad will still be possible. It is expected that such measures will favor travel agencies (we repeat - the actual impact, particularly on the tourism industry in Turkey, is yet to be seen). Interestingly, the court further requested information from the TCA on whether an investigation was initiated against Booking.com and whether any actions had been taken.

(ii) Indeed the TCA in January 2017 imposed an administrative fine on Booking.com of approx. USD 650 000/TRY 2.5 million for its 'best price guarantee' clause and 'price/quota parity provisions' in the contracts with hotels. These agreements were found to be anticompetitive under Turkish Competition Law, which cannot be blocked or individually exempted.

It should be mentioned that Booking.com's 'parity clauses' have been subject to antitrust investigations in other jurisdictions, e.g., Germany, France, Italy, Sweden, Austria, etc. Either the prohibition or commitments approach has been taken by competition authorities in the EU. In addition to antitrust measures, Austria adopted amendments to its law on unfair competition rendering online travel agents' parity clauses null and void; a similar position has been taken by France.[1] Hence, Turkey is not the only one 'attacking' Booking.com, just as...

...Booking.com is not the only one being attacked

Booking.com is not the only digital business to fall under special scrutiny by regulators, mostly due to numerous complaints from regulated ('traditional') businesses. Airbnb has also been closely monitored by both the Finance Ministry and TURSAB.[2] Uber was banned and heavily fined in Turkey in December 2016 by order of the Turkish government (on the grounds of offering unlicensed services, the Turkish police were authorized to fine drivers approx. 709 USD for the first offense and 1200 USD for the second offense, and fine passengers approx. 80 USD[3]). Again, similar stories have been seen in other jurisdictions across the globe following the rise of taxi drivers' protests (e.g., France, Italy).[4] PayPal was unable to operate in Turkey after it failed to obtain a license from the Banking Regulation and Supervision Agency (BDDK).[5]

The regulated businesses' discontent is understandable since customers favor companies that are taking full advantage of the digital economy/world and offering cheaper services, wider choice etc. Digital entrepreneurs are several steps ahead of 'traditional' service providers. This is not bad. Being able to adjust your business to

the challenges of the digital economy is part of being competitive and successful in the market, as long as it is done within the legal and regulatory framework (i.e. taxation, licensing, permits, working conditions, etc.).

In conclusion

We would like to stress that Booking.com's case is not an attack on digital entrepreneurship in Turkey. Both antitrust measures and the court injunction resulted from business practices of Booking.com, which have also been investigated in numerous jurisdictions outside of Turkey. Hence, the court injunction should not be perceived as 'blocking a website', but rather the outcome of the court's interim decision by the BTK, which is technically capable of implementing the court's order. The final outcome of Booking.com's story is yet to be seen, following anticipated appeals. In any case, regulated businesses that are currently at war with digital entrepreneurs may be perceived as unofficial 'watchdogs' of online platforms' compliance with laws and regulations. Beware...they may bite!

Footnotes

1. Report on the Monitoring Exercise Carried Out in the Online Hotel Booking Sector by EU Competition Authorities in 2016, p.4-5, http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf

2. http://www.hurriyetdailynews.com/was-the-bookingcom-ban-necessary-.aspx?PageID=238&NID=111556&NewsCatID=402

3. http://macreports.com/turkey-bans-uber/

4. https://www.dailysabah.com/technology/2016/12/28/uber-to-be-fined-for-offering-unlicensed-services

5. http://www.hurriyetdailynews.com/was-the-bookingcom-ban-necessary-.aspx?PageID=238&NID=111556&NewsCatID=402

2. BOOKING.COM FINED IN TURKEY FOR ITS MFN PRACTICES

By Hanna Stakheyeva and Baran Can Yıldırım

With the development of E-commerce, the Turkish Competition Authority (keeping a step with the European Commission) has demonstrated a special interest in evaluating vertical aspects associated with online platforms/distribution channels. One of the most recent examples is the TCA's investigation into the Most Favoured Nation/Customer clause ("MFN") of a popular Turkish online platform Bookingdotcom Destek Hizmetleri Limited Şirketi ("Booking.com"). Booking.com was "found guilty" and fined accordingly.

Below we provide a high-level overview of the TCA's decision on Booking.com and the competition law issues in relation the MFN clauses. Once the reasoned decision on Booking.com is released it will require a thorough analysis as it is anticipated to be instructive in terms of how the TCA examines the conditions under which MFN may be considered as a restriction to competition under the Law of Turkey No 4054 On Protection of Competition ("Turkish Competition Law").

Booking.com

The TCA announced its decision regarding the Booking.com (practices of which have been evaluated in numerous jurisdictions around the EU) on 5 January 2017. The investigation against Booking.com was launched in July 2015 based on the allegations that its "best price guarantee" practices within the framework of the booking services constituted a violation under Article 4 (Agreements limiting competition) and Article 6 (Abuse of dominance) of the Turkish Competition Law.

Within the scope of the investigation, the agreements concluded between Booking.com and accommodation facilities were assessed. Subsequently, the TCA concluded that those agreements did not meet the requirements (i.e. a market share threshold) under the Block Exemption Communiqué on Vertical Agreements and hence could not enjoy the exemption. Furthermore, as the conditions under Article 5 of the Turkish Competition Law were not satisfied, individual exemption could not be granted either.

In conclusion, in its Decision No 17-01/12-4 dated 05.01.2017 the TCA concluded

that Booking.com violated Article 4 of the Turkish Competition Law and imposed an administrative fine of approx. TRY 2.5 Million (approx. EUR 640,000).

MFN clause – 'best price guarantee' in essence

MFN clause is normally regarded as a vertical price limitation, a contractual mechanism, whereby a supplier grants its customer/distributor a price that will not be less favourable than the prices granted to its other customers/distributors.

MFN clauses can be reversed into 'most favoured supplier' clauses, whereby a buyer guarantees to the suppliers commercial terms that are better than, or at least as good as, those agreed with another supplier. MFN clauses are also similar to 'English clauses', which require buyers to report to their suppliers any better offers made by competing suppliers, and allow them to accept such offers only if the initial suppliers do not match them. These clauses are usually considered unlawful as they lead to artificially fixing prices.

On the one hand, MFN clauses "have sound business reasons to exist in contractual relationships" and may generate procompetitive effects. On the other hand, main concerns with MFN clause are related to the risk of foreclosure of the competitors (new market entrants), limiting competition and facilitating collusion among suppliers, demotivating bargaining will of customers and eliminating pricing flexibility of suppliers. Therefore, a careful assessment of MFN clause and its effect on competition is essential on a case-by-case basis.

Concluding remarks

With the evolution of consumer choices towards online platforms the TCA has demonstrated a special interest in evaluating vertical aspects associated with online platforms, particularly those related to MFN clauses in commercial contracts. The current situation seems to demonstrate that the MFN clauses in Turkey are likely to be sanctioned by the TCA as anticompetitive in case they are related to market players with a significant market share. More clarification in relation to MFN clauses assessment is expected to be provided with the publication of the reasoned decision of the TCA on Booking.com in a due course.

3. TEMPORARY ACCESS BARRIER IMPOSED ON BOOKING.COM BY THE TURKISH COURT ON UNFAIR COMPETITION GROUNDS

By M. Fevzi Toksoy and Hanna Stakheyeva

On 29 March 2017 Istanbul's 5th Commercial court of First Instance ruled on temporary suspension of Booking.com's activities in Turkey on the unfair competition grounds. The Turkish court ruled in favor of Turkish Travel Agencies Association ("TURSAB"), and instructed the Information and Communication Technologies Authority ("BTK") to freeze Booking.com's reservation processes/search facilities for hotels in Turkey. Earlier this year Booking.com was heavily fined by the TCA for its anticompetitive practices. There is this recent trend of increased tension between the regulated businesses and online/digital entrepreneurs in various industries, as well as jurisdictions.

Implications of the Court injunction decision

As a result of the lawsuit filed by TURSAB in 2015 against Booking.com over unfair competition towards Turkish travel agencies (misleading customers, putting pressure of hotels, raising commissions, as well as tax evasion practices), currently Booking.com's services in Turkey are (temporarily) suspended. The travelers will have to arrange their trips via travel agencies. Making reservations for hotels in Turkey but from abroad will still be possible. It is expected that such measure will be in favour of the travel agencies (however, the actual impact, particularly on the tourism industry of Turkey, is yet to be seen). The court further requested information from the TCA on whether an investigation was initiated against the Booking.com and whether any actions had been taken.

TCA's investigation and fine

The TCA investigated and in January 2017 decided to impose an administrative fine of approx. USD 650 000/TRY 2.5 million on Booking.com for its 'best price guarantee' clause and 'price/quota parity provisions' in the contracts with hotels that were found to be anticompetitive agreements under the Turkish Competition Law, which could be neither block- nor individually- exempted. Booking.com's 'parity clauses' have been subject to antitrust investigations in other jurisdictions, i.e. Germany, France,

Italy, Sweden, Austria, etc. Either prohibition or commitments approach has been taken by the competition authorities in the EU. In addition to antitrust measures, Austria adopted amendments to its law on unfair competition rendering online travel agents' parity clauses null and void; similar position has been taken by France.

Concluding remarks

Both competition law decision of the TCA and now a suspension of activities decision by the Turkish court in relation to Booking.com are the results of the complaints from the TURSAB. TURSAB has pursued every possible platform to challenge actions of Booking.com in the interest of travel agencies in Turkey (but in fact in may have the opposite/negative impact on the tourism in Turkey). We cannot deny that there is a recent trend of the increasing tone between the regulated business and the networking digital platforms in many different industries. Booking.com (in addition to Uber, Airbnb, and PayPal) is a typical example of it.

4. TURKISH COMPETITION AUTHORITY'S FINING NATURAL PERSONS

By Ertuğrul Can Canbolat, Sinan Lahur

1. Introduction

Personal liability rules for the competition law violations and accordingly, the tracking systems to ensure that the damages caused are covered/compensated by the violating person from his/her own resources, have been under the increasing scrutiny of the competition authorities all around the world and even despite the discrepancies, some of the EU member states support the idea of strengthening the individual liability rules by showing a tendency to criminalize competition enforcement or by vesting the authorities with the competence to disqualify undertakings' directors, like in the common law jurisdictions.

In this context, Law No. 4054 on Protection of Competition ("Turkish Competition Law") and Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position ("Turkish Regulation on Fines") set forth the rules and principles to determine the amount of fine that will be imposed upon the undertakings as well as their employees who violated the Turkish Competition Law. Therefore, under the Turkish Competition Law, the employees having decisive influence on the occurrence of the infringement could also be subject to the administrative fines.

2. Administrative Fines under the Turkish Competition Law

In cases where the Turkish Competition Authority ("TCA") resolves that a behavior constitutes an infringement, it will impose an administrative fine calculated from the infringing undertaking's turnover achieved within the year preceding the infringement decision of the TCA. Within this scope, the TCA takes the characteristics of the violation into account when determining the percentage of the fine to be imposed and thus, the consequences of an infringement vary depending on the facts of the case and specific behavior. However, the TCA is entitled to impose a base fine between two percent and four percent for cartels and five per thousand and three percent of the company's turnover for other violations.

Additionally, it should be emphasized that the TCA is vested with a right to increase the fine percentage up to ten percent of the company's turnover achieved within the previous year, by taking into account the aggravating factors such as undertaking's

market power, undertaking's decisive influence, the severity of damage, recidivism of the violation, maintaining cartel after the notification of the investigation decision, not complying with the commitments made for the elimination of the competition problems within the scope of Article 4 (anticompetitive practices) or 6 (abuse of dominance) of the Turkish Competition Law, providing no assistance with the examination and coercing other undertakings into the violation.

Furthermore, Article 16(4) of the Turkish Competition Law provides that "*in case administrative fines mentioned in paragraph three are imposed on undertakings or associations of undertakings, an administrative fine up to five percent of the penalty imposed on the undertaking or association of undertakings shall be imposed on managers or employees of the undertaking or association of undertakings who are determined to have a decisive influence in the infringement*". Article 8 of the Turkish Regulation on Fines brings a similar provision by setting out also the minimum level of the percentage in cartel cases: *"Each of the managers and employees of the undertaking who were detected to have had decisive influence on the cartel shall be separately given between three percent and five percent of the fine given to the undertaking, taking into account points such as active cooperation"*.

Indeed, the active cooperation of the employees with the TCA in revealing the infringement of the competition rules may be rewarded with no or reduced fine for them, provided that the quality, efficiency and timing of the cooperation play a crucial role in the infringement detection process.

Despite the clarity on the TCA's power to impose fines on persons and the amount of fine to be imposed, the term "*decisive influence*" on the occurrence of the infringement is defined under neither the Turkish Competition Law nor the Turkish Regulation on Fines; hence, the lack of clarity and the ambiguity on this matter may be deemed as the great discretionary power of the TCA in determining whether to impose an administrative fine on individuals. To bring more clarity to this issue, the TCA's precedents with regard to the individual liability should be examined in detail.

3. The Turkish Competition Authority's Precedents with regard to Individual Liability

In its decision dated 25.11.2009 and numbered 09-57/1393-362 ("White Meat decision"), the TCA concluded its investigation regarding whether 27 undertakings operating in the white meat market and the Association of the White Meat Industrialists and Breeders violated Article 4 of the Turkish Competition Law. This decision must be examined in a detailed way for the significance it constitutes. The White Meat decision is the first one in relation to an individual liability under the Turkish Competition Law. More importantly, it addresses the undefined in the Turkish legislation term of the *"decisive influence"* and sets forth the respective conditions under which the behaviors are to be considered as having the decisive influence.

Accordingly, a manager shall be considered as having the decisive influence on the realization of the infringement where he/she is:

- inviting other players in the market to coordination,
- providing suggestions to other players in the market relating to increasing prices by decreasing the supply,
- encouraging or leading other undertakings to cooperation,
- coordinating the cartel,
- offering to participate in the cartel, and
- supervising/monitoring whether the parties comply with the cartel agreement.

In the White Meat decision, in addition to approximately TRY 27.6 million (approx. EUR 6.710 million) administrative fine imposed on the undertakings, the TCA imposed three percent of the administrative fine on a natural person, the board chairman of Pak Tavuk Gıda Sanayi ve Ticaret A.Ş. ("Pak Tavuk") and a head of the Association of the Union of White Meat Industrialists and Breeders; considering his decisive influence on realization of the infringement.

In its other decision dated 03.11.2009 and numbered 09-51/1245-314 ("Bodrum Ferryboat Decision"), the TCA examined whether the Bodrum Feribot İşletmeciliği A.Ş. and Bodrum Express Denizcilik ve Turizm A.Ş. violated Article 4 of the Turkish Competition Law by being engaged in rebate practices (60% of prices) in order to exclude the new entrant(s) from the market. Following the investigation, the TCA determined the said activity as an infringement under the Turkish Competition Law and imposed approximately TRY 90.000 (approx. EUR 21.880) administrative fine on the undertakings. Unlike in the White Meat decision, in the Bodrum Ferryboat decision the TCA determined that the anticompetitive activities in question were conducted without the decisive influence of the manager of the infringing undertaking, but rather under the instructions provided by other players operating in the market. Thus, as a result of lacking the decisive influence over realization of the infringement, no administrative fine was imposed on the natural person(s).

In spite of the TCA's decisions setting out the conditions for the "decisive influence" issue, it is still not certain whether the said conditions are cumulative. In the TCA's Peugeout-1[1], Cargo[2], Citroen[3], Chamber of Jewelers[4] and Steel Ring decisions[5] no fine was imposed on the managers or employees and no reasoning for that was provided by the TCA, even though such sanction was demanded by the reporters[7]. Therefore, determination of having the decisive influence over the realization of the infringement is still not absolute in the TCA's precedents. As a result, determination of whether the manager or the employee of the infringing undertaking may face the fine up to five percent, is still not sufficiently certain and constitutes difficulties for natural persons.

The more recent decision which resulted with an administrative fine imposed on natural persons is the TCA's decision dated 05.03.2012 and numbered 12-24/711-199 ("Soda Ash Decision"). In the decision, the TCA examined whether the undertakings conspired to fix powder sodium sulfate and crystal sulfate prices and engaged

in customer allocation as well as conspiring to fix raw salt prices. In the Soda Ash Decision the TCA imposed TRY 963.482 (approx. EUR 234.238) administrative fine on Otuzbir Kimya ve Sanayi Türk Ltd. Şti. ("Otuzbir Kimya") and Sodaş Sodyum Sanayi A.Ş. ("Sodaş"). Moreover, the general manager of the Otuzbir Kimya faced TRY 12.532,38 (approx. EUR 2.917) fine and general manager of the Sodaş faced TRY 8.186,04 (approx. EUR 1.990) administrative fine due to their decisive influence in the infringement of the competition law.

Due to the fact that the managers administrated the agreement and coordinated other parties to comply with the agreement, the TCA determined their activities as having the decisive influence over the realization of the infringement. Interestingly, the TCA also concluded that even though sales representative and marketing supervisor of the undertakings played the decisive role in the infringement, no fine was imposed to them since they were following the orders given by their managers. Thus, the main decisive influence in this infringement was caused by the managers. This decision may also be used to argue that the conditions for the "decisive influence" do not have to be cumulative, since the TCA relied on only two of the conditions out of the ones originally set forth in the White Meat decision.

4. Conclusion

To sustain and ensure the efficient competition in the market, effective sanction system for violation of the competition rules must exist and function in a clear and unambiguous way. In Turkey, undertakings may be faced with a fine of ten percent of their total turnover generated in the year preceding the infringement decision. Moreover, natural person(s) may also face a fine of up to five percent of the fine which was imposed on the infringing undertaking. To impose such fine on natural persons, the Turkish competition law system requires the natural person to have the decisive influence over the realization of the infringement. Even though there exists no certain definition of the term "*decisive influence*" in the legislation, the TCA's practice of fining natural persons brings some clarity, and at the same time ambiguity, to this issue. By setting forth the conditions for the "*decisive influence*", it is still not clear whether those conditions are cumulative. This is something yet to be clarified by the practice of the TCA in the near future, hopefully.

Footnotes

1. Decision dated 06.08.2010 and numbered 10-53/1057-391
2. Decision dated 03.09.2010 and numbered 10-58/1193-449
3. TCA's Citroen Decision dated 23.09.2010 and numbered 10-60/1274-480.
4. TCA's İzmir Chamber of Jewelers Decision, dated 27.10.2016 and numbered 16-35/603-268.
5. TCA's Steel Ring Decision dated 30.10.2012 and numbered 12-52/1479-508.
6. Reporters opinions are not binding upon the TCA.

5. HIGHLIGHTS OF THE TURKISH COMPETITION AUTHORITY'S RECENT INVESTIGATIONS

By Ertuğrul Can Canbolat and Ömer Bulgak

1. Introduction

The Turkish Competition Authority ("**TCA**") has recently been quite active in both opening new investigations and finalizing the pending ones. Within this scope, the TCA concluded ongoing investigations against companies active in ready mixed concrete, music and compulsory traffic insurance industries. In the meantime, the TCA has also launched two new investigations; one being against the leading mobile operators into their alleged abuse of dominance, the other being into the alleged anti-competitive practices of poultry meat producers. Both concluded and ongoing investigations play a significant role as it will render possible to further analyze the relevant markets and understand the TCA's approach to such alleged activities. As the reasoned decisions in relation to the concluded investigations have not been announced on the TCA's website yet, an overview of these developments is provided below.

2. Newly Launched Investigations

2.1 Investigation Launched against Turkcell, Vodafone and Avea

The TCA conducted a preliminary investigation against Turkey's leading mobile operators, namely Turkcell İletişim Hizmetleri A.Ş. ("Turkcell"), Vodafone Telekomünikasyon A.Ş. ("Vodafone") and Avea İletişim Hizmetleri A.Ş. ("Avea"), upon complainants' allegations that these companies have obstructed the operations of their competitors by quoting below the short message termination fees in bulk SMS tenders.

On 3 July 2017, the TCA determined that the information and documents collected during the preliminary investigation were sufficient to launch an investigation against the mentioned undertakings. On this basis, the TCA will examine during the upcoming months whether these mobile operators have abused their joint dominant position in the market.

2.2 Investigation Launched against 19 Undertakings Operating in the Field of Chicken Meat Production

The TCA conducted a preliminary investigation against Turkey's leading chicken meat producers, upon complainants' allegations that these companies have created a violation by determining the prices offered to retailers.

Following the evaluations of the information and documents collected during the preliminary investigation, the TCA resolved on July 2017 to conduct a full-fledged investigation against 20 undertakings including the industry association, operating in the field of chicken meat production, in order to evaluate whether these undertakings infringed the competition rules by jointly determining (rising) the prices offered to retailers.

3. Finalized Investigations

3.1 Investigation Against 32 Undertakings Operating in the Field of Compulsory Traffic Insurance Market and the Insurance Association of Turkey

In February 2016, the TCA started an investigation into 32 insurance companies and the Insurance Association of Turkey, based on the alleged anti-competitive agreements or concerted practices by way of jointly increasing prices and allocating markets. The investigation was concluded on 19 July 2017. Following its evaluations, in its Decision No 17-23/383-166, the TCA resolved that the concerned undertakings were not involved in any anti-competitive behavior and accordingly, the TCA has not imposed administrative fines to the investigated companies.

3.2 Investigation conducted on the "Music Employees Association"

The TCA launched an investigation on 23 September 2016 in order to evaluate whether through the agreements in relation to the utilization of musical works, the associations of music professionals engaged practices against (i) the provision which prohibits decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services, (ii) the provision that prohibits the abuse of dominant position, and (iii) the TCA's Individual Exemption Decision numbered 07-53/617-206 and dated 20 June 2007.

In its Decision No 17-27/451-193, the TCA concluded that associations of music professionals did not engaged any practices against the competition law and therefore it was not necessary to impose administrative fines.

3.3 Investigation Conducted on the Ten Undertakings Operating in the Ready Mixed Concrete Industry

On 20 April 2016, the TCA initiated a full-fledged investigation against 10 undertakings operating in the ready mixed concrete industry. During the investigation, the TCA evaluated whether these companies were engaged in agreements or concerted practices that restricts or distorts the competition by jointly increasing prices.

At the end of the investigation, on 22 August 2017, the TCA resolved that the investigated companies were not involved in an anti-competitive behavior. On this basis, the TCA has not imposed administrative fines to the investigated companies.

6. MORE INVESTIGATIONS & FINES FROM THE TURKISH COMPETITION AUTHORITY

By Ömer Bulgak

Electricity Companies Are Under Investigation In Turkey: Alleged Abuse Of Dominance

The Turkish Competition Authority ("TCA") is examining whether business practices of Toroslar Elektrik Dağıtım A.Ş. and Enerjisa Toroslar Elektrik Perakende Satış A.Ş. forecloses operations of independent providers and prevent the exercise of consumers' right to choose their own providers.

The TCA assesses the commercial practices of the companies in light of Article 6 of the Turkish Competition Law (equivalent of Article 102 of the Treaty on the Functioning of the EU). The investigation was launched in the end of January 2017.

Investigation Into Telecommunication Companies

The TCA completed its preliminary inquiry in relation to alleged abuse of dominance by the telecommunication companies Türk Telekomünikasyon A.Ş. and TTNET A.Ş. As a result, the TCA resolved to launch an investigation with a view to detecting whether TTNET has abused its dominant position through practices in relation to fixed broadband internet packages and pay-tv service.

The commercial practices of the company will be assessed in light of Article 6 of the Turkish Competition Law (equivalent of Article 102 of the Treaty on the Functioning of the EU).

Turkish Competition Authority Fines Branded Sunglasses Wholesaler Luxottica

The Turkish Competition Authority (TCA) has concluded its decision in relation to the investigation initiated on September 1, 2015 into the sales practices of Luxottica Gözlük Endüstri ve Ticaret A.Ş. (Luxottica Turkey).

The TCA resolved on February 23, 2017 with majority of votes, that Luxottica Turkey was in dominant position in the branded sunglasses wholesale market and that it has abused this position through practices foreclosing the market to its competitors. In this regard, the TCA fined Luxottica Turkey, TRY 1,672,647 (approximately EURO 437k), which corresponds to 0.75% of the company's turnover.

Fuel Distribution Companies Are Under Investigation In Turkey Again

Fuel distribution companies are under antitrust investigation in Turkey again following a decision of the Council of State. The TCA is re-evaluating whether the fuel distribution companies in question have been unfairly restricting competition and freedom of contract through usufruct rights preventing their dealers from purchasing auto gas LPG from other companies.

The TCA by its decision No 17-13/166-M dated20.04.2017 launched an investigation into OMV Petrol Ofisi A.Ş., Milan Petrol San. Tic. A.Ş. and TP Petrol Dağıtım A.Ş. Back in 2009 the TCA conducted preliminary investigation in relation to these companies and decided not to initiate the investigation. However, this decision was annulled by the Council of State in 2016. Currently, the TCA is assessing whether the mentioned companies unfairly restricted competition and freedom of contract through usufruct rights preventing their dealers from purchasing auto gas LPG from other companies.

The case is important as it is expected to shed a light of the dealership system in this sector, particularly in relation to long-term usufruct rights, five-year-term limitation on the dealership agreements and non-compete clause.

7. RESALE PRICE MAINTENANCE: SONY IS UNDER INVESTIGATION

By Cansı Çatak

On 28 September 2017 the TCA launched an investigation into SONY Eurasia Pazarlama A.Ş. (Sony), suspected of violating Article 4 (anticompetitive agreements) of the Turkish Competition Law by way of resale price maintenance practices.

The TCA concluded its preliminary inquiry conducted in response to the claim that Sony violated Article 4 of the Turkish Competition Law by means of determining the resale price of the products sold by its dealers. In its meeting dated 07.09.2017, the TCA concluded that the findings were sufficient and took decision No 17-28/458-M to initiate the investigation into the allegedly anticompetitive Sony's practices.

Sony was subject to TCA's preliminary examination back in 2014 regarding the alleged abuse of dominant position in the market (Article 6 of the Turkish Competition Law). However, back in 2014 the TCA did not find sufficient grounds/evidence to launch the investigation following the completion of the preliminary inquiry.

It should be mentioned that under Article 4 of the Turkish Competition Law the resale price maintenance is prohibited and thus, any practice of either directly or indirectly imposing a fixed or minimum resale price for the purchaser in the downstream market within the scope of the vertical relation constitutes a serious breach of the Turkish Competition Law. Within this frame, the TCA has adopted a strict approach against the resale price maintenance practices, although the recommended resale prices or determination of a maximum resale price is generally considered as non-violating practices. A case-by-case assessment of such practices is required.

8. SUSPECTED ANTICOMPETITIVE PRACTICES IN E-COMMERCE: EUROPEAN COMMISSION IS INVESTIGATING 3 CASES

By Hanna Stakheyeva

On 2 February 2017 the European Commission on its own initiative launched three separate antitrust investigations into the e-commerce market, focusing on whether the suspected companies active in the consumer electronics, video games and hotel accommodation sectors violate the EU competition rules by preventing consumers (via certain online sales practices) from enjoying cross-border offers due to their location/nationality.

In line with the EC's Digital Single Market Strategy, the investigations are aimed at gathering the market information in order to better understand and (where necessary) to deal with the barriers that hinder cross-border e-commerce, particularly those, which businesses may establish themselves and which are potentially anticompetitive.

Suspected anticompetitive practices

- Retail price maintenance (practices of consumer electronics manufacturers restricting the ability of online retailers to set their own prices for widely used consumer electronics products);
- Geo-blocking (bilateral agreements concluded between game distribution platform and five PC video game publishers that prevent consumers from purchasing digital content/PC video games, because of the consumer's location or country of residence - via a game "activation key" that is valid only in a particular EU member state), and
- Discrimination on the basis of location/nationality (agreements regarding hotel accommodation concluded between the largest European tour operators and hotels containing clauses that discriminate between customers, based on their nationality or country of residence and preventing customers from seeing the full hotel availability or booking hotel rooms at the best prices).

It would be interesting to follow the developments in relation to these cases, particularly considering that the investigations into consumer electronics and video games are the first ones following some of the issues identified in the EC's competition sector inquiry on e-commerce.

9. DIRECTOR DISQUALIFICATION FOR BREACH OF COMPETITION LAW FOR THE NEXT 5 YEARS IN THE UK. DRAWING PARALLELS WITH TURKEY

By Hanna Stakheyeva

While fines imposed on companies for breach of competition law have become a quite common notion in the business world, the decision of the Competition and Markets Authority ("CMA") in December 2016 in relation to the disqualification of the company's managing director comes as a surprise (in fact for the first time since the enactment of the respective law) and urges importance of compliance with competition law at all levels of the corporate structure. Currently Mr. Aston is prohibited from taking a director post at any UK company in the next 5 years. The business community, also in Turkey, should be clear that the competition authorities are likely to continue to scrutinize the conduct of the directors/managers/employees and resort to such individual sanctions more often with a view to preserving the competition compliance culture effectively.

The story in short

Mr. Aston, a managing director of Trod Ltd, agreed with one of its competing online sellers not to lower each other's prices for products sold on Amazon's UK website. The CMA fined the company £163,371 for the anticompetitive behavior. Since Mr. Aston, being the director, personally contributed to the breach of competition law, the CMA concluded that he was not fit for being a director in any company in the UK for the next 5 years.

Legal grounds

The CMA has a power under the Company Directors Disqualification Act 1986 to seek the disqualification of a company's director, which has breached competition law. The CMA may exercise this right either (i) via applying to the court for the disqualification order, or (ii) by accepting a disqualification undertaking from a director. The latter offers some discount in the period of disqualification, which may be up to 15 years.

The disqualification of Mr. Aston followed the CMA's decision dated 12 August 2016 that the company breached competition law. In the present case Mr. Aston gave his undertaking before the court proceedings were commenced, hence his period of disqualification was reduced to 5 years.

As for Turkey

Article 4 of Law of Turkey No 4054 On Protection of Competition ("Law No 4054") also prohibits agreements, concerted practices and decisions restricting competition. A financial penalty (administrative fine) is normally imposed on a legal entity in breach of competition law. At the same time according to Article 16 of the Law No. 4054, directors, managers and/or employees may also be faced with individual penalties where they have a decisive influence in the infringement.

Concluding remarks

Compliance with competition law should be taken seriously by all participants of the economic activity, including company's directors and employees in other capacities. It is very likely that the competition authorities will continue looking at conduct of directors and apply individual sanctions (in addition to fines imposed on companies) for breach of competition law in order to ensure competition compliance culture more effectively.

Turkish Competition Law also prohibits agreements, concerted practices and decisions restricting competition. A financial penalty (administrative fine) is normally imposed on a legal entity in breach of competition law. At the same time, directors, managers and/or employees may also be faced with individual penalties where they have a decisive influence in the infringement.

10. AUTOMOTIVE SECTOR: €27 MILLION FINE IN A CAR LIGHTNING SYSTEMS CARTEL SETTLEMENT IN THE EU

By Hanna Stakheyeva

On 21 June 2017 the European Commission sanctioned car lightning system producers a total of EUR 26 744 000 for participating in a cartel. One of the cartel participants was fully immune from fines due to leniency application. All cartel participants admitted their fault and agreed to settle as a result of which their fine was reduced by 20-35%.

Investigation

The European Commission confirmed the existence of a cartel in the automotive sector which was run for more than three years by Automotive Lighting, Hella and Valeo. The companies coordinated their prices and other trading conditions for the supply of vehicle lighting systems across the European Economic Area. The companies met at trade fairs, during customer visits, discussed tender quotes and exchanged information on price increases, etc.

Fines

Valeo via its leniency application obtained a full immunity and managed to avoid a fine of EUR 30,5 mln;

Automotive Lightning and Hella obtained a reduction in fine – 35% and 20% respectively for their active cooperation with the investigation (in addition to 10% each under the settlement procedure for the acknowledgement of their participation in the cartel and their liability).

Concluding remarks

This is just a part of a series of investigations into the automotive sector. Previously the European Commission fined suppliers of car bearings, wire harnesses; car seat flexible foam; parking heaters, air conditioning and engine cooling systems. The case demonstrates clear advantages for the parties of the active cooperation with the competition authority in cartel cases (both in terms of time and money).

11. LICENSING AND DISTRIBUTION PRACTICES: NIKE, SANRIO AND UNIVERSAL STUDIOS ARE BEING INVESTIGATED IN THE EU

By Hanna Stakheyeva

On 14 June 2017 the European Commission opened three investigations into licensing and distribution practices of Nike, Sanrio and Universal Studios and their ability to restrict cross-border and online sales of merchandising products within the EU single market.

Merchandising products – shoes, clothes, phone accessories, toys, bearing an image/text may only be produced if the manufacturer has a licensing agreement with the intellectual property owner. The three companies under investigation license IP lights for certain world known brands (e.g. Fútbol Club Barcelona, Hello Kitty, and the "Minions" and "Despicable Me" respectively).

The investigation concerns whether the mentioned three companies restricted the ability of licensees to sell licensed merchandised goods cross-border and online, which may be harmful for consumers in terms of choice and prices.

The investigation is in line with the EC's E-commerce sector inquiry in the context of the Digital Single Market strategy and other investigations, i.e. an investigation into the distribution practices of Guess (see below). The main aim is to ensure that the licensing policies are not used as barriers to online and offline cross-border trade. The case is a good example of interplay between IP and competition rules.

12. DISTRIBUTION PRACTICES OF CLOTHING COMPANY GUESS ARE UNDER INVESTIGATION IN THE EU

By Hanna Stakheyeva

On 6 June 2017 the European Commission launched a formal investigation into the distribution agreements of Guess Group on suspicion that the company has been restricting retailers from selling cross-border to consumers in violation of competition law and e-commerce sector inquiry issues.

Companies are normally free to choose a distribution system that suits them best. However, restricting online sales of retailers, as well as offline sales of wholesalers to retailers in other Member states may be considered as a violation of Article 101 of the Treaty on Functioning of the EU in certain circumstances.

The case should be of a special interest for companies that conclude distribution agreements (for clothing, shoes and accessories) that contain cross-border sales restrictions, cross-selling bans among members of a selective distribution system, internet sales limitations and resale price restrictions.

13. CLAIMING DAMAGES FOR A DELAY IN DECIDING ANTITRUST CASES – SUCCESSFUL!

By Hanna Stakheyeva

On 7 of June 2017 the General Court of the EU ordered the EU to pay a glass company Guardian Europe approx. USD 730 000 in damages for a delay in deciding on the antitrust case against the company. The ruling also clarifies what an appropriate length of time for dealing with cases concerning the application of competition law is - "a period of 15 months..."

Background

In 2007 the European Commission fined the Guardian Group USD 167 million for its participation in a glass cartel. The decision was appealed to the General Court. It took three years and five months for the court to decide. The General Court's judgement was further appealed to the Court of Justice of the EU, which in 2014 reduced the fine to USD 117 million.

Guardian vs EU (T-673/15)

The Guardian Group sued the EU claiming damages for the General Court's delay in deciding on the initial appeal and for the prejudice that the company suffered as a result of the court's excessive fine.

Interesting outcome

The General Court in its ruling admitted that it had taken it too long to decide on the Guardian's appeal – 41 months instead of the standard of 15 months. The General Court also found no circumstances that could justify such a 26 months delay above the court's case law standard (normally the length of that period depends, in particular, on the complexity of the dispute, the conduct of the parties and supervening procedural matters). The General Court decided that the adequate compensation for this would be USD 730 000.

Concluding remarks

The case demonstrates that in spite of the company's involvement in the competition law infringement, everybody has a right to defense and receive damages in cases

where there has been a failure to comply with the obligation to adjudicate within a reasonable time, which constitutes a sufficiently serious breach of human rights under Article 47 of the Charter of Fundamental Rights of the European stating that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal'.

Additionally, the ruling in this case is important as it clarifies what the reasonable adjudication period is - "a period of 15 months between the end of the written part of the procedure and the opening of the oral part of the procedure is, in principle, an appropriate length of time for dealing with cases concerning the application of competition law."

14. LUXURY BRAND IMAGE AND ONLINE SALES RESTRICTION: ADVOCATE GENERAL'S OPINION IN COTY CASE

By Hanna Stakheyeva

On 26 July2017 the Advocate General (AG) Wahl delivered his Opinion in Coty Case C-230/16. It provides guidance on the legality of online sales bans in selective distribution agreements in the EU and their justification under the "luxury image" argument.

Highlights of the case

The Court of Justice of the EU (CJEU) is currently reviewing Coty case upon the German court application for a preliminary ruling. The dispute under appeal is between Coty Inc. ("Coty") and Parfümerie Akzente GmbH ("Akzente", an authorized offline distributor of Coty). Coty is suing Akzente in the German court for violating a condition under the selective distribution agreement that prohibits Akzente from selling Coty's luxury products (under brands Marc Jacobs, Calvin Klein and Chloe) on open third party online platforms (e.g. Amazon.de).

Online platforms: supplier vs distributor

Online platforms may be regarded as an innovative format of distribution. They have shaped the relationship between the suppliers and distributors. While online platforms provide additional commercial opportunities for distributors, suppliers tend to resort to online sales bans to protect their products from low-cost competition and free-riding. On the one hand, luxury brand owners do have a right to protect their image and exclusivity by doing so; on the other hand, this may put small businesses in a disadvantaged position (since online platform are considered 'key outlets' for SMEs).

Assessment and "luxury image" justification

Currently it is not clear whether bans in relation to sales on third party online platforms in selective distribution systems shall be treated as a ***per se*** restriction of competition law; and whether a 'luxury image' argument may justify any possible restrictive effect.

Following antitrust probes into online sales restrictions of ***Adidas*** in Germany and France, the competition authorities came to conclusion that producer cannot prohibit

an authorised reseller from selling its products online by relying on the quality standard justification (Adidas had to modify its selective distribution contracts and online sales policy accordingly). Similar position was taken by the CJEU in ***Pierre Fabre*** Case C-439/09, stating that prohibiting distributors of cosmetics products company from selling its products via the Internet amounts to a restriction of competition 'by object', which is not justified by the need to maintain the prestigious image of the products at issue.

Luxury image' argument that is relied upon by Coty in this case implies that the manufacturer of branded goods shall be able to safeguard the image and prestige of its luxury brand(s), among other, by way of restricting online sales of its distributors on third party's platforms. 'An aura of luxury' justification was earlier confirmed by the CJEU in *Dior* Case C-59/08, whereby 'the proprietor of a trade mark can invoke the rights conferred by that trade mark against a licensee who contravenes a provision in a licence agreement prohibiting, on grounds of the trade mark's prestige, sales to discount stores [...], provided it has been established that that contravention [...] damages the allure and prestigious image which bestows on them an aura of luxury.'

In AG Wahl's opinion:

- A selective distribution agreement aimed at preserving the brand image of a product is outside the scope of Article 101(1) TFEU if the conditions set out by the Court in Metro case are justified;
- Online marketplace ban is acceptable in the context of a selective distribution agreement – and as such not restrictive by object.

This reasoning seems to be logical and there are high chances the Court will support it by permitting such online sales bans under the 'luxury image' justification.

Concluding remarks

Considering the above, the CJEU's ruling on this issue will be significant. The CJEU is expected to give its preliminary ruling and, hence guidance on (i) whether the supplier under the selective distribution agreements can prevent distributors from selling its products via third party online platforms; (ii) whether the online sales bans amount to a restriction of 'passive sales', and (iii) whether it may be justified by the need to protect the image and prestige of the luxury brands. We will keep you updated on this important issue. There are high chances that the CJEU will permit such online sales bans under the 'luxury image' justification, in addition to possibly other conditions that are common for the selective distribution systems. The question is how to precisely identify which goods are luxury and prestigious to be able to benefit from the 'luxury image' justification...

15. PATENT SETTLEMENT AGREEMENTS IN PHARMA: EC'S PRELIMINARY VIEW ON TEVA/ CEPHALON

By Hanna Stakheyeva

On 17 July 2017 the European Commission (EC) sent Statement of Objections to pharmaceutical company Teva with its preliminary view that a patent settlement agreement concluded with Cephalon was in breach of EU competition law. Under the agreement, Teva committed not to market a cheaper generic version of Cephalon's drug for sleep disorders, modafinil. In other words, the originator company Cephalon agreed on paying the generic company Teva to keep its cheaper generic version of Cephalon's sleep disorder drug modafinil out of the market. The sending of a Statement of Objections does not prejudge the outcome of the investigation.

Essence of Teva/Cephalon agreement

Cephalon owned the patents for the drug and its manufacture. After certain Cephalon patents on the modafinil compound expired in EEA, Teva entered the UK market for a short period of time with its cheaper generic product. According to the EC's press release, following a lawsuit concerning an alleged infringement of Cephalon's processing patents on modafinil, the companies settled their litigation in the UK and the US with a world-wide agreement. As part of this agreement Teva undertook not to sell its generic modafinil products in the EEA until October 2012 in exchange for a substantial transfer of value from Cephalon to Teva through a series of cash payments and various other agreements. Such agreements in the EC's view served as a significant pay-for-delay inducement for Teva not to compete with Cephalon's modafinil worldwide and hence could delay the entry of a cheaper generic medicine, leading to higher prices. The EC launched investigation into the agreement in April 2011.

Patent settlements or "pay-for-delay"

The enforcement of EU competition law in the pharmaceutical sector has recently become a major trend. Practices preventing or delaying entry of generic rivals into the pharmaceuticals market, particularly the contents of patent settlement agreements, have been under the scrutiny of the EC as generic-side competition is essential for a

proper functioning of the market as well as consumer welfare. Over the past few years the EC has been monitoring patent settlement agreements in order to identify those settlements which could potentially be problematic from an antitrust perspective – namely those that limit generic entry against a significant value transfer from an originator to a generic company.

Categorization of agreements

PSAs can be categorized into agreements (i) with no limitation of generic entry; and (ii) with limitation of generic entry (with or without the transfer of money).

- Agreements that do not restrict the generic company's ability to market its own product are normally agreements that simply discontinue proceedings without any further commitment on any of the parties, and without any payment. Some form of payment from originator to generic is acceptable if it covers litigation costs and/or damages, i.e. in case of an interim injunction invoked against a generic that was prevented from marketing its products. There could also be payment from generic to originator, i.e. when the generic company had riskily entered the market before the expiration of the patent. Mutual compensation or mutual royalty-free licences are also acceptable under PSAs that do not restrict generics' entry into the market, and are normally unproblematic from a competition law perspective.
- Agreements that foresee a limitation on the generic company's ability to market its own product without payment from the originator to the generic company can raise competition concerns and require competition law scrutiny on a case-by-case basis. Such agreements normally contain a "non-challenge clause", i.e. a clause stating that the generic company will refrain from challenging the validity of the originator's patent, and/or "non-compete clause", i.e. a clause preventing market entry until the patent has expired.
- Agreements that foresee a limitation on the generics' entry with payment from the originator to the generic company for agreeing to delay the generic product launch and/or for discontinuing the patent challenge are problematic and require the highest degree of competition law scrutiny on a case-by-case basis. Teva/Cephalon agreement falls within this last category of patent settlement agreements.

Patent settlements in Turkey

Currently there is no sufficient information on how the patent settlement agreements are treated in Turkey. According to the TCA's 2013 Pharmaceutical Sector Report, there is no information on how often parties enter into patent settlement agreements. The Turkish Competition Authority (TCA) very often refers to the EC's/FTC's decisions/practice, but it has not yet rendered a decision on that front yet. Originators in Turkey are constantly initiating lawsuits against the generics; the majority of the

lawsuits are decided in favour the generics. The aim is to delay generic's competition (originators know that they will lose the case, but initiate the lawsuit anyway). The originators generally argue that the reason behind their unsuccessful litigations is the weakness in Turkish patent legislation: it used to be under the old laws/decrees that raising claims was only possible before patenting the product/process. Following the IP law reform in Turkey under the new Industrial Property Law No 6769 (which came into force on January 10, 2017) objecting/raising claims against the patents to the Patent Office is possible within 6 month after the patenting.

Concluding remarks

Pro-competitive patent settlement agreements can be considered an opportunity for both generics and originators as they prevent high litigation costs and provide certainty as to the outcome of the dispute. However, special care is required when negotiating patent settlement agreements, especially if the settlements involve restrictions on the entry of generic products onto the market and/or a value transfer from originators to generics (e.g. any payment from originators under the patent-settlement agreements cannot exceed generic profits). Any language that might suggest an anticompetitive intent/exclusion should be avoided. Rather, the focus should always be on protecting legitimate IP rights.

The Statement of Objections in Teva/Cephalon case, just as in any other case, is a formal step in EC's investigations into suspected violations of EU antitrust rules to inform the parties concerned in writing of the objections raised against them. There is no legal deadline for the EC to complete antitrust inquiries into anticompetitive conduct. The duration of an antitrust investigation depends on a number of factors, including the complexity of the case, the extent to which the undertaking concerned cooperates with the Commission and the exercise of the rights of defence.

16. PROCEDURAL REASONS FOR CHALLENGING CARTEL CASES IN THE EU SUCCESSFULLY

By Hanna Stakheyeva

The Court of Justice of the EU (CJEU) on 21 September 2017 delivered its rulings annulling for procedural reasons the judgements of the General Court (GC) in the Italian reinforcing bars cartel C-85/15 P Feralpi, (as well as C-86/15 P C-87/15 P Ferriera Valsabbia&Valsabbia Investimenti/Alfa Acciai, C-88/15 P Ferriere Nord, and C-89/15 P Riva Fire). Now the European Commission (EC) will study the possible actions to comply with the procedural requirement outlined by the CJEU. The case concerns the powers/competence of the EC prior and after the expiry of the European Coal and Steel Community Treaty (ECSC), hence changes of the procedural rules and legal grounds for competition investigations. The main message of the CJEU is that the procedure resulting in the EC's decision must conform to the procedural rules laid down by the regulation currently in force, even if the procedure began before that regulation came into force.

I. Background

Investigation & EC's 2000 decision. In 2000 the EC conducted investigations at the premises of certain Italian undertakings engaged in the manufacture of reinforcing bars and at the premises of an association of certain Italian steel undertakings under Article 47 ECSC , following which administrative procedures followed (statement of objections under the ECSC; hearing; supplementary statement of objections under Regulation 17, explaining EC's position regarding further proceedings following the expiry of the ECSC on 23 July 2002; and the second hearing). The EC adopted Decision Case COMP/37.956 – Reinforcing bars in 2002 finding a cartel and imposing a fine in the amount of EUR 10.25 million (under Article 65 ECSC).

GC's ruling. In 2003 Feralpi challenged the EC's 2002 decision before the GC. In 2007 the GC annulled the EC's 2002 decision primarily on the grounds that it did not contain any reference to Regulation 17, but the ECSC alone, which had expired, and hence the EC could no longer derive competence from those provisions, which were no longer in force when it adopted the 2002 decision.

EC's 2009 decision. In 2008 the EC decided to re-adopt its decision which was based on the evidence already presented to it. The parties were given a deadline to submit their observations. The EC's 2009 decision finding the violation did not contain the tables illustrating the price variations in the annex. The EC adopted the amending

decision, which included in its annex the missing tables and corrected the numbered references to those tables in eight footnotes.

GC & CJEU. In 2010 Feralpi unsuccessfully challenged the EC's 2009 decision before the GC, following which its appeal against the GC's ruling was supported by the CJEU.

II. Main findings of the CJEU

In the Feralpi case, the CJEU upheld the claimant's position and ruled that the GC made an error in law in holding that the EC was not obligated to organize a new hearing before adopting the decision at issue, on the ground that the undertakings concerned had already had the opportunity to be heard orally at the hearings prior to the expiry of the ECSC.

Today, the EC must give the parties to whom it addresses a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written comments. The competition authorities of the Member States are to be invited to participate in the oral hearing which is to follow the issuing of the that statement. Such participation was not provided for in the ECSC Treaty. Therefore, the representatives of the Member States did not participate in a hearing concerning the substance of the Feralpi case, but participated only in the one concerning the legal consequences resulting from the expiry of the ECSC Treaty. Yet, according to the case-law when a decision is adopted on the basis of Regulation No 1/2003, the procedure resulting in that decision must conform to the procedural rules laid down by the regulation, even if the procedure began before that regulation came into force.

Having regard to the importance of holding an oral hearing, failure to hold such a hearing constitutes infringement of an essential procedural requirement. In so far as the right to such a hearing was not respected, it is not necessary for the undertaking, the rights of which have been infringed in this way, to demonstrate that such infringement might have influenced the course of the proceedings and the content of the decision at issue to its detriment. Accordingly, the procedure is necessarily vitiated, regardless of any possible detrimental consequences for Feralpi that could result from such an infringement.

As a result, this is sufficient ground for setting aside the judgement under the appeal and the EC's decision finding the cartel and imposing the respective fine.

III. Concluding remarks

The CJEU annulled the GC's ruling as well as the EC's 2009 decision. Now the EC will study the possible actions to comply with the procedural requirement outlined by the CJEU, primarily focusing on compliance with the right to be heard/oral hearings of the parties concerned.

17. THE CAR SECTOR IN THE EU: UNANNOUNCED INSPECTIONS & MORE

By Hanna Stakheyeva

The car/automotive sector plays an essential role in any economy. Over the past 10 years, the European Commission (EC) has been focusing on protecting competition in this crucial sector: 9 cartels in the automotive sector have been uncovered and companies have been fined a total of more than EUR 6 billion for their illegal behaviour. Below we provide you with the highlights of the main developments in the EU car sector for September-October 2017.

Unannounced inspections

On 20 October 2017 the European Commission (EC) confirmed that it carried out an unannounced inspection at the premises of a car manufacturer in Germany due to certain concerns that the several German car manufacturers may have acted in breach of the EU competition rules that prohibit cartels and anticompetitive business practices.

Conducting inspections is only a preliminary step in investigations of suspected anticompetitive practices, and there is no presumption that the inspected companies are guilty, just as it does not prejudge the outcome of the investigation. There is no legal deadline to complete the inquiries.

Trucks cartel and EUR 880 million fine

On 27 September 2017 the EC concluded its investigation and imposed the EUR 880 million fine on Scania, a heavy truck producer, for participation in the trucks cartel that lasted 14 years (from 1997 until 2011, when the EC carried out unannounced inspections of the firms). Scania colluded with five other truck manufacturers (MAN, Volvo/Renault, Daimler, Iveco, and DAF) on truck pricing and on passing on the costs of new technologies to meet stricter emission rules.

Volvo/Renault, Daimler, Iveco, and DAF acknowledged their liability for the cartel and reached a settlement with the EC back in July 2016 and were faced with EUR 2.93 billion fine (which included a 10% reduction as a “reward” for cooperation with the EC). MAN was not fined at all as it revealed the existence of the cartel to the EC.

The collusion was done via meetings held at senior manager level, sometimes at the

margins of trade fairs or other events; phone conversations and with participants generally exchanging information electronically. The discussions between the companies covered such topics, as the price increases, timing for the introduction of new emissions technologies and the passing on to customers of the costs for the emissions technologies.

Concluding remarks

The cases discussed above are good examples of leniency program in action. They emphasize that cooperation with the competition authority and reaching a settlement may provide either full immunity from or a substantial reduction in a fine. Those who choose not to cooperate with the competition authority during the investigation cannot benefit from any fine reduction (e.g. Scania).

CHAPTER II
ABUSE OF DOMINANCE

1. TURKISH COMPETITION AUTHORITY FINES TURKEY'S DOMINANT ALCOHOLIC DRINK PRODUCER FOR ABUSE

By Bahadır Balkı and Sera Erzene Yıldız

Introduction

The Turkish Competition Authority (**"TCA"**) adopted a landmark decision in relation to Turkish traditional alcoholic beverages market (rakı). This decision is important from several perspectives;

- the fine calculation percentage is higher than it usually is for the relevant type of infringement,
- it ranks the fourth largest fine imposed to a company under one single investigation, and
- it lists in detail, a number of actions that the dominant company needs to undertake and refrain from.

The decision additionally demonstrates an increased scrutiny from the TCA's side to the competition issues in relation to abuse of dominance cases in the retail markets.

Background Info

The TCA has initiated on July 28, 2015, an investigation against Turkey's dominant traditional alcoholic drink (rakı) producer Mey İçki San. ve Tic. A.Ş. ("**Mey İçki**"), in order to evaluate whether it has abused its position through practices foreclosing the market to its competitors. The investigation also concerned evaluation from the point of Article 4 of the Law on the Protection of the Competition Law ("**Turkish Competition Law**") which corresponds to Article 101 of the Law on the Functioning of the European Union.

TCA's Findings

Following the investigation, which approximately took one and a half years, the TCA concluded that Mey İçki;

- was in dominant position in the rakı market (the firm's dominance had been previously certified in several cases dating as far back as 2007) and
- abused its dominant position through practices which foreclosed competitor activities.

As a result, TCA resolved to fine the company TRY 155,782,969 (approx. EUR 40.4 million), an amount corresponding to 4.2% of its turnover achieved during the preceding financial year. While setting this (unprecedented percentage for an abuse of dominance case), the TCA also took into account recurring abusive practices of the company (the

company was fined on the same basis in 2014) as well as mitigating factors (which are currently undescribed in the short public version of the decision).

As a brief side note, pursuant to the Turkish Regulation on Fines, in relation to the abuse of dominance, the TCA is entitled to impose a base fine ranging from 0.5 to 3% of the abusing company's turnover. While determining the specific percentage, power of the relevant company and the damage caused/potential damage is taken into consideration. The TCA later considers aggravating (for recurring infringements, the fine is increased from half to one hold) and mitigating factors, and ultimately has the power to impose a fine up to 10% of the company's turnover.

In its Mey İçki decision, in addition to the fine, the TCA, in order to create a more competitive market, specified a set of rules that the company needs to undertake, including;

- termination of cash discount practices to the sales points (within the scope of the product purchase agreements) at the beginning of the discount term,
- providing discounts to the sales points on transaction-basis (reflecting to the invoices), therefore ending the lump sum retrospective discount payments,
- in case of making cash payment to the sales points within the scope of investment support agreement, specifying the nature and purpose of such investment, and ensuring that those agreements are separately drafted/contracted from the product purchase agreements,
- termination of financial benefits in relation to the shelf positioning and product layout of rakı category within the traditional channel,
- (in relation to the traditional channel sales points) being entitled to recommend layout only for 70% of the shelf that is dedicated to rakı, being able to recommend shelf positioning only for Mey İçki products and refraining from any recommendations for shelf positioning of competitors' products, and
- removal from product purchase agreement, the provision forcing the sales point to display Mey İçki's promotion material and products in line with Mey İçki's aims and instructions.

Further details of the evaluations and findings will be available upon publication of the reasoned decision within upcoming months.

Concluding remarks

By imposing a fine greater than it usually does for the relevant type of infringement (the figure being the fourth biggest fine TCA has imposed to a company under one single investigation), the TCA signaled its increased interest in pursuing and fining abusive behaviours. Secondly, the exceptional list of behaviours on how to properly manage dominance is also worth examining, as it will undoubtedly interfere with the business decisions. Finally, these instructions for the establishment of a competitive market, may have far-reaching consequences for dominant retail companies in terms of their shelf positioning and incentive practices.

2. MICROSOFT IN TURKEY: TCA TO LAUNCH INVESTIGATION UPON COURT's RULING

By Bahadır Balkı

On 4 April 2017 the Turkish Competition Authority's ("TCA") received and subsequently published the decision of the Council of State in relation to Microsoft case. In October 2016 the Council of State reversed the decision No 11-60/1555-550, where the TCA concluded that there was no need to initiate an investigation into Microsoft Bilgisayar Yazılım Hizmetleri Ltd. Şti.'s ("Microsoft Turkey") activities on the implementation of its Project 3+ (the "Project"). Hence, the TCA will have to launch an investigation into Microsoft Turkey's activities.

Complaint

Istanbul Chamber of Artisans of Cybercafés ("Chamber") on 28 July 2011 submitted a complaint to the TCA claiming, among others, that Microsoft, by abusing its dominant power, (i) forced the cybercafés to buy several Microsoft products as a part of a project called "Project 3+", (ii) intentionally decreased the number of distributors/authorized dealers by setting unjust requirements, and (iii) paying an illegal commission fee to certain chambers for each sale.

Microsoft Turkey stated that contrary to allegations each product could be purchased individually. Further, it argued that Microsoft Turkey's right under the Law to set certain requirements for its distributors/dealers to meet, and the said requirements were fair and logical. The TCA rendered its decision in lieu with Microsoft's arguments, and decided not to initiate an investigation.

Appeal

TCA's decision was appealed, and finally brought before the 13rd Chamber of the Council of State (the "Council"). Without deep-diving into the merits of the case, the Council decided on 25 October 2016 that the TCA's decision was based on an inadequate examination, and that Microsoft Turkey's activities may have been considered as "concerted practice" and "abuse of dominant position", had the case been investigated. Therefore, TCA's decision was reversed.

Implications

The Council's decision will lead the TCA to launch a an investigation against Microsoft Turkey as it cannot move forward contrary to the Council's decision according to the code of administrative procedure.

3. EXCESSIVE PRICING INVESTIGATIONS IN TURKEY

By Hanna Stakheyeva

The Turkish Competition Authority (TCA) has been rather active in the recent months in launching investigations into alleged abuse of dominance via excessive pricing. For instance, on 4 May 2017 by decision No 17-15/175-M the TCA launched an investigation into alleged abuse of dominance by Sahibinden.com via implementing excessive pricing practices, i.e. sales conditions with real estate agencies. Additionally, on 27 September 2017 the TCA by its decision No 17-30/488-M opened one more investigation in relation to the abuse of dominance by Sahibinden in the online automotive listings market. These two investigations will be combined and carried out together.

The cases may shed a light on such a debated issue as to what extend the excessive pricing shall be considered as a violation of competition law in innovative industries (if at all), as well as the criteria for determining this “excessiveness” in Turkey.

Excessive price actions by the TCA have in general been relatively rare. Most of the excessive pricing cases have been closed at the preliminary inquiry stage (as mentioned in the OECD report 2011).

From the perspective of former precedents, the TCA defines the excessive pricing as pricing significantly and persistently higher than those that have prevailed under viable competition as a result of the exercise of the market power. In other words, the implementation of much higher prices that could not reasonably be related to the economic value of the supplied product is evaluated within the scope of Article 6 of the Turkish Competition Law. In this regard, the TCA examines such issues as market structure, possibility of new entries, existence of legal regulations and demand elasticity; and then conducts a comparison of actual costs with price and another analysis for the comparison of the prices in itself as well as with those of the competitors.

The first ever (milestone) decision and fine of the TCA was in relation to excessive pricing policy of a public undertaking in a dominant position Belko (decision No 01-17/150-39 dated 6.4.2001). The TCA in its assessment of excessive prices took prices and compared them with the prices of identical/equivalent products in other more competitive geographical markets.

In BOTAŞ-EGO-İZGAZ-İGDAŞ decision No 02-13/127-54 dated 8.3.2001 in spite of

66-67% profit of the undertakings concerned, the TCA did not consider the prices as excessive on the grounds that the upper and lower limits of prices of the companies were regulated by the Ministry of Energy and Natural Resources. Hence, the companies in the regulated industries cannot in principles be charged with excessive pricing claims since they do not have a freedom to set their prices.

Determining whether the price is excessive (unfair) has always been a challenge for the competition authorities in various jurisdictions, which also explains the reluctance of the latter to deal with and investigate such cases. The landmark judgement in United Brands case, which dates back 1978, outlining the test for determining the excessive pricing is still valid and the recent September 2017 Court of Justice of the EU's judgement in AKKA/LAA case confirms this. Additionally, the Court of Justice of the EU thereby emphasizes that the difference in rates following the price comparison must be significant and not temporary in order to be considered as appreciable and hence abusive. The concept of significant is rather vague and subjective depending on the circumstances of each specific case. Even so, these factors are "merely indicative" of abuse of a dominant position. In such situations, it is for the undertaking holding a dominant position to show that its prices are fair by reference to objective factors that may have an impact on management expenses; and it is up to the national court/ competition authority to assess the circumstances of each specific case.

There are high chances that the TCA may take into consideration the recent AKKA/ LAA judgement in the process of concluding its investigations in Sahibinden cases. This is something yet to be seen...

4. EXCESSIVE PRICING AS ABUSE OF DOMINANCE: "IT IS CLEAR THAT IT IS UNCLEAR"

By M. Fevzi Toksoy and Hanna Stakheyeva

The Court of Justice of the EU (CJEU) on 14 September 2017 delivered its ruling in Case C177/16 AKKA/LAA1 on excessive (unfair) pricing. While shedding some light on the issue and referring to its earlier judgements, i.e. the 1978 United Brands "excessive pricing" test, the CJEU's judgement in this case may be summarized in the following words – "it is clear that it is unclear." By invoking such concepts as "appreciable", "significant and persistent," "objective", "consistent", admitting that there is no single adequate assessment method and that the national courts as well as the Competition Authorities have a "certain margin of manoeuvre" etc., the CJEU once again confirmed that excessive pricing cases are particularly complicated. Let us focus on the main points of the CJEU's recent ruling for the purposes of examining whether an undertaking applies excessive (unfair) prices:

- ***It is appropriate to compare its rates*** with those applicable in neighboring Member States/markets as well as with those applicable in other Member States/markets adjusted in accordance with the ***purchasing power parity (PPP) index,*** provided that the reference Member States/markets have been selected in accordance with ***objective, appropriate and verifiable criteria*** and that the comparisons are made on a ***consistent basis;*** and

- The ***difference between the rates compared must be regarded as appreciable*** if that difference is ***significant and persistent.*** Such a difference is indicative of abuse of a dominant position and it is for the undertaking concerned holding a dominant position to show that its prices are fair by reference to objective factors that have an impact on management expenses.

Background info

The case was referred to the CJEU by the Latvian (Regional Administrative) court for the preliminary ruling in the course of the appeal in cassation proceedings, which were brought by AKKA/LAA against the first instance court's judgement not fully satisfying the AKKA/LAA claims. In particular, AKKA/LAA requested the first instance court to annul the decision of the Latvian Competition Authority (LCA) in full as opposed to simply ordering the review of the amount of fine. AKKA/LAA was fined for abusing its dominant position via excessive pricing for its services of

issuing for consideration licenses for the public performance of musical Works and collecting fees for remunerating the copyright holders. In fact the company was fined twice – initially in 2008 and subsequently in 2013 following the LCA's examination of the new amended rates.

For the purposes of investigating whether the excessive pricing took place, the LCA mostly relied on comparison of rates applied in Latvia for the use of musical works in shops and service centers with those applied in Lithuania and Estonia as neighboring Member States and markets. The rates applied in Latvia were 2-3 times higher than those applied in the other two Baltic States. The LCA also applied PPP index and compared the rates in force in approx. 20 other Member states, which also confirmed that the rates exceeded the average level in other Member states.

Comparison method to determine the (un)fair nature of the prices

The main question here is comparison with how many Member States/markets is sufficient, and moreover, what rate is to be considered as 'appreciably higher' within the meaning of ***Lucazeau and Others*** judgement and Article 102 TFEU, as well as what reasoning can the company use to prove the fair nature of the rates. In that respect, the CJEU ruled:

- ***United Brands test is still valid.*** The CJEU in the current case still refers to its United Brands test to determine the excessive pricing by verifying whether (i) the difference between cost incurred and price charged is excessive, and (ii) if yes, whether the price imposed is either unfair in itself or when compared with competing products.

- ***No minimum markets to compare.*** The CJEU admits that there may be other methods by which the excessive pricing may be determined, including the one based on a comparison of prices applied in various Member States/markets, even if such comparison is based on a limited number of Member States/markets (which may be a proof that the Member States are selected according to the objective, appropriate and verifiable criteria).

- ***The choice of analogue markets depends on circumstances specific to the case.*** Those may include: consumption habits, other economic and socio-cultural factors (GDP per capita, cultural and historic heritage). The CJEU left it to the national court to assess and decide on this depending on the circumstances of the case.

- ***Consistent basis of the price comparison.*** This is another rather vague concept referred to by the CJEU both in its earlier judgements in ***Tournier***, and ***Lucazeau and Others***, as well as this ruling. In essence, it is consistent where the method of calculating rates in various markets is analogous and takes into account the PPP index in the comparison with the rates charged in Member States/markets in which

the economic conditions/living standards differ. Again, the CJEU emphasized that it is up to the Competition Authority concerned to make the comparison and to define its framework, considering that there is no single adequate method and the Competition Authority has a "certain margin of manoeuvre" here.

- ***"Appreciable difference" threshold.*** As such, there is not such threshold above which the difference between the rates compared is to be considered as appreciable, and hence serve as an indication of an abuse of a dominant position. The CJEU stresses that when an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in the other Member States, that difference must be regarded as indicative of an abuse of a dominant position. The CJEU in the current case stated that the difference (between 50% and 100% higher in Latvia) is not as large as the difference observed between the fees in the cases that led to its earlier judgments in Tournier, or Lucazeau and Other. At the same time it admits that such difference may also be qualified as "appreciable", since there is "no minimum threshold above which a rate must be regarded as "appreciably higher" given the circumstances specific to each case. As long as the difference is both significant and persistent for a certain period of time (as opposed to be temporary and periodic), it may be considered as appreciable. And again it is up to the national court to verify this. In any case, those factors are only indicative of a possible abuse of dominant position.

- ***Justification/Defence to prove that difference in rates is not excessive***. The CJEU states that the company concerned may rely on objective dissimilarities between the situations in various markets/Member States included in the comparison. In case of the company concerned, this may be the relationship between the level of the fee and the amount actually paid to the copyright holders, the collection, administration and distribution expenses, other objective factors affecting costs, such as specific regulation that places a heavier burden on the administration or other features specific to the market concerned. The CJEU emphasized that it is for the company holding a dominant position to show that its prices are fair by reference to objective factors that have an impact on management expenses.

In conclusion

Determining whether the price is excessive (unfair) has always been a challenge for the competition authorities in various jurisdictions, which also explains the reluctance of the latter to deal with and investigate such cases. The landmark judgement in United Brands case, which dates back 1978, outlining the test for determining the excessive pricing is still valid and the recent CJEU's judgement in AKKA/LAA case confirms this. Additionally, the CJEU thereby emphasizes that the difference in rates following the price comparison must be significant and not temporary in order to be considered as appreciable and hence abusive. The concept of significant is rather vague and

subjective depending on the circumstances of each specific case. Even so, these factors are “merely indicative” of abuse of a dominant position. In such situations, it is for the undertaking holding a dominant position to show that its prices are fair by reference to objective factors that may have an impact on management expenses; and it is up to the national court/competition authority to assess the circumstances of each specific case.

Footnotes

1. Judgment of 14 February 1978, United Brands and United Brands Continentaal v Commission, 27/76, EU:C:1978:22, paragraph 252

5. INTEL CASE AND CONTROVERSIAL REBATES IN THE EU: EFFECT ASSESSMENT IS CRUCIAL

By Hanna Stakheyeva

On 6 September 2017 the Court of Justice of the EU (CJEU) delivered its judgement in Intel Corporation Inc. v European Commission (Case C-413/14 P). The judgement cancelled the 2009 General Court's (GC) judgement supporting the European Commission's (EC) finding of abuse of dominance by Intel and imposing a record EUR 1,06 billion fine. Now the case is referred back to the GC, who is to conduct the new assessment of the evidence and effects of the rebates system provided by Intel. The main message of the CJEU's judgement is that the anticompetitive effect of the loyalty rebates should not be presumed where the undertaking in question argues that its conduct is not capable of restricting competition in the market.

CJEU's position The CJEU did not overrule the EC's decision by its judgement. It addressed three out of six grounds of appeal and referred case back to the GC. It is now for the GC to decide on whether to annul or uphold it (again) depending on the new assessment of the evidence and effects of the case at hand that the GC is now ordered to perform.

The CJEU has ruled on the important issues, such as:

- EC's procedural obligations/Intel's right of defence. The CJEU criticized the EC for material procedural mistake affecting Intel's right of defence, including for failing to record adequately and take into account the evidence (a 5 hour interview with Intel's customer) that had been given by a third party.
- EC's territorial jurisdiction. The CJEU emphasized on the extraterritoriality of the EU competition law, i.e. that activity of an undertaking outside the EU may infringe EU competition law by its effect that is foreseeably "immediate and substantial". Behaviours which, while not implemented within the EU, but which have or likely to have an impact on the EU market serve as a basis for the EC's jurisdiction in such cases.
- Assessment test to be applied. The CJEU reminded that an undertaking suspected of having infringed Article 102 TFEU could argue that its behaviour was not capable of restricting competition. In case such an objection is expressed, the EC is required to examine (i) the extent of the dominant position, (ii) the market coverage of the rebates at issue, (iii) the conditions, the duration and the

amount of those rebates, and also (iv) the exclusionary effect of such behaviours on competitors who are at least as efficient as the dominant undertaking ("as efficient competitor test"/"AEC test")). Such an analysis may reveal that the exclusionary effect of the behaviours at issue could be counterbalanced by advantages in terms of efficiency, which can benefit the consumer.

Background

The Intel case started with a complaint before the EC brought by the Advanced Micro Devices (AMD) against Intel back in 2000. Following the investigation, the EC found that Intel indeed infringed Article 102 of the TFEU, i.e. abused its dominant position, in particular by granting (i) rebates on condition that OEMs would purchase from it all or almost all of their x86 central processing units (CPU) for use in their computers, and (ii) payments to the largest desktop computer distributor in the EU, Media-Saturn-Holding, on condition that it would be selling exclusively computers containing Intel's x86 CPUs. On top of that, according to the EC, Intel also (iii) provided payments to the OEM's for the postponement or cancellation of the launch of AMD CPU-based products or put restrictions on their distribution. The gravity of the infringements which affected the ability of Intel's competitors to compete justified the record fine EUR 1,06 billion fine imposed by the EC. Intel unsuccessfully tried to cancel the EC's decision before the GC in 2014.

Concluding remarks

The CJEU has provided Intel with a second chance to have its case reviewed/ reassessed, particularly focusing on the AEC test. The GC did not address Intel's objections towards that test and have consequently failed to take into account Intel's arguments alleging errors committed by the EC in the framework of that test.

The CJEU's judgment confirms the statement that the anticompetitive effect of the loyalty rebates should not be presumed where the undertaking in question argues that its conduct is not capable of restricting competition in the market. In such situations all the circumstances of the case must be analyzed in order to correctly determine whether competition rules have been infringed.

Additionally, this judgement is a reminder that the competition law has extraterritorial effect, as well as that competition authorities (not only the EC) must pay due care to the procedural formalities and right of defence of the undertaking(s) under investigation, e.g. to record all evidence, including interviews and meetings.

6. ECJ'S RECENT INTEL DECISION AND ITS IMPLICATIONS IN TURKISH COMPETITION LAW ENFORCEMENT

By Barış Yüksel, Hasan Güden and Mustafa Ayna

INTRODUCTION

The European Court of Justice's ("**ECJ**") recent Intel decision calls for a reflection on the impact that the court's assessment of evidence may have on Turkish competition law enforcement. In effect, by its judgment of 6 September 2017, the ECJ has set aside the judgment of the General Court which had confirmed the fine of **€**1.06 billion imposed on Intel by the European Commission ("**Commission**") and has referred the case back to the General Court.

Below will be addressed sequentially (**i**) the defence the ECJ dealt with to annul the General Court's decision, (**ii**) the approach to rebates in Turkey and (**iii**) the reference to the "*as efficient competitor*" test ("**AEC test**") in the dissenting opinion of two Board Members in the recent Luxottica[1] decision.

1. The Salient Issues of ECJ's Decision

Three out of six grounds of appeal have been addressed by the ECJ. The first two grounds having been rejected, the analysis will only be limited to the third one, according to which the General Court erred in law by failing to examine the rebates at issue in the light of all the relevant circumstances.

Among others, Intel denounced General Court's analysis concerning the capacity of the rebates and payments at issue to restrict competition and particularly its evaluation of the relevance of the AEC test applied by the Commission. Indeed, according to Intel, the test carried out by the Commission contained errors and, had it been correctly executed, the Commission would have concluded that the behaviors at issue did not have the capacity to restrict competition.

According to the ECJ, the General Court should have reviewed Intel's arguments pointing out some errors in the Commission's findings in the framework of the AEC test conducted to consider the capability of the behaviors at issue to foreclose the EU market. The General Court has nevertheless held that was not necessary to examine whether the Commission had applied the AEC test flawlessly and whether the alternative calculations proposed by Intel had been correctly performed. Indeed,

according to the General Court, loyalty rebates granted by an undertaking holding a dominant position are naked restrictions that have, by their very nature, a capacity to restrict competition, so that an AEC test does not prove to be necessary.

Then, by not attaching importance to the AEC test carried out by the Commission, the General Court did not address Intel's objections towards that test and have consequently failed to take into account Intel's arguments alleging errors committed by the Commission in the framework of that test.

2. Rebates under Turkish Competition Law

There have been some recent decisions rendered by the Turkish Competition Authority ("**TCA**") in which rebate schemes of dominant undertakings were examined; *Mey İçki*[2] and *Luxottica* decisions are of importance in this respect. Moreover, what the Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings ("**Guidelines**") provide for regarding rebates requires further attention.

The Guidelines stipulate that the TCA shall focus on whether, in response to the rebate, equally efficient competitors would be able to effectively compete with the dominant undertaking for the contestable portion of the customer's demand[3]. In this framework, a price-cost analysis shall be conducted and the TCA shall examine whether the rebate system has negative effects on the entry or expansion of equally efficient competitors in case the effective price is established to be between the Average Avoidable Cost and the Long-Run Average Incremental Cost ("**LRAIC**")[4].

Although the Guidelines expressly stipulates that the TCA shall assess the anti-competitive effects of rebate schemes by using an AEC test, in practice the TCA focuses on the loyalty enhancing effects, claiming that rebate schemes would have the potential to foreclose markets in case they lead to *de facto* exclusivity by creating loyalty enhancing effects. In other words, the case law of the TCA indicates that the rebate schemes that lead *de jure* or *de facto* exclusivity are anti-competitive regardless of whether they have the potential to exclude equally efficient competitors or not.

In the *Mey İçki* ("**Mey**") case, the dominant undertaking (in the raki – the traditional Turkish alcoholic beverage – market) granted various rebates to points of sales, including rebates offered without any written evidence, in consideration of an increased availability and/or visibility to Mey's products.

The TCA established that Mey granted rebates and other financial advantages to points of sales that would put its competitors' products out of points of sales' shelves or reduce their visibility therein. The TCA concluded that the rebate scheme of Mey has led to *de facto* exclusivity and had the "*potential*" to exclude the competitors in the raki market.

In the Luxottica case, where the TCA examined the rebate scheme Luxottica adopted for different categories of sunglasses, the TCA made it clear that it did not have

a duty to prove that Luxottica's rebate scheme actually excluded any competitors (presumably by using an AEC test) and that it was sufficient to show that the rebate scheme has loyalty enhancing effects leading to *de facto* exclusivity. The following sentence is a direct quote from the decision showing the approach of the TCA with respect to the need for an effect-based analysis: *«It is not claimed, and no findings have been presented within the scope of the investigation, to show that the rebate scheme of Luxottica actually excluded the competitors*". It should also be noted that the Luxottica decision contains a direct reference to the Intel decision of the Commission, arguing that the Commission also adopts a *per-se* approach against rebate schemes that lead to exclusivity (*de facto* or *de jure*) regardless of the fact that the Guidance on Commission's enforcement priorities in applying Article 102 of the EC Treaty to abusive exclusionary conduct by dominant undertakings calls for an effect-based analysis.

Considering these, the TCA held that the undertaking's behaviors had the "*potential*" to foreclose the market to the competitors and that this was sufficient to prove a violation after showing that Luxottica's rebate scheme did have loyalty enhancing effects and that it could lead to *de facto* exclusivity,

3. The Dissenting Opinion in the Luxottica Decision

The dissenting opinion of the two Board members in the Luxottica decision is critical because it points out that it is not sufficient for the TCA to show that a rebate scheme has loyalty enhancing effects and that it could lead to *de facto* exclusivity to prove the existence of a violation. The dissenting opinion requires the TCA to take into consideration the actual effects of such conduct by using the AEC test adopted in the Guidelines. The dissenting opinion also explains how this test should be conducted in case of rebate schemes.

In the dissenting opinion it is explained that the rebate schemes that have loyalty enhancing effects may be problematic because they might allow the dominant undertaking to carry its advantage in the non-contestable portion of the market (it is assumed that a certain portion of the market is non-contestable because the must stock characteristics of dominant undertaking's product) to the contestable portion of the market, preventing its competitors from reaching the minimum efficient scale and increasing their cost disadvantages, consequently excluding them from the market. Yet, it is suggested that the TCA must assess whether the rebate scheme in question actually excludes "*as efficient competitors*" and it is stressed that the effects on the current competitors (who might not be as efficient) should not be taken into consideration.

Conclusion

As far as the proper application of the AEC test is concerned, the Intel case underlined the requirement for the Commission or for the General Court to consider all the relevant circumstances when applying the AEC test, despite the likely anti-competitive

effects of loyalty rebates. This was thus an opportunity to remember that rebates are not *per se* anti-competitive behaviors in the EU and that the effects of the behavior at issue on the market shall be tested by administrative authorities and courts.

It is further seen that there is a parallel between the Intel decision of the ECJ and the dissenting opinion in the Luxottica decision as they both point out that competition authorities have a duty to analyze the effects of loyalty-enhancing rebate schemes on as efficient competitors to prove the existence of a violation. Although this is only a dissenting opinion, it might indicate that a more economic oriented approach might also be adopted in Turkey in the future.

We believe that the Intel decision (and the dissenting opinion in the Luxottica decision) is significant because it might affect the stand that the TCA (and consequently Turkish courts) will take as to the application of the AEC test. Given the solemn proclamation of Intel's right to have its objections taken into consideration, future decisions of the TCA (and the courts) will show if the right of undertakings subject to investigation, to have all their objections being considered by the TCA while assessing the effects on the market, will be respected.

Footnotes

1. TCA's Decision dated 23.02.2017 and numbered 17-08/99-42.
2. TCA's decision dated 16.02.2017 and numbered 17-07/84-34.
3. Guidelines, para. 76.
4. Guidelines, para. 77.

7. GOOGLE & EU RECORD ANTITRUST FINE

By Hanna Stakheyeva

On 27 June 2017 the European Commission decided to impose an unprecedented EUR 2,42 billion fine on Google (Google Inc. and Alphabet Inc.) for an abuse of dominance by favouring its own shopping service/ads in internet searches (comparison shopping market). Previous EC record antitrust fine on a single company was EUR 1,06 billion for Intel in 2009. Google is required to comply with a principle of equal treatment - provide same treatment to rivals' comparison shopping services and to its own.

Infringement in essence

Google was found abusing its dominant position by promoting its own comparison shopping service in its search results, and "demoting those of competitors." In other words, Google's ads enjoyed higher number of clicks as a result of better display/visibility - i.e. Google's own services appeared at or near the top of the search results, while even the most highly ranked rivals' services appeared on average only on page 4 or so of Google's search results.

According to the European Commission, such practices significantly affected competition in the market for comparison shopping and allowed Google to make significant gains in traffic at the expense of its competitors and to the detriment of consumers.

Controversial

On the one hand, Google was found violating EU competition law by favouring its own services over those of competitors by making Google's results more visible. But on the other hand, consumers could still visit other sites/platform to compare prices before buying online.

Fine and further actions

It is interesting that the fine was imposed after years of negotiating commitments, which normally happens in cases where the authority does not intend to impose a fine.

Google was provided with 90 days to put an end to the infringement and change the way it has operated; otherwise it may have run into a risk of further daily penalty of up to 5% of daily global revenue of Alphabet, Google's parent company.

There may be civil actions for damages from the competitors that were excluded from the market as a result of Google's practice.

Google is also being investigated in relation to other two cases: Android operating system and AdSense (advertising issues).

CHAPTER III
MERGER CONTROL

1. MERGER CONTROL IN TURKEY: ACQUISITION OF OPEL/VAUXHALL BY PEUGEOT APPROVED

By Sinan Lahur

On 18 September 2017 the TCA cleared the acquisition of Opel/Vauxhall by Peugeot unconditionally. The transaction was earlier approved by the European Commission (EC).

Peugeot makes and sells passenger vehicles and light commercial vehicles worldwide under the brand names Peugeot, Citroen and DS. Opel also manufactures and sells passenger vehicles and light commercial vehicles. Opel was controlled by General Motors and represented the General Motors' European automobile business under the brand names Opel and Vauxhall.

The TCA approved the transaction without any conditions. According to TCA's decision, activities of the parties were overlapping vertically in sale and manufacture of automobile parts markets, and, horizontally in new passenger vehicles market. In the new passenger vehicles market, the combined market share of the parties did not exceed 20%. Considering such market share and existence of multiple competitors in the market, the said transaction did not cause competition concerns in the new passenger vehicles market, and no competition concerns in horizontal overlapping was found by the TCA. Likewise, for the vertical overlap in the sale and manufacture of automobile parts market, due to the existence of powerful competitors no competition concerns were found and consequently the said transaction was approved unconditionally.

It should be mentioned that the transaction was approved by the EC on July 5 2017, stating that no competition concerns in the relevant markets were found. The EC also identified that, in the manufacture and sale of motor vehicles markets, the combined market share of the two companies were relatively small and the merged entity would still face strong competition from manufacturers such as Renault, Volkswagen, Daimler, Ford, Fiat and various Asian competitors. As for the wholesale and retail distribution markets, the EC did not accept the argument that the said acquisition would cause detrimental effects since the distribution channels were represented by different for parties. As a result, the EC approved the transaction unconditionally.

Merger control in Turkey

The Turkish law requires a prior notification to the TCA of M&A transactions, which involve a change of control on a lasting basis, if the following financial thresholds are met (with exchange rate of CBRT as of 23.10.2017, i.e. **€**1 = TRY 4,32):

- The aggregate turnover of the transaction parties in Turkey exceeds TRY 100 million (approx. **€** 23.148.148), and the turnover of at least two of the transaction parties each in Turkey exceeds TRY 30 million (approx. **€** 6.944,444), or
- Either (i) the turnover in Turkey of the acquired assets or businesses in acquisitions, or (ii) of any of the transaction parties in mergers, exceeds TRY 30 million, and the worldwide turnover of at least one of the other transaction parties to the transaction exceeds TRY 500 million (approx. **€** 115.740.741).

The notification requirement is also applicable to foreign-to-foreign transactions to the extent that the mentioned thresholds are met.

2. REASONED DECISION IN RELATION TO ACQUISITION OF TESCO KIPA BY MIGROS

By Sinan Lahur

The TCA published its reasoned decision in relation to approved on 09.02.2017 acquisition of Tesco Kipa Kitle Pazarlama Ticaret Lojistik ve Gıda San. A.Ş. (TESCO KIPA) by Migros Ticaret A.Ş. (MIGROS) subject to conditions.

MIGROS is an undertaking, which currently operates in retail sector. Fast moving consumer goods (FMCG) constitute its primary product market. TESCO KIPA is also a FMCG retailer and operates mostly in the Aegean region of Turkey. Moreover, Anadolu Endüstri Holding A.Ş. (AEH), which owns MIGROS, is producing and selling beer and holding a dominant position in the beer market. AEH operates with the brand of Coca Cola and holds a dominant position in the coke-flavoured drinks market. Thus, acquisition of TESCO KIPA was determined by the TCA as strengthening the AEH's dominant position in both markets and, therefore, there was a risk that AEH could exclude its competitors from the relevant markets. No significant competition concern was found in any other product markets.

Within this context, the TCA approved the transaction subject to conditions. MIGROS submitted the below commitments for the transaction to be approved:

- MIGROS to divest some of its markets which were subject to concentration in the Aegean region;
- the commitments to be revised in the light of the beer market developments and MIGROS to implement them accordingly;
- an expert to be appointed and supervise the implementation of the commitments; and
- Neither AEH, nor TESCO to exchange information of their competitors with each other at any point.

3. TURKEY AMENDS MERGER CONTROL COMMUNIQUÉ

By Sera Erzene Yıldız

Introduction

The Turkish Competition Authority (the "**TCA**") amended the Communiqué governing the Turkish merger control implementation (Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("**Communiqué**")) on February 24, 2017. While there is no change to the currently applicable notification thresholds, the amendments concern the regime for successive transactions as well as for the change of control through stock exchange operations.

We provide below, a brief summary on the relevant amendments as well as the expected implications.

Background Info / Amendments on the Merger Control Regime

The TCA reviews the merger control thresholds every two years and the deadline for the TCA to confirm or revise the thresholds was scheduled for the beginning of 2017. While expecting the merger thresholds to be revisited, under the recent amendment, the TCA;

- repealed the provision setting out the obligatory biannual review of the merger thresholds. Although the TCA was not under the duty to amend the thresholds, it had to revisit them biannually. From now on, the TCA will not be bound with a scheduled timing for the review of the thresholds.
- expanded the definition scope of "a single transaction". From the point of merger threshold calculation, the TCA previously accepted the transactions (two or more) realized between two parties within two years as a single transaction. With the current amendment, the TCA increased the time limit for such successive transactions from two to three years. Additionally, the previous version of the provision set out that only the transactions between the same parties would fall under such circumstance, whereas the amendment introduced that any transaction realized by an undertaking concerning the same product market would be qualified for consideration.
- introduced a specific provision for the acquisition of control through stock exchange transactions. In principle, mergers falling under the thresholds indicated

within the Communiqué, have to be notified and cleared before implementation. The newly introduced provision brings about an exception to this rule; acquisition of control through successive stock exchange transactions from a number of different sellers, may be notified subsequent to such change of control, **provided that**, (i) the merger notification shall be immediately made and (ii) voting rights obtained from such transaction shall not to be exercised until clearance. On the other hand, the provision introduces an exceptional circumstance for the exercise of voting rights before clearance, on the sole condition of protecting the value of investment.

- did not introduce any revision to the applicable merger thresholds. The TCA has also confirmed the applicable turnover thresholds back in February 2015.

Concluding remarks

The main purpose of the merger control thresholds review is to align the merger control regime with the changing market/economic realities and decrease the workload of the TCA by way of excluding review of transactions that are unlikely to affect competition in the market, but at the same time make sure that all the problematic transactions are caught and carefully assessed.

By removing mandatory biannual review schedule from its work plan, the TCA from now on, would be expected to randomly revisit and revise the thresholds. Secondly, the enlarged scope of “successive transactions qualified as one single transaction” will surely catch and render the TCA’s review mandatory for creeping transactions. Thirdly, the specific provisions for the acquisition of control through stock exchange transactions will bring legal certainty on this long-debated topic. Last and more importantly, the merger thresholds are confirmed, meaning that the applicable thresholds are functioning well.

4. MERGER CONTROL IN THE BIG DATA WORLD: TO BE OR NOT TO BE REVISITED?

By Hanna Stakheyeva and M. Fevzi Toksoy

1. Introduction

In the era of digital markets, the growing importance of Big Data[1] is undeniable. "The rise of new businesses models based on the collection and processing of Big Data is currently shaping the world."[2] Indeed, the Big Data phenomenon has not only changed the way businesses conduct their economic activities, but also presented new challenges to the legal environment, in particular when it comes to competition law and data protection.

Realizing that possession of Big Data generates significant advantages, mergers and acquisitions in digital markets have become more frequent for undertakings wishing to obtain information (and at the same time exclude competitors from having the same information). The target company may not always have big turnovers, but it may still be regarded 'precious' considering the nature/value of data it possesses.

Bearing this in mind, competition authorities in various jurisdictions have been considering adopting more careful approaches in relation to competition issues[3] and mergers with the involvement of digital markets and Big Data, in particular. For instance, the European Commission is currently rethinking the use of financial thresholds as the only element the merger control.[4] There are some concerns as to whether the current merger control regime that relies only on the monetary turnover of the parties is effective enough in the era of digital markets, particularly where mergers with valuable data/possessions rather than big turnovers are involved.

In addition to that, data protection and privacy considerations in the Big Data mergers are among the hot topics nowadays. Currently data protection and privacy assessments have been outside the scope of the competition authorities' powers; however, it is clear that the issue is inseparable from the merger cases involving digital/data processing markets (take for instance Facebook/WhatsApp merger).

The objective of this article is to look at the recent merger control cases in the digital markets and assess whether there is a real need for updating the merger control rules (focusing on the EU primarily) with a "value of transaction test" . Market definition and role of market shares in the digital markets, as well as need for a greater coordination between the competition and data protection authorities (which are currently high on the agenda of the regulators in the EU), are also addressed here.

The article concludes that merger control rules may require adaptation to the new Big Data world. It is not necessary to have the whole new merger control regime, but certain issues have to be taken into account for the mergers in the Big Data world.

2. Recent Big Data Mergers: Highlights

The main purpose of the recent mergers in the Big Data world is to obtain the competitive advantage by way of accessing (more) information and incorporating it into companies' revolutionary/innovative business strategies. Below we provide analysis of the major prominent cases in the sector with a particular focus on the assessment of the market definition, impact on competition, efficiencies and competition concerns related to the transactions.

2.1. Microsoft/LinkedIn,[5] 2016. The main aim of the transaction was to allow Microsoft to add sales, marketing and recruiting services to its core business products for the next-generation computing. The acquisition of LinkedIn by Microsoft was approved by the European Commission with several commitments in relation to the professional social networks. The European Commission retained its previous relevant market definition in competitive assessment of this case. The product market was defined as (i) professional social network services, (ii) consumer relationship management software solutions, and (iii) online advertising services. The parties activities had some overlap in online advertising market, which was defined as national in geographical scope or alongside linguistic borders within the EEA. In general, the European Commission followed its more conservative approach in determining geographic markets - while admitting the that the scope of the markets could be global, it determined it as the EEA-wide or even national instead.

The main concern here was that the increased user database of LinkedIn would create barriers for new entrants to the market of professional social network services in the EEA. It was further found that since LinkedIn products did not appear to be a "must have" solution, nor a prerequisite to compete in the market, the transaction was unlikely to enable Microsoft to foreclose the market in question. Limited combined market share of the parties in the EEA market for online advertising services played a decisive role in deciding so.

The issue of the value of information is of particular interest here, since LinkedIn contains more than 400 million people, and what is more important is that it provides information on professional profiles and network of connections between them and their activities. These facts certainly add to the value of information.[6] This consideration was not really taken into account in the competitive assessment of the merger. Rather, it was acknowledged that the merger with any such (personal) data combination could only be implemented by the merged entity "to the extent it is allowed by applicable data protection rules" (para 177 of the Decision). The data privacy consideration in this case shall be considered as a positive development

directly emphasizing that data protection legislation may limit company's ability to have access and to process its users' personal data. In line with its previous cases, the European Commission refrained from assessing the merger in light of data protection considerations. Rather, its competitive assessment was based on the assumption that such data combination was allowed under the applicable data protection rules (para 179 of the Decision).

2.2. Facebook/WhatsApp,[7] 2014. The purpose of the merger was to enable Facebook to obtain information generated through WhatsApp to improve its ability to better target its advertisements. As a result, WhatsApp's privacy policy was changed to allow the transfer of information to Facebook.[8]

Similarly to the Microsoft/LinkedIn case, the European Commission's investigation focused on the markets of (i) social networking services, (ii) consumer communications services (on apps for smartphones, since WhatsApp is not available for other devices), and (iii) online advertising services.

It should be mentioned that the transaction did not have the EU dimension, but nevertheless it was reviewed by the European Commission pursuant to Article 4(5) of the Merger Regulation No 139/2004 ("ECMR").[9] This brings about a question of whether it is necessary to introduce the alternative "value of transaction" threshold considering the availability of the case referral system at the EU level (see Section 3.1. below).

The European Commission acknowledged the role of data in this case by stating that both WhatsApp and Facebook Messenger already have large customer bases. Another positive development related to this merger assessment is the European Commission's conclusion that "the consumer communications apps market is fast growing and characterised by short innovation cycles in which market positions are often reshuffled,"[10] hence admitting that the market definition as well as market shares are also constantly evolving.

That is why the forward-looking analysis of the potential activities of the parties was conducted in this case. In particular, the European Commission looked at whether the Facebook's position in the market for online advertising could be strengthened because of the merger, irrespective of the fact that WhatsApp was not even present at this market. This confirms our main argument that competition law has to adjust to the Big Data world, primarily when it comes to market definition and role of market shares. Rather than focusing on the current market power of the parties, the forward-looking approach should be taken, as the markets are very dynamic and may not even exist at the time of the merger assessment (see Section 3.2. below).

Lastly, refraining from considering any privacy related issues that may arise from the increased concentration of data is one of the major drawbacks of the merger assessment in the case (see Section 3.3. below).

2.3. Microsoft/Yahoo![11] 2010. The transaction was related to acquisition of the

internet search and search advertising businesses of Yahoo by Microsoft. In this case, Microsoft's and Yahoo's activities in internet search and online search advertising in the EEA were very limited with combined market shares below 10%.[12]In addition to that, the parties put forward the efficiency defence - the scale of information resulting from the transaction - and obtained the approval of the European Commission. Access to the search requests allowed improving the quality of services and ensuring the personalized search results taking into account customers' preferences. Since search engines of Microsoft and Yahoo! were much weaker as compared to the ones Google has, it was concluded that the merger of the data bases of the parties could potentially increase a competition with Google.

The case emphasizes on the importance of looking at advantages to be gained via combining two sets of data.

2.4. Google/Double Click,[13] 2008. The main purpose of the transaction was to obtain information to profit from the personalized and targeted advertisements. The transaction was authorized by both the US Federal Trade Commission ("FTC") and the European Commission.

Interestingly, there is a dissenting opinion of FTC's Commissioner P.J. Harbour in the matter stating "[...] existing horizontal overlaps are troubling enough, and might have provided a predicate for the Commission to impose conditions on the merger. But even more troubling is that the combination of Google and DoubleClick likely will affect the evolution of the entire online advertising market – especially in light of existing network effects, and the tremendous additional network effects the transaction will generate. The majority's analysis skims too quickly over these points. Network effects deserve greater attention."[14] In other words, a fuller analysis should have been conducted, particularly in relation to the post-merger intentions/effects. Again, the case proves the statement that rather than focusing on the current market power and activities of the parties, the forward-looking approach should be taken in the dynamic digital markets (see Section 3.2. below).

2.5. Reuters/Thomson,[15] 2008.The European Commission, following the assessment of Thomson's and Reuters' positions in the various markets in the financial services sector, found that the main areas of overlap concerned the off-trading floor space (i.e. the research and asset management area).[16] It had concerns that the merger could create serious barriers to entry to the market because in order to compete with Thomson Reuters company the potential competitors would have needed years to accumulate similar financial data bases. Nevertheless, the transaction was cleared with remedies that the parties would provide their competitors with copies of certain financial and economic databases so that they could compete with Thomson Reuters.

In the majority of the above described cases the mergers have demonstrated to have low impact on the existing market structure because of either the modest market share(s) or absence of horizontal overlaps (except for Thomson/Reuters case).

However, it should be borne in mind that in the Big Data world the possibility to have access to a large database should be first criterion to be analyzed carefully. Additionally, forward-looking assessment of potential effects and efficiency gains are crucial for the fast evolving digital markets.

3. Big Data Merger Control Issues On The Horizon

There is an ongoing debate as to whether the current merger control rules adequately respond to the challenges posed by the Big Data and digital markets. In particular, whether "purely turnover-based jurisdictional thresholds", as well as classical relevant market definition, are effective enough to capture all mergers that may potentially have impact on the competition. This is due to the fact that in digital industries, the "acquired company, while having generated little turnover as yet, may play a competitive role, hold commercially valuable data, or have a considerable market potential for other reasons."[17] Another important issue is the necessity for the competition authorities to take into account data protection/privacy considerations while authorizing the Big Data mergers.

3.1. Value of transaction test – is it needed?

Financial thresholds demonstrate the level of importance of a certain merger and are a common tool in identifying the notifiable transactions. However, in the digital markets, it is not always the turnover, but the value of information and other resources (market presence in terms of users and/or members, innovation, know-how, etc.) that determine the importance of the company and hence the transaction.

In other words, under the turnover thresholds acquisition of a target company (e.g. a "small digital start-up") that does not (yet) generate significant turnover,[18] may not have to be notified normally. However, such company may have a "high market potential" considering the information resources it possess.

Realizing this, the European Commission has launched public consultations to determine whether the current turnover test is enough and whether the so-called "value of transaction test" is to be introduced to complement the existing turnover based thresholds. [19] This issue also appears to be on the horizon in other jurisdictions. For instance, the additional "value of the transaction test" will be introduced in Germany in the course of April 2017, according to which, if a transaction value exceeds EUR 400 million and the target has significant business presence in Germany, it will be subject to merger control formalities.[20] The value/size of transaction test is already applied in the USA.[21]

Therefore, as an option, in cases where the turnover thresholds are not met, the competition authority may look at the economic value of the transaction as an indicator of its importance. In principle, the value of the transaction may indeed

serve as an indicator of its importance for the parties and of high market potential of the target company, if the price of the transaction is high enough.

On the other hand, a major problem with this test is the fact that the parties themselves set the value of the transaction. Hence, they may just as well try and resort to various manipulations/complex payment structures in order to set the price at the level that would lower the economic value of the target and hence not trigger the merger control requirement.

Therefore, including the price factor of the merger to the notification thresholds may not be sufficient and efficient enough. It would be necessary to develop precise guidelines for the determination of the value of transaction/purchase prices according to the common M&A practices (taking into account all the monetary payments, voting rights and assets subject to transfer, etc.).

There is also a risk that the alternative "value of transaction" threshold may be rather broadly defined and hence cause uncertainties, and lead to certain disruptions in the notification process. Competition authorities should be prepared to receiving clarification requests from the companies in relation to the necessity to notify.

Lastly, the need for the alternative value of transaction threshold at the EU level shall be carefully considered in the light of the existing case referral system[22] within the EU which allows such Big Data mergers (without the EU dimension based on the turnover thresholds) to be referred to and reviewed by the European Commission. A well-known example of this is the 2014 acquisition of WhatsApp by Facebook (see Section 2.2. above). The main concern with this referral system is that notification in at least three EU member states is required (which may not always be the case, also considering that those members states may veto the reallocation of jurisdiction) and can add significant delay to the clearance timetable. Hence, the parties contemplating such merger should take this (case referral) possibility into account in the process of concluding the condition precedent and final date for the closing.

3.2. Market definition in digital markets

Big Data and digital markets also pose a challenge to competition authorities in terms of necessity to rethink the notion of the relevant market definition in its classical meaning.

Assessment of any merger in relation to its impact on competition starts with the market definition. "The analysis of merger decisions since 2003 suggests the Commission is increasingly focusing on wider geographic markets: in the last two years, no fewer than 61% of Commission merger decisions assessed a market that was EEA or wider in scope, compared to 48% ten years ago."[23] This should be particularly the case for the relevant market definition in the Big Data world, which is driven by dynamic technological innovation and globalization.

Hence, one of the possible options for the future developments in relation to digital

markets is to stop applying narrow market definitions. "The Commission has to consider a greater amount of scenarios, take the industry broad view, and basically try to predict future."[24] This is true considering that a main unique characteristic of the digital markets is their rapid change, where "yesterday is already a history", and gathering relevant data is almost impossible, hence a forward-looking approach in merger assessment is vital. Importance of the forward-looking "dynamic analytical approach, based on predictions about how markets will evolve" was emphasized back in 2007 in the FTC's dissenting opinion in relation to Google/Double Click (see Section 2.4. above).[25]

"Digital markets are extremely dynamic, which makes it important to define them in a way that captures the likely future effects of competition."[26] In addition to that, in digital markets price "is not the decisive parameter for the purchasing decisions of the clients", hence traditional means of defining the relevant market (such as SNIP test) cannot be properly applied where the key parameters are product features, quality of service or functionality.

The non-price parameters, particularly quality, were considered by the European Commission in Microsoft/Skype case,[27] as significant "since consumer communications services are mainly provided for free, consumers pay more attention to other features."

Defining product market in the Big Data world is not that straightforward and again should be considered as much broader than the actual activity of the parties. Future plans and intentions/interests of the acquirer based on its vision of data combination are to be taken into account. For instance, in the 2014 acquisition of Nest Labs Inc. by Google the affected market delineation should not be limited to the activity of the target. This is because the main interest of Google in this acquisition was not to start supply of thermostats and smoke alarms and to get into the smart-home business, but rather to obtain information that has been collected by those thermostats to improve its search advertising services.

As regards the relevant geographic market in the Big Data world, it should also be quite broad - global in principle. However, in reality the European Commission may consider looking at invisible from the first glance borders (regulations, national license agreements, linguistic and cultural aspects etc.). As practice shows, in most cases the exact market definition is left open by the European Commission.

Overall, based on the analysis of the European Commission's cases it may be concluded that firm rules how the geographical/product market in Big Data world should be delineated have not been established yet. In fact, even if there were legal precedents, they may actually be of a limited use, again due to the constantly evolving digital markets. Hence, it will be difficult to be consistent with previous practice, and market definitions in earlier cases should not be relied upon without careful (re) consideration.

Considering the rapid change and hence future uncertainty related to the digital markets, it is very likely that the question of the relevant market definition in Big Data mergers may play a second role as compared with the traditional markets. Market shares as indicators of market power may be not that relevant as well, considering the dynamics of the digital markets, where the market leader may be displaced in a relatively short period. In fact, market shares are likely to be of little use as measures of market power in the dynamic digital markets. Rather than market shares, it is the significance of the data and its ability to affect competition in the market, innovation and efficiency, as well as ability to foreclose competitors should be assessed. "Competition authorities may rely less on traditional indicators such as market shares [...]. They rather focus on indicators that inform about contestability, such as the presence of entry barriers, the availability of alternative routes to reach end-users, and the degree of innovation in unexplored technologies/services."[28]

In Facebook/WhatsApp merger the European Commission has already focused more on the network effects and number of other market participants that collect user data alongside Facebook.[29] In the Microsoft/Yahoo! case the European Commission considered the scale of data collection as the feature able to enhance market power.[30]

Therefore, acknowledging the dynamic dimension of competition, forward-looking assessment of plans/interests of the acquirer and related efficiencies are crucial for the efficient review of the Big Data merger cases. Market shares are likely to be of little use as measures of market power in the dynamic digital markets.

3.3. Privacy consideration in competition assessment of Big Data mergers

Data protection and privacy issues represent the "other side of the coin"[31] of the Big Data mergers. On the one hand, as stated by the European Commission in Facebook/WhatsApp clearance in 2014, it seems that "[...] any privacy related concerns flowing from the increase concentration of data within the control of Facebook as a result of transaction do not fall within the scope of EU competition law." On the other hand, it should not be ignored that while analyzing mergers involving Big Data, it is essential to consider data protection and privacy aspects.

Unlike the merger control rules, there is no requirement to notify and obtain the Data protection authority's approval for the transaction. Consequently, the assessment of the impact of the transaction on the privacy of customers can only be done within the framework of the merger review by the competition authorities (as only competition authorities can make the transaction conditional on compliance, including, with the data protection rules). Nevertheless, recent practice shows that competition authorities are reluctant to touch upon issues of data protection and privacy.

Facebook/WhatsApp case is just one example where the transaction was cleared following the analysis of the possibility to strengthen position in the market, and

leaving the privacy-related concerns outside the scope of the EU competition law, since it is within the scope of the data protection rules and Data protection authority(s). Because of the merger WhatsApp's privacy policy was changed to allow the transfer of information to Facebook, which may be argued, led to the deterioration in the quality of WhatsApp service quality due to its decreased privacy security.

At the same time there is a hope for positive changes in this respect. For instance, in the recent Microsoft/LinkedIn case (as discussed above), the European Commission concluded that the "privacy related concerns as such do not fall within the scope of EU competition law but can be taken into account in the competition assessment to the extent that consumers see it as a significant factor of quality, and the merging parties compete with each other on this factor."[32] Hence, the European Commission found that data privacy was an important parameter of competition between professional social networks on the market, which could have been negatively affected by the transaction.

Indeed, it should not be ignored that while analysing mergers involving Big Data, it is essential to consider data protection and privacy aspects. In fact, the two regimes have to coexist together in in Big Data mergers. Considering that in relation to the latter the competition authorities are currently very reluctant to do so (since there are data protection authorities), such mergers should be reviewed by the competition authorities in close coordination with the data protection authorities. It may prolong the merger review process, but this could be justifiable as the welfare of consumers is at stake. Another option would be, for instance, in clearing the Big Data mergers, the competition authorities should take commitments from the parties, among others, that they would (i) state what kind of information they intend to collect, how they will collect and process it and for what purposes. In such a way consumers will have a clear picture and hence will be able to shape their online behaviour/ scope of information disclosure. Such practices will demonstrate good intentions and awareness of data protection concerns. However, their efficient implementation in practice will be possible again with greater cooperation between the competition and data protection authorities.

4. Conclusion

Merger control rules in the Big Data world – to be or not to be revisited? The answer to this question seems to be positive, since indeed the turnover threshold will likely to prove to be insufficient to secure effective functioning of the merger control (considering the special nature of data as an asset and/or input for businesses). Mergers involving Big Data companies may not always have big turnovers, but they may have considerable potential market impact that may be reflected in high acquisition values. Hence, it is reasonable to consider introducing the alternative value of transaction threshold.

Another question, which is even more important, to be answered is how to ensure the adequate assessment of the value of information based on its potential use in the future and limit manipulations, as well as uncertainty for businesses to minimum. It would be necessary to develop precise guidelines for the determination of the value of transaction/purchase prices according to the common M&A practices (taking into account all the monetary payments, voting rights and assets subject to transfer, etc.). Clear guidelines from the competition authorities would be vital here.

As regards market definition in the Big Data mergers, it has to be forward-looking, considering that the digital markets are rather dynamic, characterized by rapid changes, and on top of that, price is not a decisive parameter there. In some cases the relevant product market may not yet exist and the competition authorities may have to even predict the future. Hence, there are substantial grounds for anticipating that there will be much less emphasis on the importance of the market definition in the Big Data mergers (as compared with the traditional markets), and market shares will be of little use in assessing the market power. Instead, substantive analysis of such issues as network effects, switching costs, the company's access to data, value/ significance of data, efficiencies and innovation-driven competitive constraints, as well as potential effects of combination of data sources in the future will be required largely.

Data protection and privacy aspects are likely to become more and more integrated into the competitive assessment of Big Data mergers. It is important that the merger control and data protection regimes coexist together in Big Data merger control. Considering that competition authorities are currently very reluctant to take into account the data protection consideration (since there are data protection authorities), greater cooperation between the competition and data protection authorities is essential.

Footnotes

1. According to the OECD Paper, "While the use of the term 'Big Data' is often vague and lacks precision, the most frequently used definitions of Big Data usually refer to (1) the large dimension of datasets; and (2) the need to use large scale computing power and non-standard software and methods to extract value from the data in a reasonable amount of time. [...] Big Data is the information asset characterized by such a high volume, velocity and variety to require specific technology and analytical methods for its transformation into value." See p.5 at BİG DATA: Bringing Competition Policy To The Digital Era, OECD DAF/COMP(2016)14 27.10.2016 https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf

2. p. 28, Big Data: Bringing Competition Policy To The Digital Era, OECD DAF/COMP(2016)14 27.10.2016 https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf

3. There have been reports and studies on Big Data and Competition prepared by the UK Competition and Markets Authority, 2015; the EC's Competition in a Big Data World, 2016; French and German Competition Authorities' paper, 2016; FTC's Report 2016 Big Data A Tool for Inclusion or Exclusion? https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf

4. Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control, 2016, http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html

5. Case COMP M.8124 -MICROSOFT / LINKEDIN, 06.12.2016 http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8124

6. Some sources refer to the 'data gravity' to describe a notion of Big Data to attract suppliers of services and applications, "who are drawn to information that makes their products more useful." (Waters, R. Data Mining. The Financial Times Limited, 2017, https://www.ft.com/content/d5ceda60-a1e1-11e6-82c3-4351ce86813f). This also contributes to the value of information, hence level of competition concern.

7. Case COMP/M.7217 - FACEBOOK/ WHATSAPP, 03.10.2014

8. Currently the European Commission alleges Facebook provided misleading information about WhatsApp, in particular its possibility of automatically matching Facebook' users' IDs with WhatsApp users' accounts (which apparently already existed in 2014). http://europa.eu/rapid/press-release_IP-16-4473_en.htm

9. See para 9 of Case No COMP/M.7217 - FACEBOOK/ WHATSAPP

0. Commission approves acquisition of WhatsApp by Facebook , 3.10.2014, http://europa.eu/rapid/press-release_IP-14-1088_en.htm

1. Case COMP M.5727 - MICROSOFT/YAHOO!SEARCH BUSINESS, 18.02.2010, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_5727

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13. Case No. COMP/M.4731 Google/ DoubleClick, 11.03.2008, http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf

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5. FACEBOOK CASE & WARNING FOR BUSINESS: PROVIDING INACCURATE INFORMATION TO COMPETITION AUTHORITY MAY BE COSTLY

By Hanna Stakheyeva

The USD 122 million fine imposed on 18 May 2017 by the European Commission on Facebook for providing inaccurate information about WhatsApp 2014 acquisition serves as a loud reminder for business that non-compliance with any aspect of competition/merger rules - including obligation to provide information - may be rather costly.

Background

In its notification back in 2014 Facebook stated that would not be able to match users' profiles between WhatsApp and Facebook. However, 2 years later, contrary to the earlier statements WhatsApp announced that it would begin sharing some data (i.e. phone numbers) with Facebook. In the course of investigation the European Commission also found that it was possible to automatically match the users' identities already in 2014 at the time of the acquisition, and moreover Facebook staff was aware of such technical possibility. These findings did not affect the merger clearance decision (although the European Commission does have a power to withdraw the clearance in such circumstances), but served as a ground for penalizing Facebook for procedural violations.

Sanctions

Violations of procedural requirements, such as provision of inaccurate or misleading information to the European Commission, may result in a fine of up to 1% of global annual turnover of a company concerned (while violations of substantive competition rules may lead to a fine of up to 10% of global annual turnover).

Similar powers are vested with the Turkish Competition Authority with procedural fines, periodic fines and the minimum amount of the substantive fine (which are determined as fixed amounts in the Law No 4054 on Protection of Competition and re-determined each and announced by the Communiqués of the Turkish Competition Authority).

In determining the amount of fine, the European Commission and Turkish Competition Authority take into account the nature, gravity and duration of the infringement as well as any mitigating or aggravating circumstances (such as active cooperation of the perpetrator with the Authority).

Main lesson

This is the first time since the enactment of the EC Merger Regulation 2004 that the European Commission sanctions for the provision of the inaccurate/misleading information. It is a clear signal for business in general that Competition Authorities would not tolerate any negligence and non-compliance with competition law and respective (procedural and substantive) requirements. Businesses, pay attention to what you submit to the Competition Authorities...

6. REMINDER: COMPLIANCE WITH MERGER PROCEDURAL RULES IS IMPORTANT

By Hanna Stakheyeva

In July 2017 the European Commission (EC) launched investigations into alleged breaches of EU merger procedural rules by Merck and Sigma-Aldrich, General Electric, and Canon, in particular by providing incorrect or misleading information by the first two companies; and by implementing a merger before notification and clearance by the latter company. This is just another reminder for the companies irrespective of jurisdiction and sector of activity that compliance with the merger procedural rules is important and any non-compliance, once detected by the competition authority, may be quite costly.

Merger procedural rules

The EU merger control rules, just as in Turkey, require the parties notify the transaction meeting certain thresholds prior to their implementation. No notifiable transaction may be implemented without the clearance of the competition authority, i.e. any early implementation of transaction would be considered in breach of the merger procedural rules. Additionally, authority's assessment of the transactions is possible on the basis of the information provided by the parties, which is presumed to be complete and accurate. Considering the tight timeframe for the merger review, the competition authority relies on diligence of the parties in this respect.

Cases in question

1. The EC informed the German company Merck KGaA and Sigma-Aldrich of its preliminary conclusion that the companies have provided incorrect or misleading information in the context of Merck's acquisition of Sigma-Aldrich. A preliminary conclusion is that Merck and Sigma-Aldrich failed to provide the EC with important information about an innovation project with relevance for certain laboratory chemicals at the core of the EC 's analysis. Had this project been correctly disclosed to the EC, it would have had to be included in the remedy package.

2. The EC informed the US company General Electric (GE) of its preliminary conclusion that the company provided incorrect or misleading information during the EC's investigation of GE's planned acquisition of LM Wind. GE failed to provide

information to the EC concerning its research and development activities and the development of a specific product. The information was necessary to properly assess the future position of GE and the competitive landscape on the markets for wind turbines.

3. The EC informed the Japanese company Canon Inc. of its preliminary conclusion that the company breached the EU Merger Regulation by implementing its acquisition of Toshiba Medical Systems Corporation before both notifying to, and obtaining approval by, the EC. According to the EC's press release, a preliminary view is that Canon used a so-called "warehousing" two-step transaction structure involving an interim buyer, which essentially allowed it to acquire Toshiba Medical Systems prior to obtaining the relevant merger approvals.

Possible sanctions

In the first two cases described above, if the EC concludes that Merck and Sigma-Aldrich intentionally or negligently supplied incorrect or misleading information, it could impose a fine of up to 1% of the companies' annual worldwide turnover. As regards the third case, if the EC confirms that Canon indeed implemented the transaction prior to its notification or prior to adoption of the clearance decision, it could impose a fine of up to 10% of Canon's annual worldwide turnover.

CHAPTER IV
COMPETITION LAW COMPLIANCE

1. A MANAGER'S GUIDE TO COMPETITION LAW AND ETHICS

By M. Fevzi Toksoy

I personally observe that the managing staffs of companies are becoming highly aware of competition law but this awareness is frequently related to the great label it holds as 'something of a great threat to my career'. The principal objective in delivering this piece is to clarify the key aspects of competition law through its linkage to a general understanding of compliance and ethics.

Not to degrade other components of corporate compliance, competition law does indeed rank high in the overall compliance agenda of corporations. Sanctions designed to prevent businesses from violating competition law are getting more and more severe. Especially in the case of cartels, convicted companies are facing monetary fines amounting to hundreds of millions of dollars, not to mention the loss of reputation that may cause irreparable harm to the value of a company. The main reason for such a severe punitive design stems from the fact that competition law violations are hard to detect and hence vigorous deterrence seems to be the most effective way to keep companies and managers away from even the idea of breaching these rules.

Competition law Breaches as the Sneaky Enemy of Ethical Conduct

Here, it is worth recalling what competition law forbids. First of all, economic activities are expected to develop within existing competition among rival firms. The ideal outcome of a competitive process in every economic activity is accepted to be better products at reduced costs. However, for a specific player, this process does not guarantee profit maximization or sustained presence in the market. These are such tempting goals for any entrepreneur in a market economy that sometimes competitors may wish to refrain from rivalry and instead may rationalize anti-competitive practices to achieve excessive profits or to at least guarantee their seat at the table. To resist this temptation, two "commandments" [major orders] are globally accepted in all competition laws: first, ***thou shalt not conspire with competitors*** and second, ***thou shalt not misuse your market power to eliminate competition.*** The problem is that organizations can violate these two prohibitions under many different scenarios, not all of which should necessarily classify them as state-of-the-art robber organizations. We can align the multitude of anti-competitive conduct along a spectrum, from collusion-

related anti-competitive conduct at one end to market-power related anti-competitive conduct at the other. The ethics indicator points to the maximum rate of unethical when certain conduct is classified as collusion-related. Such conduct commonly identifies companies as 'cartels,' which is a "state-of-the-art robbery organization".

Cartels are designed to eliminate the fair result that an intervention-free competitive environment would otherwise provide to consumers.

A study[1] shows that the total sales of products subject to cartel surcharges amount to 16 trillion US Dollars worldwide. This is a huge sum. This clearly means that we, as consumers, are deprived of innovative products in all markets, the sales of which make up this total amount. Since we are the producers of some of these products and at the same time consumers of others, we are not living the full potential of the present. This is economic time travel, where we have no other option than to go backwards. This explains the rationale behind the harsh deterrence mechanism in the fight against cartels, because no administrative or judicial resource in the world seems to be able to detect all cartels. This picture reveals another type of competition. This competition is among the competition agencies in the effective fight against cartels. Innovative methods to fight cartels are introduced one after another and armies of deterrence mechanisms are put into effect to discourage companies from forming cartels.

Of course other types of competition law infringements exist, which also pose a serious threat to the proper functioning of competitive markets. Classified under ***market power related conduct,*** implementation of those anti-competitive practices leads to the ***foreclosure of the markets***. In markets where a dominant player exists, through, for example, exclusive dealing, predatory pricing or excessive pricing, this powerful player finds solid ground for assuring its dominant power. These practices are independently driven (unilateral), and are employed by dominant companies as leverage under the basic instinct of the capitalist system: *being the only player in a market*. Based on my ethics scale, the abuse of dominance can be seen as less provoking than cartels, although this is not to undermine its potential to affect the market as much as cartels do.

In the last decade, the deterrence mechanism has geared up, with tools that are designed to bring violations to light more easily. Sanctions have a new direction with the inclusion of leniency programs, providing the opportunity for companies and individuals to disclose a hidden cartel set-up in exchange for immunity from fines. Alternative dispute resolution is also becoming more popular as a way to minimize the cost of lengthy court procedures.

Parallel to those developments, especially in the EU, evidence-gathering powers of the competition authorities have been strengthened with the introduction of forensic IT improvements.

In this complex scheme of competition law violations and the related consequences,

it is on the shoulders of the managers to set the corporate standards for competition law compliance.

Competition Compliance Programs

Just as preventing mobbing, racism, sexism and violation of unauthorized access to data are legal responsibilities of companies, and just as doing business transparently with corporate governance, safeguarding anti-corruption and anti-bribery are ethical-legal responsibilities, compliance with competition rules is a fundamental legal responsibility. It is just as important as compliance with tax law or employment law. In my opinion, this setup is one hundred percent accurate. Nevertheless it lacks depth. Compliance with competition rules is usually defined as a purely legal responsibility. However, there is a difference between complying with laws and being compliant: that is, complying with the letter and the spirit of the law. In order to be compliant, companies should be expected to create an added value beyond just coping with legal obligations.

A competition compliance program is an audit system designed for either sustaining a company's ongoing compliance with competition rules, or detecting non-compliant practices and remedying them. These are highly useful programs for companies. Managers must spare time, money and manpower to implement effective competition compliance programs.

An anticompetitive behavior may arise with a 'very smart' business decision and may surface with even a single e-mail or handwritten note. Therefore, forming a strong competition culture in companies is indispensable as employees' behavior is not always under the control of liable managers, just as the anticompetitive behavior of a manager is not under the control of the shareholders. Competition compliance programs are a must in order to create a control mechanism in between those players.

In substance, the main reason for developing competition compliance programs must be the implementation of a strong and sustainable corporate competition culture. The manager who takes this issue as *periodical window cleaning*, *tick the box matter* or '*Region wants it so,'* is destined to lose the game in competition law.

Appreciation of Compliance Efforts

It is a common syndrome among managers to develop a very dangerous self-confidence by seeing their staff attending competition law trainings every six months, as dictated by corporate rules. This practice should not be considered as a compliance program. Memorizing competition law requirements and deciphering the rationale behind it – which is not rocket science, though – does not guarantee a safe harbor.

Business practices that carry the potential to lead to an infringement are sometimes

considered as the conventional way business is done, just because the corporate learning established such a routine. It may even be the case that a company becomes fully aware of the illegality of a business conduct when it leads to a proceeding. However, there is no excuse for some other conduct, implementation of which requires a certain level of consciousness of their illegality. This is exactly where competition law intersects with ethics. When this happens in the existence of a compliance program, it is up to a company's general ethics and compliance policy to detect whether this is a purely managerial initiative or a corporate mistake.

Recently, companies have become increasingly demanding in their efforts to apply compliance programs. Business circles are discussing whether the implementation of a compliance program should be considered as a means to obtain a discount from competition law sanctions. The agencies are reluctant to favor the sole existence of a compliance program as a discount from fines. Yet, this approach does not impede the authorities from differentiating between the compliance levels of the companies when deciding on fines.

Finally

I observe that competition authorities are becoming more and more aware of the necessity in finding a balance in the division of criminal liability between corporations and their managers. However, one should not expect the competition authorities to rate the effectiveness of a compliance program. The authorities will just focus on the facts, and it will not be difficult for them to detect how effectively a company implemented its compliance program. An effective compliance policy, nonetheless, is the key element to safeguard the fair balance between the expectations of the shareholders and the duties of the managers.

Footnotes

1 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535131

2. COMPETITION COMPLIANCE PROGRAM AS A MITIGATING FACTOR

By Hanna Stakheyeva

1. Introduction

It is a common practice that companies become familiar with competition law and aware that they are violating competition rules only once they are faced with the investigation and fines imposed on them by the Competition Authorities for the breach of those rules. An effective competition compliance program ("**CCP**") may help companies to stay out of trouble and ensure compliance with the law, and hence to save their money and reputation by informing them about competition infringements beforehand.

In addition to that a sincerely implemented CCP showing good intentions of the company to adhere to competition rules may serve as a mitigating factor, a defence leading to a reduction in fines/sanctions, in case of prosecution by the Regulator for a competition law violation. Although, the Competition Authorities of various jurisdictions are rather divergent and inconsistent in their views on whether or not the existence of the CCP shall be treated as a mitigating factor, there is a general agreement to encourage CCP.

The article provides an overview of the CCP and its importance for companies. It is argued that the CCP implemented in a good faith may serve as an indication of a lack of intention to violate the competition law, and hence can be regarded as a defence for the company in case of prosecution by the Competition Authorities and when sanctions are under consideration.

2. Why Competition Compliance?

All companies are subject to competition law, irrespective of their size. Considering a complex nature of competition law, a special guidance in the form of the CCP is essential. The CCP can be defined as a set of practical rules that enable companies to assess and monitor themselves in terms of competition law. The main aim of the CCP is to prevent the company from violating the competition law by outlining main Do's and Don'ts for the activity of the company, its management and employees. Ideally, the CCP should be a part of a wider general compliance program (e.g. bribery, tax, corruption, health and safety, etc.).

"The Compliance program makes it clear that the company is committed to competition, and communicates that commitment to all employees."[1] Not only managers who take decisions in the company, but also employees, who implement those decisions, require guidance on their behavior in terms of complying with competition rules. Otherwise there is a risk of high fines and other negative (reputational) consequences.

a. Benefits of Competition Compliance

The CCP has become an important part of the corporate culture nowadays which may bring certain benefits to the company, such as higher returns on investment, as well as the increased motivation and pride of its employees. But first and foremost - the CCP reduces a risk of the company being involved in anticompetitive illegal commercial practices, such as:

(i) either formal or informal agreements between companies which restrict competition by way of price-fixing, market sharing, customer allocation, production or output limitation, exchanges of certain information between the competing companies, or

(ii) abuse of market power by companies with a large share in a particular relevant market by way of charging unreasonably high or low prices or imposing unjustified trading conditions on trading partners, etc.

In addition, one should not forget merger control rules and a 'stand-still' obligation requiring a prior approval of the Competition Authority for any transaction involving a change in control over a company on a lasting basis if certain (financial) thresholds are met.

As a result, the CCP may help to avoid high cost of non-compliance (as discussed below).

b. Cost of Non-Compliance with Competition Law

The cost of non-compliance with competition law could be high both in terms of financial and reputational damage.

First of all, a fine of up to 10% of the company's group annual worldwide turnover may be imposed on a company that violated competition rules, which may be quite an amount. For instance, EUR 141,7 mln fine was imposed by the European Commission on car parts suppliers for their participation in 5 cartels for supply of wire harnesses to Toyota, Honda, Nissan and Renault (2013); EUR 280 mln fine was imposed by the German authority on sugar cartelists in 2014; EUR 17 mln fine was imposed on 4 wallpaper manufacturers (for their agreement to increase prices for their products between 2005-2008), as well as a fine of EUR 38 million was imposed by the European Commission on E.ON for breaking a seal during the competition inspection (2008).

In the latter case E.ON, among other explanations to the European Commission, claimed that it was a cleaning lady that might have wiped over the seal with a cleaning product and displaces the seal. This is just another confirmation that it is highly important that every employee of the company undergoes the compliance and training program in order to be aware of a proper behavior, including during the dawn raid inspections.

Secondly, being a party to a restrictive agreement which violates competition rules, may bring about negative consequences for your business, as such agreement would be automatically void and unenforceable in court.

Thirdly, any third party whose interests are believed to be harmed by the anticompetitive practice of the company, may bring a claim for damages before the national court against such company.

And finally, one should remember that the Competition Authorities normally publish a press release whenever they have found an illegal conduct and fined the companies. Hence, such media coverage may be detrimental to the reputation of such company.

3. Competition Compliance Program: Main Elements

A successful CCP should be based on a thorough analysis of the areas of main activity of the company, and hence the areas in which the competition infringement(s) may occur. There is no one size fits all in designing the CCP due to the variety of sectors and companies. However, the following instructions are relevant to any CCP.

In designing the CCP one should assess the sector of activity and a history of previous infringements in this sector; level of interaction of the company with its competitors; position of the company and its competitors in the market, barriers to entry etc.

It should be in writing (e.g. in the form of a manual) and in all the working languages of the company so that it is understandable to all the participants of the economic activity of the company.

The CCP should have the following elements:

- Description of competition law in general, risk assessment,
- A practical set of DO's and DON'T's in the activity of the company (e.g. a clearly illegal conduct such as exchange of information on future prices, allocation of quotas, price-fixing agreements etc.),
- Highlight the potential costs of non-compliance for the company,
- Commitment directly stating which practices shall be unacceptable by the company,
- Continuous improvement ensuring a periodic update of the CCP and training of the employees by the qualified (either external or in-house) legal experts who have designed and implemented the CCP.

The key for a successful CCP are efficiency, training, information, due diligence (of the past and current activity of the company in the light of competition rules), compliance, control, monitoring and updates.

4. Approaches to Compliance Programs

The Competition Authorities of various jurisdictions are rather divergent and inconsistent in their views on whether the existence of the compliance program shall be treated as a mitigating factor, i.e. whether fines should be reduces if a violator has CCP in place.

3.1. CCP is a ***mitigating factor*** that may lead to a reduction in fines on the company. Since CCP cannot be regarded as 100% perfect, hence what matters is the existence and a good faith implementation of the program, as well as no intention to violate the law. This approach is common for the USA and Canada. The existence of the compliance program and its diligent enforcement and active actions in good faith to ensure compliance by all employees with it may be taken into account in determining whether the company had an intent to comply with the competition law.[2]

3.2. CCP is a ***neutral factor:*** If violation occurred, then the compliance program is a failed program. The main reasoning behind is that why reward a compliance program that has failed.[3] This reflects the approach at the EU level (that of the European Commission).[4]

It is important to note that the current trend at the EU level is changing towards more positive approach in relation to compliance efforts. This is particularly seen at the level of the EU member states. For instance, the UK allows 10% credit if the company has the CCP, but it has to be legitimate, and not merely exist on paper. The Competition Authority of France may give credit to a company that demonstrates the existence of a genuine CCP.

3.3. CCP is an ***aggravating factor*** when calculating fines in cases where it is simply a fake, superficial or sham program that does not contribute to prevention of competition law violations and/or mislead the Competition Authority during an investigation.

Some jurisdictions has not yet granted any guidance on how to assess the CCP. For instance, CCPs are not widespread in Turkey yet. But the Turkish Competition Authority encourages to adopt such programs and to increase awareness of the companies, their management and employees of competition rules.

5. Concluding remarks

Currently there is no consensus among the Competition Authorities as to treating the CCP as a mitigating or aggravating factor. Some Authorities do grant a reduction in

sanctions, some do not. But there is a general agreement/trend that the CCP should be encouraged. One of the most effective ways to encourage the companies to put the CCP in place is via reduced sanctions.

Indeed, companies should be rewarded for having genuine compliance programs in place at the time when they are found to be involved in the anticompetitive commercial activities. This will eventually ensure more competition law compliance. And of course the best award for the companies for a good CCP would be not to infringe the law.

Footnotes

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CHAPTER V
INTERNATIONAL TRADE

1. TURKEY IMPOSES SAFEGUARD MEASURES ON TOOTHBRUSHES: HEALTHY MARKETS HEALTHIER TEETH

By Ertuğrul Canbolat and Sinan Lahur

Upon the complaint submitted by the largest national producer of toothbrushes, the Turkish Ministry of Economy examined the import volume of such product and determined that the product subject to investigation is being dumped on the Turkish market.

On 22.04.2017 the Turkish Ministry of the Economy ("Ministry") launched an investigation against the imported toothbrushes (classified under the combined nomenclature code of 9603.21.00.00.00) to determine whether the product in question had been subject to dumping in Turkey.

On 28.08.2017 the investigation was finalized by issuing Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No. 2017/10). According to Communiqué No. 2017/10, the Ministry examined the import of the product between 2013 and 2016 and concluded that was a significant increase in the import volumes. Moreover, in 2016, import volume of the product concerned reached nearly 70 million, which is approximately the population of Turkey. Due to the vast and sharp increase in the import, Banat Fırça ve Plastik A.Ş., which covers 97% of the national production, submitted the complaint in relation to such increase in the volumes.

As a result, the Ministry decided to impose safeguard measures on the product, i.e. additional charges for the imported toothbrushes shall be applied. For the first period, the additional charges shall be USD 0,23 for per unit, for the second period - USD 0,22, and for the final period - USD 0,21.

2. TURKEY LIFTS CUSTOMS SUPERVISION CHARGES ON FURNITURE

By Sinan Lahur

The Ministry of Economy of Turkey (Ministry) lifted the customs supervision charges on imported chairs which were in place since 10 January 2007.

Customs supervision charges are one of the safeguard measures Turkey is entitled to impose on imported products in order to protect the national industry/ producer. Customs supervision charges allow the Ministry to levy additional taxes for CIF value of imported goods.

Introducing. On 10 January 2007, the Ministry by adopting its Communiqué No: 2007/9 imposed customs supervision charges on certain furniture (i.e. adjustable height chairs, chairs made from bamboo or Indian silk, wood or metal etc.). Furniture, imported value of which did not exceed 150 kg (gross) was outside the scope of the customs supervision; whereas furniture, import value of which exceeded that threshold, was subject to the customs supervision charges ranging from $5 to $7 for each unit of CIF value (USD/Gross Kg).

Amending. On 15 May 2016 the Ministry issued another Communiqué amending Communiqué No: 2007/9, the main change according to which was the decrease in the value of the unit of CIF to $1,5 - $3,5.

Abolishing. On 16 September 2017, the Ministry issued its final Communiqué abolishing Communiqué No:2007/9. As a result, there exist no customs supervision charges on imported furniture to Turkey any longer.

3. CUSTOMS UPDATES IN TURKEY FOR THE IMPORT OF VARIOUS GOODS

By Ertuğrul Can Canbolat, Mustafa Ayna and Hasan Güden

On 17 August 2017, the Council of Ministers enacted the Additional Decision to Import Regime Decision No. 10561 and the Additional Decision to Import Regime Decision No. 10580 (together referred to as "**Decisions**"). The Decisions set forth additional customs duties that shall be taken in respect to the imports of the goods falling under the CN codes that are listed in the List No. 2 attached to the Import Regime Decision enacted by the decision of the Council of Ministers dated 20.12.1995 and numbered 95/7606.

Indeed, it was decided by the Council of Ministers to enact those Decisions pursuant to the letters of the Ministry of Economy of 03 July 2017 (for the Decision No. 2017/10561) and of 17 July 2017 (for the Decision No. 2017/10580) and in accordance with Article 1 of the Law No. 1567 dated 20 February 1930 (Law regarding the Protection of the Value of Turkish Currency), Article 2 of Law No. 474 dated 14 May 1964 (Law on Customs Tariff Schedule), Article 2 of the Law No. 3283 dated 06 May 1986 (Law on the Repeal of Customs Exemptions Granted by Certain Laws), Articles 16, 22 and 55 of the Law No. 4458 dated 27 October 1999 (Customs Law), and the Law No. 2976 dated 02 February 1984 (Foreign Trade Regulation Law).

The Decisions will be enforced by the Turkish Ministry of Economy and additional customs duties will be collected by the customs offices, separately from the customs duties taken in imports and any other financial obligations and it will be forfeited in national budget. Additionally, in implementing the Decisions, the importer is liable to correctly declare the origin of the goods.

According to the Decisions, additional customs duties for the goods in the attached table, which do not originate in the European Union or Turkey and are imported with A.TR movement certificate, will be taken at the rates indicated in the "*Other Countries*" column of the table. On the other hand, the cases where additional customs duty shall not be collected are clearly explained:

- additional customs duty within the scope of the Decisions will not be applied in cases where the goods are exported to the member states of the European Union with A.TR movement certificate under the customs surveillance through collection of duties on the basis of customs duty rates listed in the lists in the Import Regime Decision.

- the additional customs duty will not be taken in cases where the preferential origin of goods originating in the countries included into the diagonal cumulation of origin system is certified pursuant to the Free Trade Agreements of which Turkey is a party.
- additional customs duty will not be applicable in cases where the goods within the scope of the Decisions are also listed in the List No. 5 added to the Import Regime Decision.
- the goods listed in the additional table are imported within the framework of Inward Processing Regime and are exported as compensating goods, the provisions in the Decisions will not be applied in calculating the countervailing duty, if any.
- additional customs duty will not be applicable in cases where within 45 days from the publication of the Decisions, a customs declaration (bill of entry) is registered or a summary declaration is submitted in relation to imports of the goods – which have been freighted to be shipped to Turkey by the arrangement of a chatter paper.

Furthermore, in any case, the calculated total duty rate (the sum of the additional customs duties in the Decisions and in the List No. 2 which is attached to the Import Regime Decision and) will not exceed 50% increased levels stated under the Law on Customs Entry Tariff Schedule dated 15.05.1964 and numbered 474. In case it exceeds, the 50% increased level stated under the Law No. 474 will be applied.

Within this scope, please find below the tables which show the additional duty rates. The countries and groups of countries listed in the sub-columns of the column entitled "*Additional Customs Duty Rate (%)*" are those defined in the List No. 2 added to the Import Regime Decision. Any change made to the latter List No. 2 shall be valid for the application of the Decisions.

Table 1. Rates imposed by the Decision No. 2017/10561

CN Code	**Name of the Product**	**Additional Customs Duty Rate (%)***						
		1	**2**	**3**	**4**			**8**
					5	**6**	**7**	
8402.11.00.00.00	Watertube boilers with a steam production > 45 t/ hour	0	0	0	20	20	20	20
8402.12.00.00.00	Watertube boilers with a steam production <= 45 t/ hour	0	0	0	20	20	20	20
8402.19.10.00.00	Vapour generating boilers with fire tube	0	0	0	20	20	20	20
8402.19.90.00.11	Vapour generating boilers with smoke tube	0	0	0	20	20	20	20

CN Code	Name of the Product	Additional Customs Duty Rate (%)*						
		1	2	3	4			8
					5	6	7	
8402.19.90.00.19	Others	0	0	0	20	20	20	20
8402.20.00.00.00	Superheated water boilers	0	0	0	20	20	20	20
8402.90.00.10.11	Curly furnaces	0	0	0	10	10	10	10
8402.90.00.10.19	Others	0	0	0	10	10	10	10
8402.90.00.90.11	Steam pipes	0	0	0	10	10	10	10
8402.90.00.90.12	Steam drums	0	0	0	10	10	10	10
8402.90.00.90.13	Steam collector pipes (collectors)	0	0	0	10	10	10	10
8402.90.00.90.14	Curly furnaces	0	0	0	10	10	10	10
8402.90.00.90.19	Others	0	0	0	10	10	10	10
8403.10.10.00.00	Cast iron boilers	0	0	0	20	20	20	20
8403.10.90.00.00	Others	0	0	0	20	20	20	20
8403.90.10.00.00	Cast iron boilers	0	0	0	10	10	10	10
8403.90.90.00.00	Others	0	0	0	10	10	10	10
8404.10.00.10.00	Auxiliary plant for use with boilers of heading	0	0	0	20	20	20	20
8404.10.00.90.11	Economizers and air heaters	0	0	0	20	20	20	20
8404.10.00.90.12	Superheaters and superheater coolers	0	0	0	20	20	20	20
8404.10.00.90.13	Steam and heat accumulators	0	0	0	20	20	20	20
8404.10.00.90.14	Carbon cleaning machines	0	0	0	20	20	20	20
8404.10.00.90.15	Gas economizers	0	0	0	20	20	20	20
8404.10.00.90.19	Others	0	0	0	20	20	20	20
8404.20.00.00.00	Condensers for steam power units	0	0	0	20	20	20	20
8404.90.00.10.00	Parts of auxiliary plant of heading and condensers for steam or other vapour power units	0	0	0	10	10	10	10
8404.90.00.90.11	Superheating pipes	0	0	0	10	10	10	10
8404.90.00.90.19	Others	0	0	0	10	10	10	10

CN Code	Name of the Product	Additional Customs Duty Rate (%)*						
		1	2	3	4			8
					5	6	7	
8416.10.10.00.00	Automatic control device	0	0	0	14.9	14.9	14.9	14.9
8416.10.90.00.00	Others	0	0	0	14.9	14.9	14.9	14.9
8416.20.10.00.00	Furnace burners only for gas, (monobloc, incorporating a ventilator and a control device)	0	0	0	14.9	14.9	14.9	14.9
8416.20.20.00.11	Pulverized solid fuel burners	0	0	0	14.9	14.9	14.9	14.9
8416.20.20.00.19	Others	0	0	0	14.9	14.9	14.9	14.9
8416.20.80.00.11	Pulverized solid fuel burners	0	0	0	14.9	14.9	14.9	14.9
8416.20.80.00.19	Others	0	0	0	14.9	14.9	14.9	14.9
8416.30.00.00.00	Mechanical stokers, incl. their mechanical grates, mechanical ash dischargers and similar appliances (excluding burners)	0	0	0	14.9	14.9	14.9	14.9
8416.90.00.00.11	Parts of furnace burners	0	0	0	7.5	7.5	7.5	7.5
8416.90.00.00.19	Others	0	0	0	7.5	7.5	7.5	7.5
8428.10.20.90.11	Lifts for human beings	0	0	0	7.6	7.6	7.6	7.6
8428.10.20.90.12	Lifts and skip hoists for merchandise	0	0	0	7.6	7.6	7.6	7.6
8428.10.20.90.19	Others	0	0	0	7.6	7.6	7.6	7.6
8428.10.80.90.00	Others	0	0	0	7.6	7.6	7.6	7.6
8428.40.00.00.00	Escalators and moving walkways	0	0	0	7.6	7.6	7.6	7.6
8431.31.00.00.11	Lift light curtains >= 1 meter (photocell height)	0	0	0	7.6	7.6	7.6	7.6
8431.31.00.00.12	Lift guide rails	0	0	0	7.6	7.6	7.6	7.6
8431.31.00.00.19	Others	0	0	0	7.6	7.6	7.6	7.6
8539.50.00.00.00	Light-emitting diode “LED” lamps	0	0	0	20	20	20	20

** 1: EU member states, EFTA member states, Israel, Macedonia, Bosnia-Herzegovina, Morocco, West Bank and Gaza Strip, Tunisia, Egypt, Georgia, Albania, Jordan, Chile, Serbia, Montenegro, Kosovo, Mauritius, Moldovia; 2: South Korea, 3: Malaysia, 4: Group of countries benefiting from Generalized System of Preferences, 5: Least Developed Countries, 6: Countries benefiting from Special Incentive Regulation, 7: Developing Countries, 8: Other countries*

Table 2. Rates imposed by the Decision No. 2017/10580

CN Code	Name of the Product	Additional Customs Duty Rate (%)*						
		1	2	3	4			8
					5	6	7	
8414.80.75.90.00	Others	0	0	0	14.6	14.6	14.6	14.6
8417.80.50.00.00	Industrial or laboratory furnaces and ovens for cement, glass and chemicals	0	0	0	14.9	14.9	14.9	14.9
8421.23.00.00.00	Oil or petrol-filters for internal combustion engines	0	0	0	15.1	15.1	15.1	15.1
8421.31.00.90.00	Others	0	0	0	15.1	15.1	15.1	15.1
8426.20.00.00.00	Tower cranes	0	0	0	7.6	7.6	7.6	7.6
8430.31.00.00.00	Self-propelled tunneling machinery	0	0	0	5	5	5	5
8430.39.00.00.00	Others (only tunneling machinery)	0	0	0	4.1	4.1	4.1	4.1
8456.11.90.10.00	Machine tools for working metals and carbides	0	0	0	12.5	12.5	12.5	12.5
8456.40.00.00.00	Machine tools for working any material by removal of material, operated by plasma arc processes	0	0	0	20	20	20	20
8461.50.11.00.00	Sawing or cutting-off machines, for working metals, metal carbides or cermets (with circular saws)	0	0	0	14.2	14.2	14.2	14.2
8461.50.19.00.00	Others	0	0	0	14.2	14.2	14.2	14.2
8461.50.90.00.00	Slitters	0	0	0	14.2	14.2	14.2	14.2
8462.10.90.00.19	Others	0	0	0	14.3	14.3	14.3	14.3
8462.21.10.00.00	Flattening machines, incl. presses, numerically controlled, for working metal	0	0	0	13.9	13.9	13.9	13.9

CN Code	Name of the Product	Additional Customs Duty Rate (%)*						
		1	2	3	4			8
					5	6	7	
8462.29.91.00.00	Hydraulic bending, folding, straightening or flattening machines	0	0	0	14.3	14.3	14.3	14.3
8464.10.00.00.00	Sawing machines for working stone, ceramics, concrete, asbestos-cement or like mineral materials or for cold-working glass	0	0	0	20	20	20	20
8464.20.80.00.00	Others (excluding machines for working ceramics)	0	0	0	20	20	20	20
8464.90.00.00.00	Others (excluding machines for working ceramics)	0	0	0	20	20	20	20
8467.89.00.11.00	Boring and Drilling machines	0	0	0	2.5	2.5	2.5	2.5
8472.90.90.90.12	Perforators or staplers (office machines)	0	0	0	20	20	20	20
8474.10.00.10.00	Sorting, screening, separating or washing machines for solid mineral substances	0	0	0	4.2	4.2	4.2	4.2
8474.10.00.90.00	Others	0	0	0	16.2	16.2	16.2	16.2
8474.20.00.10.00	Machinery for crushing stone	0	0	0	16.2	16.2	16.2	16.2
8474.20.00.90.00	Others	0	0	0	16.2	16.2	16.2	16.2
8474.31.00.00.00	Concrete or mortar mixers	0	0	0	16.2	16.2	16.2	16.2
8474.32.00.00.00	Machines for mixing mineral substances with bitumen	0	0	0	16.2	16.2	16.2	16.2
8474.39.00.00.00	Others	0	0	0	16.2	16.2	16.2	16.2

CN Code	Name of the Product	Additional Customs Duty Rate (%)*						
		1	2	3	4			8
					5	6	7	
8474.80.10.00.00	Machinery for agglomerating, shaping or moulding ceramic paste	0	0	0	16.2	16.2	16.2	16.2
8474.80.90.00.11	Machines for forming foundry moulds of sand (coremaking machine)	0	0	0	16.2	16.2	16.2	16.2
8474.80.90.00.12	Machines for making tiles, bricks and briquettes	0	0	0	16.2	16.2	16.2	16.2
8474.80.90.00.13	Machines for making concrete blocks	0	0	0	16.2	16.2	16.2	16.2
8474.80.90.00.19	Others	0	0	0	16.2	16.2	16.2	16.2
8479.82.00.00.00	Mixing, kneading, crushing, grinding, screening, sifting, homogenising, emulsifying or stirring machines	0	0	0	20	20	20	20

** 1: EU member states, EFTA member states, Israel, Macedonia, Bosnia-Herzegovina, Morocco, West Bank and Gaza Strip, Tunisia, Egypt, Georgia, Albania, Jordan, Chile, Serbia, Montenegro, Kosovo, Mauritius, Moldovia; 2: South Korea, 3: Malaysia, 4: Group of countries benefiting from Generalized System of Preferences, 5: Least Developed Countries, 6: Countries benefiting from Special Incentive Regulation, 7: Developing Countries, 8: Other countries*

4. IS "LESSER DUTY RULE" A TIGHTROPE WALKER'S POLE IN INTERNATIONAL TRADE REMEDIES LAW OF TURKEY?

By Ertuğrul Can Canbolat and Cansı Çatak

1. Introduction

The recent developments in the case law have led the trade remedy law practitioners to bring the Turkish Ministry of Economy's ("**Ministry**") approach towards the implementation of the "*lesser duty rule*" to their agenda. There are deep concerns and raising voices of the interested stakeholders from both sides (domestic industry and foreign traders) as to the benefits and drawbacks of its application.

From the very beginning of the implementation process of the WTO rules into members' legislations, the nature, aim and ground of the "*lesser duty rule*" as well as its effectiveness have been heavily criticized and accordingly, the approaches pursued by the legislators and competent authorities fluctuated significantly in various jurisdictions. As a reminder, the "*lesser duty rule*" refers to the cases where the injury caused by dumped or subsidized imports could be removed by imposition of a duty lesser than the calculated dumping margin or amount of subsidy. In the application of the lesser duty provision, the core issue is legal ambiguity regarding whether the authorities may exercise a great deal of discretion or they are obliged just to adopt an approach favouring the application of the "*lesser duty rule*".

In this regard, members of the WTO, especially those which have adopted a relatively strict trade policy, have been focusing on the "*lesser duty rule*" from more protective perspective and enjoying the opportunity of using the option arising from the wording of "*desirable*" in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("**Anti-Dumping Agreement**"). On the other hand, some of the WTO members promoting the continuous application of the "*lesser duty rule*" by their competent authorities have been discussing the determination of the potential cases where non-application of the concerned rule may help to create an effective way by outweighing its benefits and drawbacks.[1] With a view to achieving the business perspective, others encourage the public to disclose its opinion on this issue.

Albeit the various existing approaches, it is undeniable that the "*lesser duty rule*" can be used as a tool to balance the contradicting interests of both domestic industries and exporting/importing entities, as well as to ensure the public/consumer welfare.

2. The "*Lesser Duty Rule*" at the International Level

Anti-Dumping Agreement. Article 9 of the Anti-Dumping Agreement sets out that "*it is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry*". In other words, the nature of the "*lesser duty rule*" under Article 9 is not an obligation but rather an option for the WTO members to transpose this rule into their national legislations in ensuring fair competition by preventing so-called trade distortions; however, at the same time, this provision does evince its desirability of adopting this principle. As a result, the Anti-Dumping Agreement grants whole discretion to the WTO member countries in their application and transposition of this issue into their national legislations.

EU rules. Under the acquis[2] "*the amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry.*" The acquis limits the applicable remedy. The underlying reason of transposing the "*lesser duty rule*" into the EU law is that it is sufficient to remedy the injury suffered by the EU industry which is lower than the dumping margin. In other words, the EU authorities have recognized the "*lesser duty rule*" in cases where anti-dumping/countervailing duties are lesser than the dumping/subsidy margin and the injury margin. In fact, the earlier anti-dumping cases in the EU prove that the EU authorities have consistently resorted to the "*lesser duty rule*". The main rationale for this lies in the aim (i) not to punish the exporters (at dumped prices) for the non-injurious parts of their practices, (ii) to assure the public interest in general, and/or (iii) to create fewer distortions to the current market competition.

As an example, regarding "*imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the PRC*", the Council of the EU stated[3];

"In view of conclusions reached with regard to dumping, injury, causation and union interest and in accordance with Article 9(4) of the basic Regulation, it is considered that definitive anti-dumping measures should be imposed on imports of crystalline silicon PV modules or panels and cells of the type used in crystalline silicon modules or panels, originating in or consigned from the PRC at the level of lower of the dumping and the injury margin found, in accordance with the lesser duty rule. In this case, the duty rate should accordingly be set at the level of the injury margins found."

However, it is still very controversial whether the EU authorities are required to do so. Some of the practitioners claim that "*the word 'should' cannot, in law, be the basis of a mandatory rule. The word 'should' is conditional and gives to the competent authority the possibility to impose a duty at less than the dumping margin*".[4]Furthermore, it may be asserted that the eagerness of the EU authorities in former cases does not reveal or render this practice as mandatory or put emphasis upon the potential negative effect of it on

the consumer welfare in the long-term perspective despite its short-term benefits.

3. The "*Lesser Duty Rule*" under the Turkish Trade Remedy Laws

Similarly, Article 7 of the Turkish Law on the Prevention of Unfair Competition in Imports ("**Turkish Law**") regulates the "*lesser duty rule*" as follows:

"*An amount equal to the margin of dumping or the amount of subsidy, specified by the Board and approved by the Ministry consequent to the investigation, shall be imposed on dumped imports as anti-dumping duty and on subsidized imports as countervailing duty, respectively. However, where it is determined that a rate or amount of duty lesser than the calculated dumping margin or amount of subsidy* ***would be adequate to remove the injury caused*** *by dumped or subsidized imports, such lesser rate or amount* ***shall be imposed****.*"

As seen, the Turkish Law applies the "*lesser duty rule*", namely the amount of the anti-dumping duty shall not exceed the dumping margin but should be less if such lesser duty would be adequate to remove the (threat of) injury. Contrary to the wording used in the mentioned above Article 9(4) of the EU Regulation, the relevant article of the Turkish Law includes the "*shall*" wording. At the same time, the law also enables the Ministry to enjoy discretion by using the wording "*adequate*". Therefore, it appears that the above-stated provision obliges the Ministry to impose an anti-dumping duty at less than the calculated margin of dumping if such lesser duty would be adequate to remove the injury to the domestic industry.

As a matter of fact, the Ministry has systematically applied the "*lesser duty rule*" and thus, there has been a considerable number of cases[5] of the Ministry where the anti-dumping measures were based on injury margin (which is determined by a comprehensive analysis of the domestic industry's economic indicators and the effect of the dumped imports on the domestic industry's pricing tendency/progress such as price undercutting, price depression and suppression), when the level of the dumping margin exceeded what was necessary to remove the injury suffered and eventually the Ministry applied the lesser duty. In its recent case concerning the imports of "*phthalic anhydride*" products originating in South Korea, the Ministry determined the dumping margin as 15% of the CIF value, however, following the evaluation of the investigation report, which included the recommendation to apply the lesser duty, it reached the conclusion to impose a measure of 8.44% of the CIF value (almost half of the calculated dumping margin).

4. Conclusion

The Turkish legislation seems quite clear and it is uncontroversial that the Ministry is vested to take anti-dumping measures to eliminate or mitigate injury caused by dumping. Accordingly, the Ministry should distinguish the injurious and non-

injurious effects of the dumping and depending on that, decide on the respective measure with a possibility to invoke the lesser duty in order to ensure that the measure does not exceed what is necessary to remedy the injury caused. Indeed, unlike Article 9 (4) of the EU Regulation, the relevant article of the Turkish Law includes the "*shall*" wording and accordingly, the application of the "*lesser duty rule*" appears to be mandatory in Turkey. In many of its investigations, the Ministry has adopted an approach to apply the "*lesser duty rule*".

Additionally, in order to guarantee the right to defence of the interested parties in favour of/against the application of the lesser duty, any injury calculation should be made and reflected properly. In other words, the transparency/availability of such calculations to the interested parties to a certain degree is required. Otherwise, the injury calculation method and the lack of transparency/openness in relation to such calculation method may overshadow the application of the "*lesser duty rule*" which can assure the right balance between both parties' interests as well as the free market economy rules.

Footnotes

1. Laurent Ruessmann, "Modernisation of the European Union Trade Defence System – Reform De Jure and De Facto", http://www.fieldfisher.com/media/1909600/AJCCL-Europe.pdf

2. Paragraph 4 of Article 9 of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union

3. Paragraph 414 of Proposal for a Council Implementing Regulation imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China

4. Bernard O'Connor, "There is no lesser duty in EU trade defence law", http://www.lexology.com/library/detail.aspx?g=03c49e52-f5e8-4602-9ad7-5b779ec2d666

5. See for instance, Article 29 of the Communiqué on the Prevention of Unfair Competition in Imports (No. 2004/22); Article 27 of the Communiqué on the Prevention of Unfair Competition in Imports (No. 2006/2); Article 24 of the Communiqué on the Prevention of Unfair Competition in Imports (No. 2011/1); Article 36 of the Communiqué on the Prevention of Unfair Competition in Imports (No. 2013/17); Article 37 of the Communiqué on the Prevention of Unfair Competition in Imports (No. 2014/2); Para. 4 of Article 15 of the Communiqué on the Prevention of Unfair Competition in Imports (No. 2015/21); Article 33 of the Communiqué on the Prevention of Unfair Competition in Imports (No. 2015/23); Article 24 of the Communiqué on the Prevention of Unfair Competition in Imports (No. 2015/44); Article 25 of the Communiqué on the Prevention of Unfair Competition in Imports (No. 2016/11); Article 30 of the Communiqué on the Prevention of Unfair Competition in Imports (No. 2016/15); Article 26 of the Communiqué on the Prevention of Unfair Competition in Imports (No. 2016/27)

5. ANTI-DUMPING MEASURES IN THE COURSE OF JULY 2017: WHAT HAS THE TURKISH MINISTRY OF ECONOMY TO SAY?

By Ertuğrul Can Canbolat and Hasan Güden

1. Introduction

The Turkish Ministry of Economy ("**Ministry**") frequently intervenes in cases where imports take place at the expense of domestic industry. This focus on foreign firms exporting to Turkey often leads the Ministry to adopt trade barriers, such as the so-called anti-dumping measures or safeguard measures. We thus have chosen to highlight communiqués and reports issued by the Ministry in this regard during the month of July 2017 and analyze the main sectors and issues concerned.

2. Communiqués & Reports

- Quota based restriction on imports of **frameless glass mirrors**[1] originating in Iran constitutes the object of Communiqué No 2017/7, issued by the Ministry on 1 July 2017, stating that newly determined quota restrictions shall enter into force for three more years starting from 3 July 2017 onwards.
- On the same day a similar Communiqué No 2017/8 concerning certain **products made from propylene polymer**[2] and containing the same safeguard measure was published. The Ministry also launched an Informative Report on Interim Damage Investigation[3] relating to Communiqué No 2017/8 in which it established that despite the safeguard measures, China remained the first exporter to the Turkish market with a considerable market share. Still the concerned countries saw their export numbers fallen, and as a consequence their market share decreased under the effect of the aforementioned measure. The Ministry also notices that domestic industry's market share did not vary despite the decline of the concerned product's imports due to a drop in domestic industry's sales, so that it could be assumed that domestic industry underwent cut in prices and price pressure. According to the Ministry, the implementation of safeguard measures didn't help domestic industry stem the negative slope in a variety of parameters such as production, domestic sales or profitability. Moreover, the measures put into force have proved to be insufficient to suppress damage to the domestic industry due to dumping imports.
- According to Communiqué No 2017/16 published on 5 July 2017, the extension of the permanent measure taken on 28 October 2016 against certain **plywood**

types[4] originating in China, Bulgaria and Vietnam has been requested by the Turkish Plywood Producers Association on behalf of domestic industry. The Ministry, having accepted that sufficient evidence has been administered, decided that an investigation relating to the aforementioned products originating only in China shall be initiated.

- Communiqué No 2017/15 published on 5 July 2017 by the Ministry stipulates that several domestic producers requested the permanent measure taken against Chinese and Vietnamese **granite**[5]**producers** on 17 February 2016 to be extended. Considering that sufficient evidence has been provided on the material injury that would prevail in case the measure does not remain in force, the Ministry ruled accordingly and decided to extend the measure to the imports of the concerned products originating only in China.
- The Ministry published on 11 July 2017 Communiqué No 2017/19 related to measures applicable against the import of certain products. **Endless transmission belts of trapezoidal cross-section**[6] originating in China, India and Vietnam, **welded stainless steel tubes, pipes and profiles**[7] originating in Taiwan and China and **refractory bricks of chromite, magnesite or chrome magnesite**[8] originating in China shall be subject to safeguard measures until 15 March 2018. At the same time measures taken against **woven fabrics** of synthetic and artificial stable fibers[9] originating in China shall be terminated on 5 May 2018.
- In its Communiqué No 2017/17 announced on 12 July 2017, the Ministry decided to extend the application of the safeguard measures taken on 16 October 2014[10] against China, India and Malaysia as to **fully drawn yarn**[11] but with a modified range of additional customs duty for China, the former one becoming adjusted with the range applicable to the other two countries.
- On 12 July 2017 the Ministry completed an anti-dumping investigation, which was launched on 6 February 2016 against China and Korea for the imports of **concrete pumps**[12] and **concrete pumping trucks**[13] and issued the Communiqué No 2017/18 ruling that the above-mentioned imports did cause material injury to the relevant domestic industry. On the ground of this latter communiqué, the concerned products will be subject to an additional customs duty rate comprised between 5,10% and 11,63% of CIF when imported from Korea while imports from China will be taxed additionally within a range of 5,10-12,27% of CIF. In its report[14] relating to the investigation initiated on 6 February 2016, the Ministry considers that the import quantity of the concerned products from Korea rose during the investigation period (from 6 February 2016 to 12 July 2017) while the import of Chinese products increased in 2014 but has fallen in 2015. The Report suggests also that the "lesser duty rule" shall be implemented due to the fact that the changing nature of the concerned products from "end product" to "completely knock down" results in importers gradually being considered as "local producers".

At the same time, Turkey, too, is subject to safeguard measures, *inter alia*, adopted by

the EU authorities. The European Commission published on 20 July 2017 a Notice of initiation[15] of a partial interim review of the definitive countervailing duty[16] already imposed on the import of **rainbow trout**[17] originating in Turkey. This notice follows a request lodged by the Aegean Exporters Association for whom the rules under which Turkish exporters of the concerned product benefited from subsidies have been amended, thereby impeding the offsetting of the subsidies. The European Commission, considering that the evidence provided was sufficient, held that the modification of eligibility limits are of a lasting nature, therefore requiring the review of the definitive measures.

3. Concluding remarks

As seen from the above, the Ministry has been quite active in July adopting communiqués and reports and consequently (re)shaping the trade related rules for the foreign companies exporting to Turkey. As a general trend, upon the complaint of the domestic industry and provision of sufficient evidence, the Ministry extends safeguard measures. Furthermore, Turkey faces investigations and measures as well and thus must meet commercial requirements of other countries or political organizations.

Footnotes

1. CN code 7009.91 to which a restriction of 2147 tonnes for the period 3/7/2017-2/7/2018, 2211 tonnes for the period 3/7/2018-2/7/2019 and 2277 tonnes for the period 3/7/2019-2/7/2019 is brought. .

2. CN code 3920.20.21.00.19 to which a restriction of 1293 tonnes for the period 2/7/2017-1/7/2018, 1331 tonnes for the period 2/7/2018-1/7/2019 and 1371 tonnes for the period 2/7/2019-1/7/2019 is brought.

3. “Informative Report on Interim Damage Investigation”.

4. CN codes 4412.10, 4412.31, 4412.33, 4412.34 and 4412.39 to which is imposed an additional duty of USD 240/m3..

5. CN code 6802.23 and 6802.93 to which is applied an additional duty of USD 174/tonne.

6. CN codes 40.32.00.00.00, 4010.34.00.00.00, 4010.39.00.00.00 to which is applied an additional duty of USD 5,04/kg if originating in China, USD 3,50/kg if originating in India and USD 4,55/kg if originating in Vietnam..

7. CN codes 7306.40.20.90.00, 7306.40.80.90.00, 7306.61.10.00.00 to which is imposed an additional duty ranging between 7,98% and 14,65% of CIF if originating in Taiwan and a range of duty between 13,82% and 25,27% of CIF if originating in China.

8. CN codes 6902.10.00.10.11, 6902.10.00.10.12, 6902.10.00.10.13 and 6815.91 to which is imposed an additional duty of USD 145/tonne if originating in China.

9. CN codes 55.13, 55.14, 55.15 and 55.16 to which is imposed an additional duty of 87% of CIF if originating in China.

10. See Communiqué No 2014/31.

11. CN code 5402.47 to which is applied an additional duty between USD 0,15-0,17/kg if originating in Malaysia and India, USD 0,25-0,30/kg if originating in China.

12. CN code 8413.40.00.00.00.

13. CN code 8705.90.30.00.00.

14. “Informative Report on Dumping Investigation”.

15. OJEU, C 234/04, 20.7.2017, p. 6.

16. Commission Implementing Regulation (EU) 2015/309 of 26 February 2015 imposing a definitive countervailing duty on imports of certain rainbow trout originating in Turkey (OJEU, L 56, 27.2.2015, p. 12).

17. CN codes 0301 91 90, 0302 11 80, 0303 14 90, 0304 42 90, 0304 82 90 and 0305 43 00 to which is imposed an additional duty between EUR 6,9/9,5 % of the net, free-at-Union-frontier price if originating in Turkey.

6. EC VS TURKEY IN COMPLIANCE WITH WTO RULES: DUMPING EXPORTS TO THE EU AND RESTRICTING IMPORTS FROM THE EU?

By Ertuğrul Can Canbolat and Hanna Stakheyeva

1. INTRODUCTION

The European Commission ("Commission"), being quiet active between the last week of June and first week of July 2017, initiated trade remedy investigations (i.e. anti-dumping and expiry review) against various countries, including Turkey. In particular, the Commission launched an anti-dumping investigation concerning Turkey's exports to the EU and a trade barrier examination concerning EU imports to Turkey.

Considering importance of the issue for the companies active in the low carbon ferro-chrome and uncoated wood free paper market, as well as for the economy of Turkey and EU in general, below we provide highlights of the investigations together with the outline of main procedural steps and opportunities available for the parties in the course of the investigations.

2. Anti-Dumping Investigation Concerning Turkey's Exports to the EU

2.1 Legal framework

As emphasized in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, the main purpose of the anti-dumping rules is to protect a Union/domestic industry against injuries caused by dumped imports of the like products. In this context, the Commission shall conduct an investigation to determine the existence, degree and effect of any alleged dumping upon a written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the Union industry.

On 23 June 2017, the Commission announced its decision to launch an anti-dumping investigation concerning the imports of "*low carbon ferro-chrome*" products (with the CN code 7202.49.50) originating in China, Russia and Turkey following the complaint that the concerned imports are being dumped and are causing material injury to the European Union ("EU") industry. According to the Notice of the Initiation, the complaint was lodged on 10 May 2017 by the Association of European ferro-alloy producers ("Euroalliages") on behalf of the sole EU producer of low carbon ferro-chrome in the EU, namely Elektrowerk Weisweiler GmbH ("Complainant"). The investigation will be carried out by the Commission in accordance with Regulation

(EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the EU ("Regulation").[1] It outlines the main aspects of the EU antidumping investigation including the principles, initiation of proceeding, definition of the EU industry and like product, determination of dumping and injury, provisional and definitive measures, and undertakings.

2.2 Important deadlines

As of 23 June 2017, i.e. the date when the Notice of Initiation[2] was published in the Official Journal of the EU, the clock has started ticking for both exporting producers and the Commission, which are bound by certain strict deadlines. For instance, within 15 days following the publication of the Notice of Initiation all exporting producers and associations of exporting producers in Turkey are invited to get in contact with the Commission so that they can identify themselves and request a questionnaire to be able to submit highly important and confidential data. Further, the exporting producers and, where applicable, the associations of exporting producers shall have 37 days of the date of the publication of the Notice of Initiation in order to submit their responses to the questionnaire. At the same time, the Commission shall carry out its comprehensive dumping and injury analysis and then conclude its investigation within 15 months of the date of the publication of the Notice of Initiation in the Official Journal of the EU.

2.3 Benefits of cooperation & confidentiality

Within this scope, if an interested party does not provide necessary information within the above-stated time periods, such party shall be deemed as non-cooperative. In such cases, provisional or final findings, affirmative or negative shall be made on the basis of the facts available. Accordingly, the result of the investigation may be less favorable to that party than should it had cooperated. In addition to this benefit of cooperating with the Commission, the preparation and submission of full responses in a right and duly manner will also help the exporting companies to put forward their arguments more effectively as well as assisting the Commission in ensuring a fair comparison between the export price and normal value.

Full responses to the questionnaires imply also provision of the confidential data. In this regard, the Regulation ensures protection and the non-disclosure of the confidential data submitted by the interested parties, however, with the condition that they also provide their non-confidential summaries which should be sufficiently detailed to permit a reasonable understanding of the substance of the information submitted in confidence. This guarantees both parties' fundamental right, namely right to defence.

2.4 Other procedural steps

The Commission shall, where it considers it appropriate, carry out verification visits at the premises of the interested parties, in order to examine their records and to verify information provided on dumping and injury. In the absence of a proper and timely reply, the Commission may choose not to carry out a verification visit. Therefore, a proper preparation by the exporting companies for the verification plays a critical role as only the verified data will be used in the determination of the dumping and injury margins. The methods used by the Commission in the dumping margin calculation are regulated under Article 2 of the Regulation whereas Article 3 sets forth the main principles of the injury calculations. The respective measure to be adopted following the investigation shall be applicable for a five-year period.

Finally, the Commission shall announce its findings in which it discloses its intent to recommend the imposition of a provisional or definitive duty in respect of the EU as a whole. As there will be a very short deadline for the interested parties to submit their comments on the findings, the simulations for both dumping and injury calculation by the interested parties as well as the design of the strategies from both technical and legal perspective prior to the announcement appears to be of vital importance for the future export plans of the companies.

In conclusion, it is highly advisable that the Turkish exporting producers of the product under the investigation should consider both the advantages (such as getting an individual duty rate) and disadvantages (if any) of cooperation with the Commission in the concerned anti-dumping investigation which will shape their future exportation strategies.

3. Trade Barrier Investigation Concerning EU Imports To Turkey

3.1 The legal issue

On 7 July 2017 the Commission initiated an examination procedure on obstacles to trade within the meaning of Regulation (EU) 2015/1843 applied by Turkey and consisting of measures affecting the import of uncoated wood free paper.[3] The investigation was launched upon a complaint of an industry association against the import surveillance system/importing licensing requirement introduced in Turkey as of 28 September 2015 for uncoated wood free paper imported into Turkey at a customs value of USD 1200 per tonne or less. The complainant states that such a specific licensing requirement could be incompatible with the Customs Union Agreement and the WTO rules since it affects all imports from the EU. As explained by the complainant, it is impossible to obtain such license due to the specific information requirements of the licensing procedure – such information is only available for paper producers, and consequently the importers of wood free paper are (indirectly) forced to declare their customs value above USD 1200 per tonne (even where the actual import value is less), which creates additional cost/tax for the importers of the product.

3.2 Procedural aspects

Within 45 days following the date of publication of the Notice of Initiation, any interested parties may submit in writing comments/information/supporting evidence/request to be heard to the Commission in relation to specific issues raised by the complaint and primarily concerned by the outcome of the investigation.

The trade barrier examination in the EU, just as in any other jurisdiction member of the WTO, is one of the tools available for the companies/professional associations in addressing foreign government measures that may have a negative impact on their business. It may lead to a WTO dispute settlement case if the trade barrier examination/regulations fails does not lead to a satisfactory settlement with Turkey. But in general the Commission aims to reach such solution so that the companies can enjoy the beneficial results more quickly (as compared to other possible outcomes involving long and costly dispute settlement mechanisms).

4. CONCLUDING REMARKS

Both the anti-dumping investigation in low carbon ferro-chrome market and the trade barrier examination in relation to the uncoated wood free paper market recently initiated by the European Commission against Turkey demonstrate increased importance of trade between the EU and Turkey, as well as compliance with the WTO rules. The outcome of the investigations is yet to be seen, but in any case cooperation between the parties concerned and the Commission are vital in order to reach the satisfactory solutions as soon as possible with as less negative impact as possible for both jurisdictions.

Footnotes

1. http://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154702.en.L176-2016.pdf
2. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0623(01)&from=EN
3. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2017.218.01.0020.01.ENG&toc=OJ:C:2017:218:TOC

7. WERE TRADE REMEDIES OF TURKEY SATISFACTORY IN 2016? – A STATISTICAL AND LEGAL OVERVIEW

By Ertuğrul Can Canbolat and Mustafa Ayna

1. Introduction

For the past few years, Turkey has tended to use various trade remedy tools more frequently, thus the number of investigations increases in depth and breadth with the aim of supporting domestic industry through its protectionist approach. Whilst ranked seventh among 43 WTO members as user of anti-dumping measures between 1995 and 2014, Turkey occupied one of the leading positions in applying trade remedies in 2015, along with the USA, Brazil and India. Furthermore, the OECD Report on Trade and Investment Measures dated 2015 ranked Turkey second among G20 members for initiation of anti-dumping investigations between Q3 2014 and Q1 2015. Countries most affected by the measures are China, India, Malaysia and Indonesia, as well as other G20 members, with metals, plastic and rubber goods, and machinery sectors being the most affected by the imposed duties.

Similarly, in 2016, the Turkish Ministry of Economy adopted a relatively strict trade policy and became the voice of Turkish producers by promulgating new investigations against various countries in parallel with the economic difficulties in Turkey. However, were trade remedies satisfying in terms of both statistics and legal grounds? This article provides the statistical analysis and overview of main developments in the Turkish trade remedy laws in 2016.

2. Statistical Analysis Of 2016: Could It Be Considered As A Dumping Year?

The number of investigations initiated/conducted by the Dumping and Subsidy Research Office of the Ministry of Economy General Directorate of Imports ("**General Directorate of Imports**") in 2016 illustrates the pace of the strict approach adopted in 2016: nineteen new investigations and thirty completed investigations. The starting point in most of newly initiated and formerly launched but concluded investigations in 2016 were the complaints submitted by the domestic producers regarding dumped imports, interim reviews, expiry reviews and circumvention.

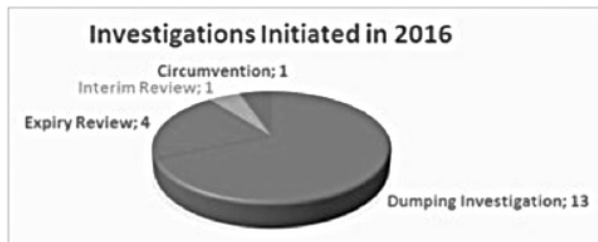
As every case is characterized by the variables such as product concerned by the complaint, the country of origin and imposition of a measure, the statistical evaluations are carried out on the basis of those variables.

2.1. Investigations initiated in 2016

In conformity with the Agreement on Implementation of Article VI of the GATT (1994) ("**Anti-Dumping Agreement**"), the Turkish legislation on the prevention of unfair competition in imports allows the General Directorate of Imports to conduct a dumping or subsidy examination either *ex officio* or upon a written complaint of any person or association acting on behalf of the Turkish domestic industry, if it is determined that there exists sufficient evidence on dumped or subsidised imports and injury resulting thereof.

Considering the financial situation in 2016, the investigations were launched against different products classified under seventy-eight customs tariff statistics positions (Turkey's customs tariff system), on the basis of complaints lodged by various Turkish industries such as chemical, textile, steel, copper, glass, tyre, porcelain and solar panel. While approximately 70% of these investigations relate to dumping claims, 21% are expiry reviews.

Table 1



Source: ACTECON based on information available at www.ekonomi.gov.tr

In this regard, the General Directorate of Imports entered year 2016 with the initiation of a dumping investigation against concrete pumps and concrete pump trucks imports from China and South Korea; and it closed year 2016 with the initiation a dumping investigation on heavy plates against China again. Thus, the products originating in the Far East countries (primarily China) became again on the top of the list of the subject of the investigations (i.e. 13 investigations), followed by Russia (3 investigations). Brazil, the USA, Greece, Spain, Italy, Poland, Finland and the Arab Emirates are also on the list.

Table 2

Source: ACTECON based on information available at www.ekonomi.gov.tr

Whilst six of the investigation were initiated against more than one country, the antidumping investigation against imports of "*unbleached kraftliner paper*" originating in Brazil, Finland, Poland and Russia, and the circumvention investigation against the imports of "*hinges*" originating in Spain, Italy, Greece and Thailand are the cases where a large number of countries was involved.[1]

Consequently, the statistics show the increasing use of trade remedies by the Turkish Ministry of Economy, which may also be an indicator of the increase in the awareness of the Turkish domestic industries to apply such mechanism in order to protect themselves from the alleged dumped imports and ensure a proper protection of their interests.

2.2. Investigations completed in 2016

The Law of Turkey (No. 3577) on the Prevention of Unfair Competition in Imports[2] sets out different rules and procedures for different types of investigations to be followed by the General Directorate of Imports in imposing a respective measure. For example; although questions of (i) whether the circumstances regarding dumping or subsidy and injury have changed significantly, or (ii) whether the existing measures have been achieving the intended results in removing the injury, shall be evaluated as part of an interim review investigation, the General Directorate of Imports is entitled to impose a measure in an expiry review investigation, if it reaches a conclusion that the expiry of measures would be likely to lead to the continuation or recurrence of dumping or subsidy and injury. In this regard, thirty investigations were concluded in 2016 and surprisingly, more than 50% of these decisions constituted expiry review.

Table 3

Source: ACTECON based on information available at www.ekonomi.gov.tr

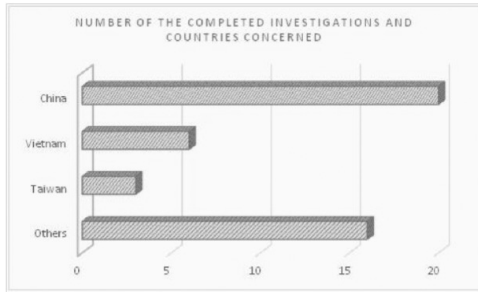
On the other hand, the General Directorate of Imports may prefer not to adopt a trade remedy when (i) the complaint is withdrawn during the examination phase (in this case, it shall be considered not to have been submitted), (ii) the complainant no longer cooperates, and/or (iii) the reason for complaint was abolished or one/more condition/s specified for the imposition of a measure are not satisfied in the concerned case. Considering the fact that this is an exceptional situation and the Ministry of Economy closed the investigations without any measure in 26 cases between 1990 and 2016 with only 7 of them in 2000s, it is noteworthy that no measures were adopted in two investigations in 2016 albeit over 90% of the concluded investigations ended with a measure.

One of these two investigations is about the imports of "*hot rolled steel*" originating in China, France, Japan, Romania, Russia, Slovakia and Ukraine. The investigation was completed without any measure after the withdrawal of the complaint. The other case relates to the imports of "*BOPP films*" originating in China, India, Egypt and Saudi Arabia. It was closed without any measures, because there was no evidence of any injury during the period of investigation. The latter seems to embody a landmark decision and constitute a precedent for the future investigations.

Not surprisingly, 2/3 of all concluded investigations are concerning the imports from China and Vietnam. In addition to these countries, the Ministry of Economy also concluded investigations about 17 more countries in 2016.

Table 4

Number of the Completed Investigations and Countries Concerned



Source: ACTECON based on information available at www.ekonomi.gov.tr

Consequently, the fact that most of the investigations ended with a measure relates to the Far East countries can be considered as a sign that more investigations against the Far East countries will be on its way in 2017.

3. Turkish Trade Remedy Laws: Any Development In Their Interpretation Or Any New Approach In Their Implementation In 2016?

3.1. Broadening scope of the confidentiality of a complaint

The General Directorate of Imports may initiate either an *ex officio* dumping or subsidy investigation on its own initiative without an official complaint by the Turkish domestic industry or upon a written complaint by a Turkish domestic industry. In any case, there has to be sufficient evidence on the representativeness of the domestic industry on the basis of product type, the existence of dumped or subsidized imports and injury for the domestic industry caused by such imports. Therefore, it would not be wrong to state that in an anti-dumping investigation, the complaint or any petition provided by the Turkish domestic industry is the main document containing the allegations of unfair trade practices and hence plays a crucial role in ensuring the parties' fundamental right, namely "*right of defence*".

In this regard, the confidentiality of a complaint in an anti-dumping or review investigation has been one of the contradictive topics raising the question whether the fundamental right of the relevant parties to defend themselves is complied with. Similarly to the Anti-Dumping Agreement, the Turkish Regulation on the Prevention of Unfair Competition in Imports provides for the boundaries/limits of the confidentiality of a document submitted within the scope of a complaint. In this regard, any information whose disclosure would be of significant competitive advantage to a competitor or would have a significantly adverse effect upon a person

submitting the information or which is provided on a confidential basis by parties to an investigation, shall, if good cause is shown, be categorized as confidential.

Accordingly, the General Directorate of Imports has been pursuing an approach that broadens the scope of the confidentiality rule (particularly for the complainants) and even sometimes applies this rules that may raise concerns in terms of the effective use of the right of defence by the counter parties, as the complaint is the main document that includes the allegations of the Turkish domestic industry. Especially, in the investigations initiated in 2016, it can be observed that the non-confidential versions of the complaints do not even provide any data (product type representativeness, dumping margin, price undercutting, price suppression, etc.), and it is of a critical importance to indicate the grounds/justifications of a complaint and to ensure the right of defence.

Consequently, in 2016, there was no legal development concerning the implementation of confidentiality rules, while broadening the approach to their application has caused the parties concerned to question the legality of relevant investigations. Within this framework, we believe that it would be extremely beneficial to all the parties involved in the process if the Ministry of Economy develops and issues its guidance (in the form of Communiques/Guidelines) in 2017 to precisely draw the boundaries of the confidentiality principle for the complainants. It would no doubt assist the Turkish domestic producers to properly prepare their complaints and thus it would also prove the opportunity for the parties to use their rights of defence in an effective manner.

3.2. Removal of injury: by means of additional decisions to the Import Regime Decision and anti-dumping measures?

In 2016 Turkey enacted several additional decisions to the Import Regime Decision of the Council of Ministers dated 20.12.1995 and numbered 95/7606 in order to set out additional customs duty that shall be taken into account in respect to the imports of the goods (such as chemicals, tires, ceramics, porcelain, plastics, glass, trees, foods, fruits, etc.) with certain customs tariff statistics positions. According to these decisions, the additional customs duty shall not be applied in cases where:

- the preferential origin of goods (originating in the countries included into the diagonal accumulation of origin system) is certified pursuant to the Free Trade Agreements, which Turkey is a party to;
- the goods are exported to the member states of the European Union with A.TR movement certificate under the customs surveillance through collection of duties on the basis of customs duty rate stipulated in the lists included in the Import Regime Decision.

On the other hand, neither the Turkish customs legislation nor the Turkish anti-dumping regulation provide clarification of the approach to be adopted by the Turkish

Ministry of Economy where an additional customs duty against the imports of products (that are already subject of a pending anti-dumping investigation) is regulated by the Council of Ministers through the additional decision to the Import Regime Decision. Therefore, it can be concluded that such regulation does not prevent the Ministry of Economy from adopting an anti-dumping measure even after the imposition of such additional customs duties. However, this certainly raises concerns about the most-favoured nation clause and compensation for domestic industries' injury along with the question whether this could be put forward as an argument within the scope of injury defence.

Therefore, in 2017 the Ministry of Economy may reveal its approach to the arguments put forward by the exporters concerning additional decisions, which already remove the damage to the relevant Turkish domestic industry (if any); and thus there is no need to impose another (anti-dumping) duty, which may hamper the exports to an unfair extent.

3.3. China's non-market economy status

On 11 December 2016 China celebrated its 15th anniversary of its accession to the WTO with an expectation to enjoy all its rights under the Protocol on China's accession to the WTO in 2001 ("**Protocol**"). The Protocol regulates China's non-market economy status and thus the calculation of normal values in anti-dumping investigations concerning the imports from China. Due to the arguments of "*distorted*" domestic prices during the accession debates, the Protocol was designed to empower the WTO members to treat China as a non-market economy in the anti-dumping investigations and thus, differently from other members for the determination of price comparability in respect of domestic prices and costs in China, which relates to the determination of normal value of goods. On the other hand, this discretion of the WTO member states was arguably subject to a time limitation - until 11 December 2016.

Therefore, among the hottest topics in 2016 were the questions of whether;

- China's non-market economy status in the WTO would change at the end of 2016,
- implementation of the rules concerning the China's non-market economy status in the Protocol would be applicable for the investigations initiated before 11 December 2016,
- the WTO members would pursue such new policy (considering the political sight of the trade remedies and the fact that China is one of the countries on the top of the list against which anti-dumping duties have been applied mostly), and what would be the consequences of its misapplication.

Albeit many divergent interpretations of these issues by both academics and practitioners all around the world still, the global economies such as the USA, EU and India have opposed the market economy methodology for China for the lack of a rule to automatically grant China market economy status, and because China has not made necessary arrangements/complied with its obligations to deserve such treatment since the distortions still take place.

On the other hand, China closely followed all debates around the world during the whole year and realised the intention of the WTO members not to grant market economy status to China. Provided that it might constitute a breach of the obligations arising from the WTO rules, China on 12 December 2016 applied to the WTO Secretariat for the consultations with the USA and the EU regarding special calculation methodologies used by the USA and EU in anti-dumping proceedings[3].

As for Turkey, it has conducted several technical meetings with the Turkish domestic producers' and exporters' unions so to enable them to submit their opinions about the mentioned (potential) change in the China's status. Yet the above-questions have remained unanswered. It appears that the Turkish Ministry of Economy will follow global economies such as the EU and USA and the result of the WTO's dispute consultations will play a determinative role in terms of the Turkey's future policies. Indeed, the evaluations in the last two final disclosures announced at the Turkish Ministry's website regarding the solar panels and concrete pumps reveal that an unfavourable approach will be followed at least in cases where the investigation was launched before 12 December 2016.

Consequently, we believe that the following questions will find their answers in 2017 (particularly, after clarifying the WTO's approach to China's status application):

- whether China's claims regarding the market economy status will be accepted in the investigations initiated after 12 December 2016 or the period of investigation will be accepted as the criterion to follow the market economy rules for Chinese exporters,
- whether the domestic sales of Chinese producers will be taken into consideration in calculating the dumping margins, and
- whether all cost related items will be taken into consideration as it is, or some of the items under the questionnaire (especially costs such as energy) will be still adjusted.

4. Conclusion

Although it cannot be clearly stated whether 2016 was a satisfying year in terms of trade remedies, there is no doubt that great use of trade remedy tools and increasing number of anti-dumping investigations in Turkey with the aim of supporting domestic industry also points out to the potential protectionist approach to be adopted by the Turkish Ministry of Economy in 2017.

Therefore, year 2017 is anticipated to provide not only more statistical data but also an opportunity to clarify some legal controversies in relation to trade remedies and the process. In relation to the latter, we hope that the Ministry of Economy would issue its guidelines on application of confidentiality to assist the Turkish domestic producers to properly prepare their complaints and thus ensure the opportunity for the parties concerned to use their rights of defence in a more effective manner.

Footnotes

1. These are the investigations that are launched in 2016. Similar to the WTO rules, Turkish antidumping legislation provides that antidumping investigations should generally be completed within 12 months of the initiation date, but this deadline may be extended to a maximum of 18 (12+6) months.

2. Law of Turkey (No. 3577) on the Prevention of Unfair Competition in Imports dated 25.07.1999

3. https://www.wto.org/english/news_e/news16_e/ds515_516rfc_12dec16_e.htm

8. TURKISH STEEL SECTOR AND DUMPING INVESTIGATIONS AGAINST CHINA

By Bahadır Balkı and Ayberk Kurt

1. Introduction

Steel imports from the People's Republic of China ("**PRC**") take a vast majority of the Turkish market staring from 2015. Due to its relatively low prices, dumping investigations against the PRC have been initiated in various jurisdictions around the world, including USA, EU, Indonesia, Thailand, South Africa, Brazil, Taiwan and Turkey. Below we provide you with an overview of the steel industry in Turkey, as well as past and current dumping investigations against the PRC. The outcome of the pending investigation in Turkey is of interest due to its anticipated impact on the future of the potential investigations in the steel sector, as well as determining the market status of the PRC based on the fact that its economy will from now on be considered as a "*market economy*".

2. Highlights of steel market

Steel, a homogeneous alloy of metal, holds strategic position in almost every developed country's economy. The importance of steel is explained by its relation with other industries such as automotive, construction, electronics, mechanical and electrical engineering. Also, steel is one of the products characterized by extensive trade flows between the countries considering that (i) largest steel customers and suppliers operate on a global level, (ii) price levels are relatively comparable across jurisdictions and dependent on the conditions of competition worldwide, and (iii) transportation cost does not constitute an important part in the total cost. Given that the steel markets have similar competition dynamics worldwide; the steel import is an appropriate substitute of the local production. Additionally, based on its strategic importance, steel industry has historically been a field, subject to trade remedies.

In Turkey, the 9th biggest steel producer in the world, steel represents one of the largest sectors in country's economy. Turkey also has a great amount of steel imports, which puts significant pressure on the domestic industry. According to the Turkish Steel Producers Association's data, Turkey's steel export did not meet the import in 2015, and Turkey became a net steel importer for the first time in 15 years. At the same time, steel import from the PRC increased up to 58%

compared to 2014, becoming the second biggest importer in Turkish steel market (the number one importer being Russia)[1].

Considering that the Chinese steel is relatively cheap, in order to evaluate whether Chinese imports are dumped, there has been a number of investigations launched in various jurisdictions, including Turkey.

3. Current and past investigations against steel from PRC

a. Investigations in Turkey

In 2015 the Ministry of Economy of Turkey ("**Ministry**") initiated a dumping investigation upon the application submitted by domestic players in the steel industry in Turkey concerning imports of hot-rolled steel coils[2] originating in the PRC, France, Japan, Romania, Russia, Ukraine and Slovakia. Seven months later following the initiation of the investigation, the Ministry imposed provisional measure on producers from the PRC in the form of dumping duties ranging between 15% and 35%. However; later on the complainants withdrew their claims and the investigation was concluded without any measures.

The Ministry recently initiated a dumping investigation in December 2016 upon the complaint submitted by one of the biggest steel producers concerning imports of hot-rolled heavy plates[3] originated in the PRC.

b. The investigation in the EU

The Chinese heavy plate producers also were faced with the dumping investigation conducted by the European Commission in relation to imports of hot-rolled steel and heavy plate products from the PRC in February 2016. In October 2016, the European Commission imposed provisional dumping duties on the two steel products concerned, i.e. duties ranging between 65.1% and 73.7% for heavy plates and 13.2% and 22.6% for hot-rolled steel. It is expected for the European Commission to conclude the investigation within 2017.

4. The PRC's non-market economy status

One of the main issues that the Ministry will take into consideration is the PRC's transition to market economy status. As a side note, with the expiry of certain provisions of the PRC's WTO Accession Protocol on 11 December 2016, the PRC is no longer classified as a non-market economy. This fact will be of significant importance in terms of dumping margin calculations. At this point, although Chinese producers may rely on such expiry to argue that the PRC should no longer

be labelled as the non-market economy, the involvement of PRC's government in the economy remains as a fact.

It is still not clear whether the PRC should be regarded as the market economy and, hence, whether the Chinese domestic market prices can be relied upon while calculating the dumping margin. It seems that if the Chinese producers manage to prove the existence of the market economy conditions, relevant domestic market data may be used in the process of calculation of the margin.

5. Concluding remarks

Considering the increase of steel trade from the PRC and use of trade remedies worldwide, the Ministry's approach and findings in the course of the investigation launched in December 2016 are of a particular interest. The result of the investigation may have an impact on (i) the future of the potential investigations in the steel sector, as well as (ii) determining the market status of the PRC, which is currently unclear but crucial for the calculation of the dumping margin.

Footnotes

1. http://www.dcud.org.tr/tr/page.asp?id=6

2. Under the CN Codes 7208.37.00.90.11, 7208.37.00.90.19, 7208.38.00.90.11, 7208.38.00.90.19, 7208.39.00.90.11, 7208.39.00.90.19 and 7225.30.90.00.00

3. Under the CN Codes: 7208.51.20.10.11, 7208.51.20.10.19, 7208.51.20.30.11, 7208.51.20.30.19, 7208.51.20.90.11, 7208.51.20.90.19, 7208.90.80.10.11, 7208.90.80.10.12, 7208.90.80.20.11, 7208.90.80.20.12, 7211.13.00.11.00, 7211.13.00.19.00, 7211.14.00.21.12, 7211.14.00.29.11, 7211.14.00.29.12, 7225.40.40.00.00, 7225.99.00.00.10 and 7225.99.00.00.90 http://www.resmigazete.gov.tr/eskiler/2016/12/20161221-5.htm

CHAPTER VI

REPORTS & LEGISLATIVE UPDATES

1. NEW YEAR - NEW MINIMUM FINES FOR COMPETITION LAW VIOLATIONS IN TURKEY

By Mustafa Ayna

New 2017 year brought an increase of the minimum administrative fines by 3,83% for the competition law violations in Turkey, such as provision of false or misleading information/documents, M&A without the authorization of the Turkish Competition Authority ("TCA"), hindering the on-spot-inspections.

As of 1.01.2017 the level of minimum administrative fines shall constitute TRY 18.377 (approx. EUR 4443,22). It will be in force until 31.12.2017.

2. NEW BLOCK EXEMPTION COMMUNIQUÉ NO.2017/3 FOR THE VERTICAL AGREEMENTS IN MOTOR VEHICLE SECTOR

By Sera Erzene Yıldız

On 24 February 2017, Block Exemption Communiqué No. 2017/3 on Vertical Agreements in Motor Vehicle Sector ("Communiqué No. 2017/3") entered into force upon its publication in the Official Gazette. On 7 March 2017, Guidelines on Explanation of Communiqué No. 2017/3 was also released on the website of the Turkish Competition Authority.

Communiqué No. 2017/3 abolishes Communiqué No. 2005/4, which was applied to the purchase, sale and resale practices in the motor vehicles sector. One of the most significant changes under the new Communiqué is the determination of a single market share threshold system (30%) for exclusivity and quantitative selective distribution systems. Moreover, provisions such as the transfer of contract, justification of termination and arbitrator conditions, which are among the general conditions of the exemption, are not included in Communiqué No. 2017/3. Additionally, in terms of the distribution of new motor vehicles, the restriction of multi-brand distribution structure and opening of additional sales points by the suppliers are not anymore listed as factors preventing the parties from enjoying exemption.

Communiqué No. 2017/3 provides a two-year transition period (to make necessary amendments) to the agreements, which already benefit from the recently abolished block exemption (Communiqué No.2005/4) but cannot fulfil conditions under Communiqué No.2017/3.

3. DEVELOPMENTS ON VERTICAL AGREEMENTS IN TURKEY: DRAFT GUIDELINES ARE OPEN TO PUBLIC CONSULTATIONS

By Ertuğrul Can Canbolat, Cansı Çatak and Ömer Bulgak

Introduction

On 20 July 2017, the Turkish Competition Authority ("**TCA**") announced its draft amendments to the Guidelines on Vertical Agreements ("**Draft Guidelines**") on its website and provided the opportunity to the interested parties, including both the consumers and the undertakings, which are active in the markets that the amendments relate to, either to explain the market structure for better approach to be pursued or to raise the competitive concerns which may occur as a result of such amendments. In this regard, any comments, recommendations and/or evaluations may be submitted to the TCA until 11 September 2017 via e-mail.

Having stated that this is particularly crucial for ensuring the proper functioning of the relevant markets as well as avoiding ambiguities in the implementation of provisions of Article 4 of the Law No. 4054 on the Protection of Competition ("**Competition Law**") on anticompetitive agreements. Additionally, the Draft Guidelines take into consideration the recent developments in the EU acquis and the respective sectoral needs. Within this scope, the main amendments and additions to under the Draft Guidelines concern the agency agreements, most favoured customer clauses and online sales restraints. Accordingly, the objective of this short article is to provide an overview of the above-stated main changes.

Agency agreements

One of the draft amendments under the Draft Guidelines provides more clarity to the current Guidelines on Vertical Agreements by stating that the exclusive agency clause only concerns intra-brand competition and does not generally lead to anti-competitive effects; however, the non-compete obligations, including those related to the period following the termination of the agreement, concern inter-brand competition and may lead to anti-competitive effects if they foreclose the relevant market where the contracted goods and services are being sold. As a result, this provision shall be considered within the scope of Article 4 of the Competition Law. By referring to the wording of the EU *acquis*, the TCA highlights that although the current version of the text (stating that a non-compete obligation in an agency agreement can be

evaluated within the scope of Article 4 of the Competition Law only if it creates market foreclosure effect) signals "*rule of reason*" analysis, Article 4 of the Competition Law does not adopt such an approach.

Most Favoured Customer clause

The TCA also aims to assist the undertakings that are eager to make use of a most favoured customer clause ("**MFC**"), which is one of the most popular topics in the recent competition law cases in different jurisdictions with various approaches (e.g. Yemeksepeti and Booking.com cases in Turkey). The MFC clause, as one of the conditions shaping the whole contractual and business relationships of a supplier, ensures that the holder of such a transactional right is treated as favourably as the supplier's most-favoured-customer in relation to the competition parameters such as terms, prices and availability of a product to be supplied. In this regard, the MFC conditions may be designed either under the standard vertical agreements on purchase/supply or resale, or under the online platforms' transactions.

In terms of the MFC clauses in online platforms, Booking.com has been subject to many investigations all around the world and most of those investigations were dealt by different competition authorities in a different way. Hence, there is no single approach regarding the evaluation of the MFC clauses and case-by-case analysis is essential. Actually, Booking.com case is the most recent decision of the TCA relating to the analysis of MFC clauses (in particular, price parity clause) under Article 4 of the Competition Law which sets forth the main rules governing the horizontal and vertical relations between the undertakings and prohibits any agreement, decision and practice preventing, distorting or restricting competition in the relevant markets.

In its evaluations, the TCA emphasizes that some of the MFC clauses may have the effect of restricting competition (such as reducing the price competition in the relevant market and price rigidity, facilitating cartels and collusions, creating entry barriers and exclusionary effects, restricting intra-brand competition), whereas others may lead to efficiency gains (such as investment incentives, reduction in the transaction costs, prevention of freeriding and protection of trademark, decrease in delays and demand uncertainties). Hence, the created effects shall be observed within the context of market position of the beneficiary, characteristic and nature of the market and the MFC clause.

In this regard, the TCA reached a conclusion that the MFC clauses in the agreements concluded between Booking.com and hotels restrict competition in the market; then the TCA evaluated these clauses within the scope of both block exemptions regarding the vertical agreements and individual exemption. However, from the perspective of the Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("**Communiqué No. 2002/2**"), the concerned decision does not contain detailed analysis since the market share of Booking.com exceeds 40%. Therefore, the new draft

additions proposed to the current Guidelines on Vertical Agreements (especially, the practical examples) could be considered as a tool to provide some clarity as to which MFC clauses shall be evaluated within the scope of block exemptions.

Online sales

Finally, the Draft Guidelines also include a number of explanations regarding the online sales restraints which may or may not be considered within the scope of the block exemption rules. Having stated that online platforms enable the consumers to reach a huge range of information, to compare the prices and to easily access to any seller, whereas the suppliers can sell their products on a relatively lower prices in broader geographical markets; the TCA, first, emphasizes that a restraint on the online sales regulated between a supplier and buyer is categorised as a type of passive sales and then the TCA provides the following list of four online sales restraints (two of them relating restrictions on region and consumer, one relating to the proportion of the overall online sales, and the latest one relating to the prices of online sales) which will not enjoy the block exemption under the Communiqué No. 2002/2 and whose preparation is made on the basis of the relevant acquis:

- agreeing that the (exclusive) distributor shall prevent customers located in another (exclusive) territory to view its website or shall put on its website automatic re-routing of customers to the manufacturer's or other (exclusive) distributors' websites,
- agreeing that the (exclusive) distributor shall terminate consumers' transactions over the internet once their credit card data reveal an address that is not within the distributor's (exclusive) territory,
- agreeing that the distributor shall limit its proportion of overall sales made over the internet, and
- agreeing that the distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline.

On the other hand, the TCA also acknowledges the supplier's right to require some conditions for the use of the internet as the sales channel such as quality standards, sales of certain products and/or existence of a brick and mortar shop. The other issues in the draft guidelines relates to either the explanations of these conditions or minor changes added to the current text for online sales.

In conclusion

The Draft Guidelines, which bring additional explanations in line with the developments in competition law as well as the technology, reflect the European Union's approach which constitutes Turkey's model for competition policy. The document is open to public consultations - any interested party may submit its observations/ suggestions to the Turkish Competition Authority by 09.11.2017.

4. SIMPLIFICATION OF PAYMENT TO THE TCA FOR COMPANY ESTABLISHMENT AND LIQUIDATION IN TURKEY

By Mustafa Ayna

On 31 March 2017, the Competition Authority announced Communiqué (No. 2017/4) on Payment by Joint Stock Companies and Limited Companies in Accordance with Law No. 4054 simplifying the payment process of a fee to the TCA. The TCA is entitled to collect 0,004% of the capitals of all partnerships to be newly established with the status of an incorporated and limited company.

On 13 February 2016, the Coordination Council for the Improvement of Investment Environment (YOIKK) took a decision on simplification of company establishment and liquidation processes and reduction of respective costs. In accordance with the decision, it was agreed to sign a protocol between the TCA and Turkish Union of Chambers and Commodity Exchanges ("TOBB") in order to collect the 0.004% payment envisaged by Article 39 of the Turkish Competition Law by TOBB. In particular, the payment now may be made either through a private bank, or TOBB, or held in their accounts for a certain period of time. Previously such payments could be made only through one specific bank which was authorized by the TCA.

Hence, the recent change diversified and increased businesses' choice in relation to how the required payment to the TCA is made.

5. TELEVISION BROADCASTING SECTOR WITHIN THE CONTEXT OF TCA's DIGITALIZATION AND CONVERGENCE STUDY REPORT

By Ertuğrul Can Canbolat and Baran Can Yıldırım

The TCA conducted a TV broadcasting sector study and identified main competition problems in the Report in March 2017. Below we provide highlights of the main competition concerns that arise from the recent technological developments, including increasing usage of the IP-based networks, digitization of the content, and 3G/4G technologies. The Report would be of a particular interest for the TV broadcasting sector operators.

Competition Concerns in General

Entry Barriers. Some of the traditional entry barriers of the TV broadcasting sector include, among others, (i) policy implementations of the regulatory authorities that restricts the entrance due to economic, cultural and social factors; (ii) non-transparency of the rules that regulate the entry conditions; (iii) high capital requirement; and (iv) good relations between the dominant firms and the consumers and advertisers. Following the recent trends and technological developments, those entry barriers were reshaped. Due to technology, the cost of information transmission and reproduction has decreased. Further, digitization has gone away with the frequency shortage. These developments loosen the market entry barriers in terms of cost, consequently increasing a number of players but remaining the content at the same level.

Popular contents, such as sports competitions and series, are likely to be provided by Pay TVs, which have to provide unique content in order to attract customers. These developments lead to a content shortage in the TV broadcasting sector. Further, the control on the access services through satellites is likely to source the market power over the broadcasting networks. Therefore, technologic developments will not completely eradicate the concerns on the transmission shortage.

Vertical Consolidation. According to the OECD, the chain of broadcasting, production and distribution can be categorized as content/program production, content/program bundling, wholesale distribution and retail distribution.

Concerns Specific to Turkey

TV broadcasts are made through analogue terrestrial, satellite, cable, and broadband Internet technologies. The concerns are mainly attached to the broadcasts through analogue terrestrial. That is to say, the shortage in frequencies may constitute a market entry barrier. Currently, the capacity can carry up to 24 national and 17 regional channels. In terms of the broadcasts through satellites, due to the sole choice of Turksat, the competition in the transmission is not enough to create an efficient market. Further, the broadcasts through cable are geographically very limited. In order to increase competition, significant investments throughout Turkey are required. In terms of the broadband internet technologies, Turkey appears to be among the developed countries as to the usage per person. However, the market penetration activities fall behind the OECD countries, which pose a barrier for the quality and efficiency.

Further, market share of the Pay TVs are sustainably increasing in Turkey. However, despite such increase, Pay TV services' penetration is significantly low, especially compared with the developed countries. This is mostly due to Turkish consumer trends and the availability of the open TV channels through analogue terrestrial broadcasts and satellites. This situation is a result of the socio-economic condition of the consumers as well as the availability of the pirated content.

Another important finding is on the right of broadcasting of the football matches in Turkey. The Report has found that although Turkish Football Federation has the right to regulate how to sell/distribute the right of broadcasting, this does not prevent the Turkish Competition Authority to have jurisdiction over the market. The Report further states that currently the said market is highly uncompetitive and certain improvements should be made, such as distributing the right of broadcasting of the football matches between at least two different undertakings that use two different platforms.

In conclusion, we expect that the TCA would activate its work in relation to TV broadcasting sector, where it has already identified several competition concerns according to the Report.

6. TURKISH COMPETITION AUTHORITY'S 18TH REPORT ON ANNUAL ACTIVITY 2016

By Mustafa Ayna and Ayberk Kurt

18th Annual Activity Report, which sets out TCA's activities in 2016, has been published. Increased competition law awareness of the undertakings due to competition advocacy activities may explain the decreasing tendency in the number of antitrust cases in the last five years period. At the same time the increase in the total number of the TCA's decisions in 2016 could be attributed to the increase in the number of mergers/acquisitions/ privatization files. More statistics and summary of the Report are provided below.

Overall examination of the TCA's activities shows that in 2016 the TCA reviewed and finalized 325 cases, out of which:

- 83 of these files are related to competition violations (anticompetitive practices/ abuse of dominance),
- 33 of them are related to applications for exemption/ negative clearance, and
- 209 of these cases concern merger/acquisition/privatization processes. The increase in the total number of decisions in 2016 could be attributed to the increase in the number of mergers/acquisitions/ privatization files.

Antitrust cases

83 decisions resulted either from the preliminary investigations or inquiry processes carried out in 2016 regarding the alleged violations of Articles 4 and/or 6 of the Turkish Competition Law (anticompetitive agreements and abuse of dominance respectively). This figure decreased compared to 89 cases in 2015. 9 out of these 83 cases were examined ex officio.

Increased competition law awareness of the undertakings due to competition advocacy activities (including as a result of Communiqué on the Application Procedure for Competition Violations No. 2012/2 and decisions of the TCA) may explain a tendency towards a decrease in the number of antitrust cases.

Sectors that were subject to competition review most frequently in 2016: (i) oil and petrochemicals, (ii) transportation, vehicles and services, as well as (iii) food, agriculture, forestry, fisheries and livestock. The overall share of these three sectors in the competition infringement cases, concluded by the TCA in 2016, is about 47%.

Out of 83 decisions, 62 were taken following preliminary investigations, and 20 - following full-fledged investigations. The TCA rejected complaints in 11 cases. Administrative penalties were imposed on undertakings in 9 cases.

Exemption applications

As regards the exemption/negative clearance applications, out of 33 cases 9 were related to medicine health and medical supplies. Out of 24 exemption applications lodged in 2016, 19 resulted in direct or conditional block exemptions and/or individual exemptions. 67% of the files in relation to exemption/negative clearance files were in the pharmaceutical, health and medical materials, finance and transportation, vehicle and services sectors.

M&A notifications

As regards concentration cases, out of 209 transactions, 161 were acquisition, 32 were joint venture establishments, 9 were privatizations and 7 were mergers. Foreign investors continue to be interested in the Turkish market, considering the increase in the value (as well as the number, although less significantly) of Turkish-to-foreign transactions, and foreign investment in Turkish companies in 2016.

7. M&A OVERVIEW REPORT OF THE TURKISH COMPETITION AUTHORITY

By Mustafa Ayna and Ayberk Kurt

M&A Overview Report 2016 (Report), available at the webpage of the Turkish Competition Authority as of April 12 April 2017, provides brief information on the Turkish merger control system and makes comparison between 2015 and 2016, as well as Turkish and foreign investments. The aim of the Report is provide an overview of the merger control regime in Turkey and determine the place of Turkish companies in the market. Foreign investors continue to be interested in the Turkish market, considering the increase in the value (as well as the number, although less significantly) of Turkish-to-foreign transactions, and foreign investment in Turkish companies in 2016.

Some M&A statistics under the Report

Number of M&A. The number of the M&A transactions notified to the TCA in 2016 increased when comparing with 2015. In 2016, a total of 209 M&A transactions were notified to the TCA, while in 2015 the TCA received 159 notifications.

Origin of M&A parties. According to the categorization in terms of the origin of the transaction parties 34 transactions were realized solely between the Turkish companies in 2016, while in 2015 those constituted 29. Furthermore, 107 out of 209 transactions were foreign-to-foreign transactions in 2016, which is almost a double number compared to year 2015 where foreign-to-foreign transactions amounted to 64. Finally, 50 transactions were between Turkish and foreign companies in 2016 (with 48 respective transactions in 2015). It is worth emphasizing that the value of Turkish-to-foreign transactions increased from TRY 6 billion (**€** 1.5 billion) in 2015 to TRY 10 billion (**€** 2.5 billion) in 2016.

Foreign investment. In 2016, foreign investors invested in Turkish companies in 47 different transactions (45 transactions in 2015). According to the ranking of foreign investors in terms of transactions, The Netherlands is leading (with 9 transactions), followed by Germany (6), Japan (4) and UK (4). Number of transactions with the involvement of France, Korea, and Australia increased in 2016 as compared with 2015. In acquisition transactions where Turkish companies were acquired, foreign investment constituted approximately TRY 18 billion 891 million (approx. **€** 4.816 billion) in 2016, while in 2015 this figure amounted to TRY 6.3 billion (approx. **€** 1.6 billion).

Market and value. Most M&A were realized in the production, transmission and distribution of electricity markets. The highest transaction value in Turkey in 2016 was realized in the field of the activities of financial intermediary institutions. The transaction value in this area constituted 27.9% of the total value of all transactions in 2016 (excluding privatizations).

Procedure. In the Report, the TCA also indicates that M&A transactions notified to the TCA in 2016 were concluded within an average of 15 days following the date of final notification. The Report provides a clear picture of merger control regime in Turkey and determines the place of Turkish companies in the market. Foreign investors continue to be interested in the Turkish market, considering the increased value (as well as number) of Turkish-to-foreign transactions, and foreign investment in Turkish companies in 2016.

8. MAIN COMPETITION CONCERNS IN E-COMMERCE SECTOR: HIGHLIGHTS OF THE EC'S FINAL REPORT ON THE E-COMMERCE SECTOR INQUIRY

By Ertuğrul Can Canbolat and Hanna Stakheyeva

Following a year of e-commerce sector inquiry, on 10 May 2017 the European Commission published its Final report on the e-commerce sector inquiry ("Report") outlining prevailing market trends and competition concerns linked to e-commerce, ultimately identifying priorities for enforcing the competition rules. Companies that are active in the e-commerce sector may wish to pay a due attention to, assess and possibly reconsider their current practices in order to minimize any competition law exposure. Below we provide typical trends and main competition concerns under the Report for your convenience.

TYPICAL TRENDS

E-commerce has had a significant impact on companies' distribution strategies and consumers' behaviors. The most typical trends are:

- Increased price transparency leading to
- Consumers finding best (price/product) options;
- Free-riding behavior, since consumers may use presale services of 'offline' shops before purchasing the product online, or search and compare products online before purchasing in 'offline'/traditional shops;
- Increased price competition affecting both online and offline sales in terms of price, as well as quality, brand, and innovation; and
- Increased price coordination due to the ability to monitor competitors' prices (with special software) and adjust own prices accordingly.
- Easier access of retailers to customers by selling products through third party platforms.
- Increased recourse to vertical restraints, such as pricing restrictions, marketplace (platform) bans, restrictions on the use of price comparison tools, and exclusion of pure online players from distribution networks.

- The key determinant for competition in copyright-protected digital content markets is the availability of the relevant rights, which have to be acquired in order to lawfully market/transmit the content. Complex licensing practices with various contractual restrictions have developed.

MAIN COMPETITION CONCERNS

- **Vertical restraints in selective distribution agreements.** Requiring for at least part of manufacturer's products being sold via 'offline' shops has a potential of excluding pure online players from the distribution of the products. While such 'offline' requirement is normally covered by the vertical block exemption regulation (and may be justified by the qualitative and quantitative selective distribution), if there is no apparent link to distribution quality/other efficiencies, such clause may require further scrutiny on a case-by-case basis.

- **Retail price maintenance.** Manufacturers should refrain from interfering with the retailers' freedom to set their final prices by imposing minimum retail prices or recommended retail prices and monitoring compliance with them. With the e-commerce, deviations from such price 'recommendations' are currently easier to monitor/detect by manufacturers (often by means of pricing software) and consequently to retaliate against such 'non-complying' retailers. This limits incentives for retailers to deviate from such price recommendations. This also leads to price collusion among retailers, which all together raise competition concerns.

- **Dual pricing.** Charging different wholesale prices to different retailers is generally considered a normal part of the competitive process. At the same time charging different wholesale prices for the same product to the retailer depending on whether the products are sold online or offline may is generally considered as a hardcore restriction under the block exemption regulation. Hence, such dual pricing agreements shall be individually assessed, e.g. when such practice is indispensable to deal with the free-riding.

- **Marketplace restrictions/platform bans** are mostly found in selective distribution agreements in relation to branded, complex or technical goods. They range from absolute bans to restrictions on selling on marketplaces that do not fulfil certain quality criteria. Marketplace bans do not generally amount to a de facto/hardcore prohibition. It may be justified by the product category in question. This is without prejudice to the pending preliminary ruling before the Court of Justice of the EU (Case-230/16 Coty Germany).

- **‹Geo-blocking›** by way of blocking website access of customers abroad, re-routing customers to websites targeting other member states, refusing to deliver cross-border (most common measure in the EU) or to accept cross-border payments

(second most common measure in the EU) may trigger competition concerns. Geo-blocking measures based on unilateral decision by non-dominant companies fall outside the scope of article 101 TFEU, while geo-blocking based on concerted practices between distinct companies may be caught under article 101 TFEU. Hence, contractual cross-border restrictions may raise competition concerns, if they (i) restrict the territory into which a distributor may sell goods (passive sales restrictions are more problematic; in selective distribution systems, neither active nor passive sales restrictions are legal); and/or (ii) limit retailers' ability to actively and passively sell to customers outside their member state.

- **Big data issues** related to collection, processing and use of large amounts of data, and exchange of competitively sensitive data (on prices and sold quantities) between competing marketplaces and third party sellers/manufacturers with own shops and retailers are always problematic from competition law perspective.
- **Contractual restrictions in licensing agreements**, such as territorial restrictions and geo-blocking, as well as duration of licensing agreements/ automatic renewal, which makes it difficult for new players to enter the market constitute main competition concerns in relation to digital content/online provision of audio-visual and music products.

CONCLUDING REMARKS

With the development of online trade certain e-commerce related business practices that raise competition concerns have emerged. It is expected that European Commission will target the most widespread business practices outlined above in order to promote competition and cross-border trade. This may also influence approach of competition authorities in other jurisdictions in relation to their assessment of compatibility of e-commerce related business practices with competition rules. Companies that are active in the e-commerce may wish to pay a due attention to, assess and possibly reconsider their practices in order to minimize any competition law exposure.

9. NEW ANONYMOUS WHISTLEBLOWER TOOL: INDIVIDUALS IN FIGHT AGAINST ANTI-COMPETITIVE PRACTICES

By Sera Erzene Yıldız and Hanna Stakheyeva

Starting from 16 March 2017, individuals can help the European Commission ("**EC**") in uncovering cartels and other anti-competitive practices without disclosing their identity, made possible by the introduction of encrypted communications through an external service provider. Such positive step is expected to increase the effectiveness of the EC policies, as well as the workload of the competition authorities in their fight against anticompetitive practices. While several jurisdictions including Germany and Denmark enjoy similar tools, others (particularly outside the EU, such as Turkey) may wish to reconsider their application formalities, with a view to rendering it more appealing in terms of confidentiality protection. Below we provide highlights of the new whistleblowing tool in the EU, and an analysis of the third party's anonymity options in applications to the Turkish Competition Authority ("**TCA**") in relation to competition infringements.

Anonymous applications in the EU

While cartel members are, in principle, entitled to receive an immunity or reduction in fine if they confess their involvement in a cartel (through a leniency program), the new "whistleblowing tool" enables individuals who have knowledge of (past, on-going or planned) antitrust violations/cartels to contribute to the revealing of anti-competitive practices by the EC. In that, the new "whistleblowing tool" guarantees the anonymity of the individual's identity through a system specifically designed for encrypted messaging system, which allows two-way communications between the individual and the EC (e.g. option to ask the EC to reply messages, allows the EC to seek clarifications/details). Since only the content of the messages is conveyed, it is technically impossible to identify the "whistleblower" (unless he/she is willing to do so).

Anonymity options in Turkey

Just as in the EU, the leniency program is used in Turkey to help in revealing cartels. Leniency applicants may benefit from total immunity or reduction in fine, depending on the timing and order of their application. One of the conditions for being able

to benefit from the immunity and/or reduction over the fine is to keep the leniency application confidential until the end of the investigation. Failure to keep the application confidential would result in the TCA depriving the applicant from the expected leniency benefits.

Third-party applications (in the form of notification, complaints and Ministry requests) filed by natural persons, institutions, organizations, associations and other legal entities to the TCA also contribute to the fight against anti-competitive practices in Turkey. Communiqué No 2012/2 on Application Procedure in relation to Infringements of Competition Law ("**Communique 2012/2**") sets out that the TCA accepts applications in writing, either sent through post, email, fax, phone, or submitted in person.

Unlike in the EU, however, no anonymous whistle-blowing tool is available in Turkey. Among the essential formal and substantive requirements of the application to the TCA by a natural person are indication of name, surname, citizenship number, address and signature (in case of applications filed by a legal person – commercial name, address, authorized signatures list, and signature of legal representatives of the entity). The applicant may only request the TCA to keep his/her identity confidential. In this case, the communications (including the inner-institution ones) would exclude information related to the identity of the applicant. This confidentiality request does, of course, in no way, compare to the whistleblowing tool that the EC has recently introduced.

Communique 2012/2 also states, as a procedural rule, that anonymous applications will be left aside without any formal action. On the other hand, there is still a chance for an anonymous application (e.g. application that does not meet the formal requirements under Communique 2012/2) to be considered by the TCA, if it ***"is deemed of serious nature"*** and suggests the existence of an infringement by providing concrete and sufficient information about the infringement. However, such formulation grants the TCA with a wide discretion in deciding on whether to consider the application or not.

Concluding remarks

It is expected that the new tool in the EU will (i) increase the likelihood that the information provided will be sufficiently precise due to absolute anonymity of the "whistleblower", and hence (ii) contribute to effectiveness of the leniency program in the EU and quicker detection of anticompetitive practices/cartels to the benefit consumers and the EU's economy as a whole. Additionally, it may influence the leniency policy in other jurisdictions, which have undertaken to harmonize their competition laws and practices with the EU rules as part of their EU integration policy.

The Output provides regular update on competition law developments with a particular focus on the Republic of Turkey and practice of the Turkish Competition Authority, as well as the European Commission. The Output cannot be regarded as a provision of expert advice and should not be used as a substitute for it. Expert advice regarding any specific competition, regulatory & international trade matters may be obtained by directly contacting ACTECON.

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It comprises a mixture of our essays, case summaries and articles on recent developments that we have selected during 2017 in competition law, regulation and international trade areas.

We hope that you refer to this piece as a helpful resource. Obviously, the content is aimed to provide the reader with general intelligence on the covered topics. We would be grateful to receive your feedbacks, opinions, updates on new developments as well as different point of views. Have a joyful and fruitful reading!

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