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The Turkish Competition Authority announces the conclusion of its preliminary inquiry and finds no price fixing in the baby food products market (*Numil / Nestlé / Montero / Kopas / Hipp / Hero / Abbott*)

ANTICOMPETITIVE PRACTICES, RELEVANT MARKET, AGRICULTURE / FOOD PRODUCTS , PRICE FIXING, TURKEY

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Introduction

In February 2019, the Turkish Competition Authority (“TCA”) released the public version of its decision [7] with regard to its preliminary inquiry against the undertakings producing and/or selling baby food products. Contrary to the price fixing allegations, the TCA found that the concerned undertakings did not breach Article 4 of the Law No. 4054 on the Protection of Competition (“Competition Law”) and thus held not to initiate a full-fledged investigation.

As will be explained below, the TCA’s determination of relevant product markets in the baby food industry and its economic analysis for price fixing evaluations are noteworthy points.

Relevant Markets – Substitutability Test Based on the Intended Use, the Age of a Baby, the Distribution Channel, and the Nature of a Baby Food Product

In defining the relevant product markets, the TCA has put emphasis upon the following along with the evaluations in its and EU’S previous competition cases:

- the intended use to distinguish the baby food from various foodstuff;
- the differences between “*infant formulae*” and “*follow-on formulae*” to determine the main categories of baby food products;
- the baby’s stages to sub-segment the “*baby milk*” products;

- the nature of and distribution channel used for a baby milk product (*i.e.* standard and therapeutic) to disclose the non-substitutability. As regards the intended use, the TCA stressed that the baby food products are separate from other regularly used foodstuff (*e.g.* milk, rice flour, custard, and biscuits) since the organism and digestive system of a baby is different than those of an adult and baby food products consist of the most accurate composition of vitamin, protein, carbohydrate, oil, and minerals required by a baby (*i.e.* it enables the satisfaction of a baby's need in the best way and at one time). Additionally, the TCA determined that the baby food products may be gathered under three main categories, *i.e.* bottle formulae (baby milk), spoon formulae, and jar baby food. Having compared the above-mentioned products, the TCA concluded that spoon formulae and jar baby food are used in case the bottle formulae is not sufficient to satisfy the needs of a baby and thus they can only be complementary to the bottle formulae. Furthermore, while spoon formulae is to satisfy a baby's need for a meal, jar baby food is used to meet the need of a baby for fruits.

Then the TCA highlighted that the bottle formulae may be sub-segmented in accordance with the baby's stages:

- *infant milk* for babies aged 0-6 months;
- *follow-on milk* for babies aged 6-12 months;
- *growing-up milk* for babies aged 12-36 months. In this context, it should also be noted that the TCA also referred to the special labelling requirements of each product which are set out under the Turkish food codex legislation on baby food products.

Eventually, as in the EU Commission's *DANONE/NUMICO* decision [2] of 2007, the TCA evaluated the differences between standard and therapeutic milks by focusing on the addressed consumers (*i.e.* therapeutic milks are used for the babies with a health problem) and the distribution channels (*i.e.* therapeutic milks are only sold in pharmacy channels) along with the prices (*i.e.* therapeutic milks are more expensive) and the refunding system (*i.e.* therapeutic milks may be refunded). Therefore, standard and therapeutic milks are deemed non-substitutable.

In light of the above, since the complaints relate to the bottle formulae, the TCA defined the relevant markets as follows: "*infant milk*", "*follow-on milk*", and "*growing-up milk*" markets in Turkey [3].

No Document or Economic Evidence Supporting the Price Fixing Allegations

In order to determine whether the concerned undertakings have agreed to increase their prices or colluded to fix their prices, the TCA first evaluated the general structure of each relevant market (by focusing on the market shares) and then the trend of the prices between August 2015 – August 2018 in each relevant market as well as the currency fluctuation.

Accordingly, the TCA's inquiry has disclosed the following facts:

- the documents obtained during the on-the-spot inspections in the premises of the concerned undertakings do not indicate any coordination or collusion among undertakings to fix their prices;
- the trends of the concerned undertakings' average prices were similar until the beginning of 2017, however, those in the period from 2017 up to now which is subject of the complaint were different from each other and although the prices generally increased during this period, there was no overlap indicating a collusion among competitors;

- the upward trend in the prices seems to be in parallel with the increase in currency exchange rates (with an approximate correlation coefficient of 0.90 and determination coefficient of 0.82).

Conclusion

The case consolidates the certainty already established in the previous competition case law regarding the market definition. Additionally, the economic analysis conducted by the TCA in determining the correlation between the currency fluctuation and price increases is of importance since this enables the TCA to more appropriately evaluate the market structure.

[1] TCA's decision dated 25.10.2018 and numbered 18-40/643-313.

<https://www.rekabet.gov.tr/Karar?kararId=cc50439e-fc44-434c-b008-124b9e29678c> ↗

[2] Case No COMP/M.4842.

[3] As for the relevant geographical market, the TCA has considered that the conditions for (i) entering the market, (ii) accessing the supply sources, (iii) production, (iv) distribution, and (v) sales do not demonstrate any regional differences.