Leniency Concluded with TCA’s Opinion Instead a Full-Fledged Investigation-Ready Mix Concrete Industry

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Parallel to the European Union Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, Article 9 (3) of the Law No. 4054 on the Protection of Competition (“Competition Law”) regulates “termination of infringements” as “the Board, prior to taking a decision (…) shall inform in writing the undertaking or associations of undertakings concerned of its opinions concerning how to terminate the infringement”.

Accordingly, the Turkish Competition Authority (“TCA”) may share its opinion, which is not binding for undertakings, without initiating a full-fledged investigation even with a violation determination. However, in order not to initiate a full-fledged investigation, effects of these violations should be removed with TCA’s non-binding opinion. In its recent Dokuz Göller Decision[1], despite the leniency application and the violation determination, the TCA solely shared its non-binding opinion with the purpose of terminating the violation and did not initiate a full-fledged investigation.

On March 9, 2017, Dokuz Göller İnşaat Gıda Tarım Enerji San. Tic. Ltd. Şti. (“Dokuz Göller”) applied for a negative clearance/exemption according to the Competition Law, regarding two separate agreements concluded with Albayrak İnşaat Tic. San. Ltd. Şti. (“Albayrak”) (together referred to as “Parties”). With such agreements, the Parties decided that Albayrak will stop producing ready-mixed concrete and in return Dokuz Göller will stop producing aggregate and give aggregate purchase commitments to Albayrak which ultimately leads to market sharing. In this context, the aggregate produced by Albayrak would only be sold to Dokuz Göller in accordance with the Aggregate Agreement and the aggregate production facility of Dokuz Göller would be sold to Albayrak in accordance with the Stone Crusher Facility Agreement.

Furthermore, on May 22, 2017, Dokuz Göller made another application regarding its previous negative clearance/exemption application, to be evaluated as a leniency application in accordance with the “Regulation on Active Cooperation for Detecting Cartels” (“Leniency Regulation”). In this context, the TCA accepted the leniency application made by Dokuz Göller on June 1, 2017 and initiated a preliminary investigation against the Parties and other undertakings operating in the ready-mixed concrete and aggregate markets within certain districts of Antalya.

Once the clauses of the relevant agreements have been examined, it has been established that there is no clause preventing Albayrak from producing ready-mixed concrete. However, according to the statements of the Parties and since Albayrak ended its ready-mixed concrete production on March

31, 2016 (both agreements entered into force on April 1, 2016), it has been determined that stopping ready-mixed concrete production was a part of the agreement, though not written.

The TCA determined that Albayrak's focus on aggregate production after stopping ready-mixed concrete production and not selling aggregate to any undertaking other than Dokuz Göller restricts competition. It was further concluded that the relationship between the Parties could not benefit from group exemption or individual exemption since agreements ultimately leads to market sharing.

On the other hand, when the effects of agreements were evaluated in relation to the relevant product markets, the TCA determined that the prices in the ready-mixed concrete market have increased by 3%. Moreover, the TCA decided that the prices of aggregate increased due to increases in costs. In this context, the TCA emphasized that the agreements have a "limited" competition restrictive effect on the relevant markets. However, according to a Dokuz Göller official, (i) Albayrak stopped producing ready-mixed concrete and Dokuz Göller stopped producing aggregate, (ii) the customer portfolio of Albayrak was transferred to Dokuz Göller and (iii) after agreements concerned, price of aggregate began to increase while the quality began to decrease. Because of that, the official stated, the amount of cement used for ready-mixed concrete production was increased in order to maintain the quality, which caused cement costs (and accordingly ready-mixed concrete costs) to rise by around 10-20%.

In result of the preliminary investigation conducted, against the case-handlers view to initiate a full-fledged investigation, the TCA, while considering that (i) all the issues related to both agreements were identified during the preliminary investigation, (ii) the restrictive effects on competition were limited, (iii) the effects of the violation is eradicable and (iv) the leniency application was made by Dokuz Göller, concluded that the restrictive effects of the violation may be removed without initiating a full-fledged investigation. Thus, instead of a full-fledged investigation, the TCA decided to share its non-binding opinion pursuant to the Article 9 (3) of the Competition Law stating that the Aggregate Agreement and the Stone Crusher Facility Agreement concluded between Parties must be terminated; otherwise, a full-fledged investigation will be initiated.

In this regard, the previous decision of the Council of State regarding the implementation of Article 9 (3) should be mentioned. In its decision, parallel to TCA's Dokuz Göller Decision, the Council of State determined that, if (i) all the issues subject to investigation may be enlighten, (ii) the restrictive effects on competition were limited and eradicable, (iii) the infringement has been concluded with all its effects and the anti-competitive harm has been terminated without the need of a full-fledged investigation, the TCA may adopt a different approach provided under the Competition Law. Within this context, as Article 9 (3) was also introduced for procedural economy purposes in terms of terminating negligible restrictions on competition, Dokuz Göller Decision should be deemed as a case in point regarding successful implementation of Article 9 (3) of the Competition Law.

1. TCA's decision dated 09.08.2017 and numbered 17-26/412-184.