MOROĞLU ARSEVEN

Investigations by the Turkish Competition Authority in 2016 in a Nutshell

22 Dec 2016

First published in the IBA Antitrust Committee newsletter, December 2016.

This year was busy for the Turkish Competition Authority (the ‘Authority') and indications suggest this investigation-focused workload will continue into 2017. Among many other things, there have been significant developments in the determination of the standard of evidence for presumption of concerted practice and huband-spoke information exchanges.

The Authority was established in 1997 according to Law No 4054 on Protection of Competition (the ‘Competition Law'). It is an active, independent autonomous administrative authority, regulating restrictive agreements and concerted practices, abuse of dominance, and anticompetitive M&A in Turkey.

The Competition Board (the ‘Board') operates as the decision-making body, conducting preliminary investigations and investigations, as well as imposing administrative monetary fines for violations of the Competition Law. Among other issues, the Board considers restrictive trade practices and conduct of concerted practices (Article 4), as well as abuses of market dominance (Article 6).

The following article summarises notable Board enforcement work in 2016, including reasoned decisions, short form investigation decisions and newly launched investigations.

Reasoned decisions

The Board issued notable reasoned decisions during 2016 in the cement and readymixed concrete markets, where it imposed administrative monetary fines on the investigated undertakings.

Aegean region cement plants decision1

The decision addressed assertions of cooperation and serious increases in cement prices, as well as sharing customers and geographic areas by a number of cement plants in the Aegean region.

The Board's investigations found all cement companies had violated requirements for restrictive trade practices and concerted practices (Article 4 of the Competition Law). The Board imposed administrative fines on all companies, amounting to a combined total of TL 70,915,527 by a majority of votes (circa US$22m and €20m).

The Board's reasoning reflects a new perspective on determining parallel price increases, nature of evidence, and determining evidence's impact and sufficiency, as well as analysis of market structure. The decision suggests the Board may have begun to treat any communication among competitors as evidence of concerted

practice, even if this communication does not contain a clear link to anti-competitive outcomes.

The reasoned decision included an opinion from the Board's single dissenting Board member. The dissenting opinion noted the weakness behind the Board's reasoning, claiming the gathered evidence and the Board's lack of analysis on capacity utilisation were insufficient to portray a cartel.

Sinop region ready mixed concrete decision2

The decision addressed assertions of cooperation, establishment of a partnership for mutual manufacturing and commercialisation and serious increase in cement prices, as well as preventing transportation of ready-mixed concrete by five Sinop-based ready-mixed cement companies.

The Board concluded that a horizontal agreement between the parties could help them to coordinate prices and determine capacity output, as well as share customers and geographic areas. Accordingly, the Board determined that the Sinop ready-mixed cement market showed characteristics of a market which violates competition rules. It went on to note that parties to this partnership created significant market power, preventing possible competitive actions in the market by other parties.

The Board held that all five companies had violated requirements for restrictive trade practices (Article 4 of the Competition Law), imposing administrative fines on all companies, amounting to a combined total of TL 118,918 (circa US$37,000 and €34,000).

The Board ruled that the partnership did not qualify for an individual exemption. However, two board members (Kenan Türk and Assistant Professor Dr Tahir Saraç) included a dissenting opinion on this topic, claiming the requirements for an individual exemption had been met. They also argued that the scheme in question was beneficial to customers because it does not cause a significant price increase in the ready-mixed cement sector.

Tyre manufacturers decision3

The decision addressed assertions of indirect hub-and-spoke information exchanges. The Board gave a reasoned decision upon receiving a complaint for restrictive trade practices and concerted practices (Article 4 of the Competition Law) of three major competitors in the tyre sector (Goodyear, Bridgestone and Pirelli).

The complainant claimed that three major tyre manufacturers violated competition laws by exchanging information about tyre sale units and negotiating price increases through their joint distributors, market research companies and related market associations.

The Board considered two aspects of the information exchanges:

- the criteria determined by the United Kingdom Competition Appeal Tribunal's Tesco decision, emphasising that practices should be examined to assess whether their object is to restrict competition; and
- whether the information exchange is strategic and could be performed through another source.

The Board concluded that distributors had disclosed information to competitors in the upstream market with the intention of bargaining. Therefore, the distributors' practice was not intended to restrict competition.

The Board held that disclosure of consolidated historic data is not intended to restrict competition. However, it held that information exchanges made through research companies and sectorial associations are deemed to restrict competition if:

- commercially sensitive competitive information is disclosed;
- the data's characteristics are important in terms of market structure, frequency of disclosure, disclosed information's market coverage and participation; and
- the anti-competitive effects of the violation can be seen in the market.

In the present case, the Board could not determine the effects of the information exchange. Accordingly, the Board decided not to initiate an investigation because:

- there was no written agreement or evidence to suggest that the object of the alleged conduct was to restrict competition; and
- distributors made the information exchange indirectly and some disclosures were made in the upstream market, outside the control of competitors.

Mars Sinema decision4

The Board initiated a preliminary investigation upon receiving a complaint that Mars Sinema is fixing the ticket and café services prices in its franchise agreements.

The Board noted that Mars Sinema operates 73 movie theatres around Turkey, among which only two theatres operate under franchise agreements. Thus, despite Mars Sinema's market power, the franchise agreements constituted only a small portion of its portfolio. The Board concluded that vertical price restraints foreseen in Mars Sinema's franchise agreements affected only Ankara and Antalya since 2014 (where the two franchised theatres are located). Therefore, the market effects of the restrictions are very limited and short in duration.

The Board held that there was no need to proceed with a full-fledged investigation into the vertical price restrictions, provided Mars Sinema ceased its price maintenance behaviour within 90 days.

Google decision5

The decision addressed allegations that Google had established agreements with original equipment manufacturers which violated requirements for restrictive trade practices (Article 4) and abused its dominant position in the market (Article 6). The Board gave a reasoned decision upon receiving a complaint from Yandex.

The Board investigated usage rates of different application stores and internet browsers. It concluded that Google's application store and internet browser have higher usage than their pre-installation rate. Therefore, the Board determined that Google products are consumers' first choice.

The Board noted that Google's exclusivity agreements with original equipment manufacturers could prevent competition. However, it went on to say that these agreements do not prevent consumers from downloading other parties' applications in the application store. The Board adopted the same attitude towards similar allegations regarding tying arrangements.

The Board assigned the Board's presidency to prepare an opinion to Google to remove the anti-competitive provisions in its agreements with original equipment manufacturers and to terminate its related practices, according to Article 9/3 of the Competition Law.

Beer can lid decision6

The decision addressed allegations that Ecocaps (can cap manufacturer) abused its dominant position by refusing to sell a cap system in Turkey to any beer manufacturer except Tuborg, as per an exclusivity agreement between Ecocaps and Tuborg. The Board gave a reasoned decision upon receiving a complaint from Efes, a competitor beer manufacturer.

Efes claimed Ecocaps has the dominant position for Alu-lid cap systems, with 100 per cent of the market. However, the Board decided that there is more than one hygienic cap system, meaning Ecocap's system is substitutable. The Board added that access to Ecocap's system is not a necessity to act in the beer market.

The Board held there was no need to proceed with a full-fledged investigation. It stated that the agreement between Ecocaps and Tuborg met the requirements for an individual exemption under Article 5 of the Competition Law.

Short form decisions

The Board also issued a number of administrative fines during 2016, with the reasoning behind these sanctions yet to be published. Decisions can be categorised as below.

Abuse of dominant position

Congersium decision

On 27 October 2016, the Board decided that Ankara Uluslararası Kongre ve Fuar İşletmeciliği Merkezi AŞ (‘Congresium') had abused its dominant position (Article 6 of the Competition Law) by rejecting to contract without legitimate reasons. The Board issued an administrative fine of TL 268,043 (circa US$84,000 and €77,000); 1.5 per cent of gross income in the 2015 financial year.

Türk Telekominikasyon AŞ decision

On 9 June 2016, the Board decided that Türk Telekomünikasyon AŞ had abused its dominant position (Article 6 of the Competition Law) by rejecting to contract without legitimate reasons. The Board issued an administrative fine of TL 33,983,793 (circa US$10.5m and €9.6m); 0.45 per cent of gross income in the 2015 financial year.

Yemeksepeti decision

The Board recognised for the first time that a price parity clause could violate competition laws. It issued an administrative monetary fine to Yemeksepeti, a major online platform for food orders, for abuse of dominant position (Article 6 of the Competition Law). The Board held that the exclusionary effects of Yemeksepeti's ‘most favoured customer' clauses meant the platform abused its dominant market position. These clauses discourage restaurants from offering lower prices in any other online food ordering mediums. The Board

issued a fine of TL 427,977 (circa US$133,000 and €122,000), as well as ordered Yemeksepeti to revise its agreements with restaurants and terminate implementation of the most favoured customer clauses.

Submitting misleading information to the competition authority

Türk Telekomünikasyon AŞ decision

The Board held that Türk Telekomünikasyon AŞ brought wrong or misleading documents to its investigation. The investigation addressed possible abuse of a dominant position via the pricing of its ‘home advantage tariff' and special offers. On 3 May 2016, the Board imposed an administrative fine of TL 7,551,954 (circa US$2.3m and €2.1m).

Investigations launched in 2016

The Board initiated a number of investigations during 2016, which can be categorised as below.

Abuse of dominance (Article 6):

- Volkan Yolcu Taşımacılığı Seyahat Nakliyat Ticaret AŞ and Öz Edirne Birlik Mustafa Altunhan for terminating contracts with a bus company without a legitimate reason;
- Mey İçki San Ve Tic AŞ for applying sales pressure through investment support and merchandise agreements; and
- the preliminary investigation addresses electricity distribution companies, Akdeniz Elektrik Dağıtım AŞ, CLK Akdeniz Elektrik Perakende Satış AŞ and Ak Den Enerji Dağıtım Ve Perakende Satış Hizmetleri AŞ, for abuse of their dominant position (Article 6 of the Competition Law); this could represent a significant milestone given that the Board's past approach to complaints about electricity distribution companies was to not initiate fully fledged investigations.

Restrictive trade practices and concerted practices (Article 4):

- Thirty-three insurance companies, in the traffic insurance market; and
- ten ready mixed cement producing companies operating in İzmir.

Violation of both Article 4 and Article 6:

- Turkish Pharmacists' Association and seven pharmacist chambers;
- five iron and steel companies; and
- musical occupation organisations.

Notes

1. Decision number 16-02/44-14, dated 14 January 2016; published on the Competition Authority's website on 31 May 2016.
2. Decision number 16-05/117-52, dated 18 February 2016; published on the Competition Authority's website on 2 June 2016.
3. Decision numbered 15-44/731-266, dated 16 December 2015; published on the Competition Authority's website on 16 February 2016.

4. Decision numbered 15-41/682-243, dated 20 November 2015; published on the Competition Authority's website on 1 February 2016.
5. Decision number 15-46/766-281, dated 28 December 2015; published on the Competition Authority's website on 21 March 2016.
6. Decision number 16-04/69-27, dated 10 February 2016; published on the Competition Authority's website on 29 April 2016.

Related Practices

- Antitrust and Competition