e-Competitions

National Competition Laws Bulletin

August 2012

The Turkish Competition Board decides that there is no abuse of dominant position in the ice-cream-market (Unilever Sanayi ve Ticaret Türk)

Turkey, Unilateral practices, Abuse of dominance, Essential facility, Refusal to deal, Objective justification, Agriculture/Food products

Turkish Competition Authority (Rekabet Kurulu), 28 August 2012, File No. 12-42/1257-409, Unilever Sanayi ve Ticaret Türk A.Ş., not available

Ercüment Erdem, e-Competitions | N° 50373, www.concurrences.com

The Competition Board (the "Board") decided that *Unilever Sanayi ve Ticaret Türk A.Ş.* ("*Unilever*") does not abuse its dominant position by refusing to sell ice cream branded "Algida" at certain points of sale and thus, deemed it unnecessary to open an investigation.

Undertaking Subject to Preliminary Inquiry

Unilever is a company active in the fast moving Turkish consumer goods market since 1953 and operates in the industrial ice cream market since 1990 under the brand name "Algida". The sub-brands of Algida are "Cornetto", "Magnum", "Max" and "Carte d'Or".

Behavior Subject to Preliminary Inquiry

The applicant alleged that *Unilever* abuses its dominant position by refusing to sell him the ice cream branded Algida despite cash payment.

Legal Framework of the Preliminary Inquiry

Article 6 of the Act No. 4054 on the Protection of Competition (the "Competition Act") prohibits the abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with other or through concerted practice.

The Competition Act also enumerates a non*numerous clausus* list of behaviors which constitute an abuse of dominant position. Even though the refusal to sell products is not stated in that list, it is accepted as a behavior which may lead to an abuse of dominant position both by the Commission of the European Communities [1] (the "Commission") and the Board [2] since this behavior is liable to eliminate a trading party as a competitor.

Applicability of Provisions Related to Abuse of Dominant Position

The precondition for the applicability of Article 6 of the Competition Act is the existence of a dominant position in the relevant market. However, this precondition is not enough to be subject to competition rules. Indeed, holding a dominant position is not prohibited under Competition Act. For the prohibition to be applicable, an undertaking shall not only have a dominant position on the market but shall also be abusing its dominant position.

Refusal to sell constitutes an abuse of dominant position, providing the below conditions are cumulatively fulfilled. The Commission defines these conditions as follows:

Existence of Essential Facilities/Products. The product should be in itself indispensable to carrying on that person’s business, inasmuch as there is no actual or potential substitute in existence. This condition would be fulfilled if there are no plausible alternatives to the facility and if the impossibility of duplicating the facility can be determined objectively.

Elimination of Competition in the Secondary Market. The undertaking in a dominant position has the possibility to reserve another market, the downstream or ancillary market, completely, or to a large extent, to itself or to one of its subsidiaries due to its dominant position in the input market.

It is not necessary that the undertaking in a dominant position also be active in the secondary market in order for this condition to be fulfilled. For instance, the undertaking in a dominant position may facilitate its entry into the secondary market by refusing to sell.

Absence of an Objective Justification. A case-by-case analysis is required for this condition. For instance, a refusal to sell harmful products that necessitate proper precautions and technical expertise when being handled may be considered an objective justification.

Board Analysis and Findings

The Board first determined the relevant market, then considered whether *Unilever* is in a dominant position in this market and finally analyzed if refusal to sell could be considered in that case as an abuse of dominant position.

Relevant Market

Relevant Product Market. A relevant product market means a market that includes all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products’ characteristics, their prices and their intended use. Hence, in determining the relevant product market, the interchangeability or substitutability of the products by the consumer is taken into account.

The Board stated that there are two different ice cream markets: the industrial ice cream market and the "scooping" ice-cream market. The most important difference between the two markets is that industrial ice cream is sold everywhere and scooping ice cream is only sold around the place where it is produced.

Considering that ice cream branded Algida is industrial ice cream, the Board determined the relevant product market to be the industrial ice cream market.

Relevant Geographic Market. A relevant geographic market means a market which comprises the area in which the firms concerned are involved in the supply of products or services, the conditions of competition are sufficiently homogeneous and can be disassociated from neighboring markets because competition conditions are perceivably different.

Given that Algida branded ice cream is sold all around Turkey, the Board determined the relevant geographic market to be all of Turkey.

Dominant Position Analysis

The dominant position analysis of the Board was based on one of its previous decisions from 2008 where it concluded that *Unilever* enjoys a dominant position, given its share of more than 40 % of the industrial ice cream market through its ice cream branded Algida [3].

The Board concluded that no important development has occurred since its 2008 decision and that *Unilever* is still in a dominant position in the industrial ice cream market.

Abuse of Dominant Position Analysis

The Board pointed out that refusal to sell products may be considered an abuse of dominant position within the scope of Article 6 of the Competition Act provided the three cumulative conditions explained above are fulfilled.

In light of the foregoing, the Board examined the first condition, the existence of an essential facility, and reached the conclusion that the ice cream branded Algida does not constitute an essential facility since there are several national and local industrial ice cream producers active in the relevant market creating an alternative for customers.

The Board, considering that the three conditions stated above should be cumulatively fulfilled, decided that *Unilever*'s refusal to sell ice cream branded Algida to certain points of sale did not constitute an abuse of dominant position.

Evaluation of the Board Decision

This Board decision is a relatively important decision since it determines the conditions under which the refusal to sell by an undertaking in dominant position constitutes an abuse of dominant position under Article 6 of the Competition Act.

However, the only reference made by the Board to the above-stated cumulative conditions in the decision without explaining their content may be criticized. Considering that Board decisions should enlighten business practice, their decisions should be more detailed in order to better guide the behavior of undertakings.

In addition to the above, the non-examination by the Board of the existence of the two other conditions because the first condition is not realized is another point to be criticized. Such an analysis would provide for more reliable information on the market conditions and would acknowledge the other players on the market about the Board's perspective.

[1] See joint cases C-468/06 to C-478/06 of the Commission available at http://eur-lex.europa.eu/LexUriServ... (accessed on: 29.11.2012).

[2] See Turkish Competition Authority (*Rekabet Kurulu*), 16 May 2012, n°12-26/767-220, available at http://www.rekabet.gov.tr/dosyalar/... (accessed on: 29.11.2012).

[3] Turkish Competition Authority (*Rekabet Kurulu*), 15 May 2008, n°08-33/421-147, available at http://www.rekabet.gov.tr/dosyalar/... (accessed on 04.12.2012).

Ercüment Erdem | Erdem & Erdem (Istanbul) | ercument@erdem-erdem.com