The Turkish Competition Board revokes an individual exemption granted to a major player in the beer market over exclusive distribution agreements (Tuborg)

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The Turkish Competition Board, Decision on Revocation of the CPS Exemption, No: 7-36/583-256, 9 November 2017

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The Turkish Competition Board's ("Board") decision dated 09.11.2017 and numbered 17-36/583-256 [1] ("Decision on Revocation of the CPS Exemption") reveals the changing structure of the Turkish beer market. With this decision, the Board revoked its individual exemption granted for the exclusive agreements of Tuborg in the closed beer market and, thus, Tuborg, who benefited from the exemption regime up to this time, began to be subject to the same conditions as Efes. Before getting into the details of the Board decision at issue, the competitive environment in the Turkish beer market is briefly introduced, below.

Relevant Parties

In the beer market, the competition runs between the two major players who are Efes Pazarlama ve Dağıtım Ticaret A.Ş. ("Efes") and Tuborg Pazarlama A.Ş. ("Tuborg"). Efes is a company engaged in the distribution, marketing and sales of beer. It operates eighteen beer factories in six countries, including Turkey, seven malt one hops production facilities, and twenty-two bottling plants. Also, Efes has a wide range of product portfolios, such as the Efes brands, Bomonti, Miller, Beck’s Duvel, Peroni, Erdinger, etc. Efes is the market leader in several countries, and is the world’s 11th largest beer company in terms of sales volume. On the other hand, the Danish based company, Tuborg, operates beer and malt production facilities in Turkey, as well as being engaged in the distribution of several imported beer brands. Similarly, Tuborg has a large product range, such as the Tuborg brands, Leffe brands, Corona, Weihenstephan, Guinness, and Carlsberg, etc.

Features of the Beer Market in terms of Competition Law

While examining the Turkish beer market, there are two main factors to be taken into consideration. Firstly, the restrictive regulations of the Tobacco and Alcohol Market Regulatory Authority ("TAMRA") are heavily effective in the Turkish beer market. Given the Regulations introduced in 2013, the TAMRA Regulations prohibited advertisement and publicity, sponsorship, etc. in the beer market and, therefore, the said market passed to the dark
market conditions. Based on the dark market conditions and prohibitions on advertisement, it is considerably difficult for new undertakings to enter into the beer market. Indeed, it is impossible for the new players entering the market to compete with the current producers, which are still in the market and known by the consumers, without making any promotions or advertisements.

Secondly, importation in the beer market remains limited. As the market shares of the undertakings that operate through importation is low due to the changes in foreign exchange rates, the amount of the special consumption tax, and consumer habits, importation does not create competitive pressure in the market.

The Board divides the beer market into two groups with respect to the points of sale. The closed points of sale ("CPS") are the closed points of sale that offer the products to the consumers, such as grocery stores, super markets or kiosks. Open points of sale ("OPS") are those venues, such as hotels, restaurants or bars, where the products are sold to consumers for immediate use, generally together with food, music and accommodation services. Also, various permits for the sale of beer in both of these points of sale are required.

Decision on Revocation of the CPS Exemption

There have been a great number of Board decisions with respect to complaints and exemption applications in the beer market; however, the Board's latest Decision on Revocation of the CPS Exemption is of importance since it is a first in terms of revoking the previously granted individual exemption to Tuborg. In its decision dated 03.07.2017 and numbered 17-20/320-142 [2], the Board, on the one hand, rejected the request to grant exemptions to agreements to be concluded between Efes and the CPS. On the other hand, upon the request of Efes, the Board began examination of the request for revocation of the individual exemption that Tuborg has in the closed beer market. As a result of the examination conducted by the Board, the individual exemption that Tuborg has benefited from was revoked through the Decision on Revocation of the CPS Exemption. In this regard, the Board has returned its decision dated 18.03.2010 and numbered 10-24/331-119 [3] ("Tuborg Exemption Decision") that grants individual exemption to the agreements, including exclusivity agreements, to be concluded by Tuborg and its distributors with the CPS and the OPS.

The Board found that Efes, who has been in the dominant position in the beer market, as determined in the previous Board decision, has continued to lose its market share since 2010, while Tuborg continues to steadily increase its market share on the basis of sales volume and turnover basis by acquiring the market shares lost by Efes. Also, the Board determined that the current market structure is very different from the market structure when the Tuborg Exemption Decision was made, and that Tuborg is in a competitive position with Efes in respect of market share, sales amounts, availability rates and financial power. By taking the changing conditions in the Turkish beer market and the changed position of Tuborg into account, the Board revoked the individual exemption granted to Tuborg’s agreements that allow exclusivity in the closed beer market.

Considering Tuborg’s steadily increasing market share in the confined closed beer market, relatively protecting the number of CPSs over the years, as well as increasing its availability and its strong financial structure to support its investments, the Board decided to revoke its individual exemption granted for the exclusive agreements of Tuborg in the closed beer market, due to the fact that the relevant agreements no longer meet the condition of ‘not eliminating competition in a significant part of the relevant market’ that is regulated under Article 5(c) of the Law on the Protection of Competition No. 4054.

Conclusion
The Decision on Revocation of the CPS Exemption reveals the dynamic structure of competition law. Also, it is of importance since it is a first in terms of revoking the previously granted individual exemption to Tuborg. Based on the changing structure of the beer market, and the increasing market power of Tuborg, the Board has signaled that it will not tolerate Tuborg's increased market power any longer, and noted that Tuborg is in a competitive position with Efes with regard to market share, sales amount, availability and financial power.

