The Turkish Competition Board holds as not abusive a refusal to supply in the glass market (Anadolu Cam)

Turkey, Unilateral practices, Refusal to supply, Market definition, Abuse of dominant position, Distribution/Retail

By its decision dated 5 June 2007, the Turkish Competition Board (Hereafter "CB") examined the allegations of a glassware retail shop, Solmaz Mercan ("SM" or "Complainant") stating that Anadolu Cam is violating Article 6 of the Act on the Protection of Competition n° 4054 ("Act n° 4054") by abusing its dominant position through applying heavy limitations on supply of goods to SM since 2002. SM alleges that the mentioned limitation places them at a competitive disadvantage against Pasabahce, which is a group company of Anadolu Cam.

Market definition

The CB underlined that the glass package sector produces glass packages in several sizes and colors for food, water, beverage, mineral water, beer, vine, alcoholic drinks, pharmaceuticals and cosmetics industries. In other words, the glass package products are used especially in industrial customers as a semi-product. Additionally, CB stated that although it is possible to differentiate the glass packages according to their shape and intended usage; the consumers started to tend for any kind of product, which is offered for sale in glass packages. If we are to examine the production technology of glass package products, there is strong substitutability in products produced through different technologies. Therefore, CB has reached to the conclusion that all glass package products should be classified as a single product market.

However, CB affirmed that the above determinations are relevant for Anadolu Cam and due to the intended use of the glass packages by the Complainant and its clients, the relevant market shall also be defined as "glass household goods market". This bilateral approach of the CB in the determination of the relevant market is interesting.

In consequence, the CB declares that the relevant product market is the "glass package" and "glass household goods" markets.

By taking into consideration a distribution network has been established all through Turkey in both "glass package" and "glass household goods" markets, CB stated that the geographical market is determined as the Turkish Republic territory.

Overview of the relevant market

In first part of its decision, the CB examined Anadolu Cam and the glass package sector, in general.

Anadolu Cam is an affiliate of Türkiye İÇERİ ve Cam active in the production of flat glass, glass package, glass household goods and chemicals. Anadolu Cam specializes in glass package market and produces glass packages.

Anadolu Cam has three main factories within Turkey and four abroad : three in Russia and one in Georgia. Anadolu is the 6th biggest producer in the European market and 11th in the World Market in glass package sector.
Dominant Position Examination

In the second part of its decision, the CB examined the national glass package sector. The CB stated that in the glass package market there were only two national producers: Anadolu Cam and Marmara Cam.

First of all, CB stated that generally in glass package markets, the first entrant of the market has a considerable competition advantage, if they have a strong capital. One of the major barriers in entering into such a market is the very high costs for the initial investment.

The above explained circumstances also have been an effective factor in the Turkish market. Anadolu Cam is the first undertaking, which entered in to the relevant market and thus, has a high market share. The CB, taking into consideration the high investment necessity and high transportation costs for the importations, declared that Anadolu Cam had a position dominant in the relevant market.

Refusal to supply goods

Turkish competition law does not explicitly specify "the refusal to supply" among the list of practices regulated as an abuse of dominant position in the article 6 of the Act on the Protection of Competition n° 4054. However, the doctrine and the jurisprudence of the CB accept that the practices listed in the Art. 6 of the Act n° 4054 are not limitative in nature and if an undertaking, which is in a dominant position, refuses to supply goods, this may be prohibited.

The official translation [1] of Art 6 of the Act n° 4054 reads as follows:

"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 others or through concerted practices, is illegal and prohibited.,

Abusive cases are, in particular, as follows :

a) Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market,

b) Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts,

c) Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price,

d) Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market,

e) Restricting production, marketing or technical development to the prejudice of consumers."

In the present case, the CB has determined the conditions for a refusal to supply by an undertaking, is to be considered as an abuse of dominant position :
The undertaking should be in a dominant position.

An attitude of refusal to supply should exist.

The above mentioned refusal to supply could not be reasoned by objective and justified reasons.

The practice shall restrict the competition in the relevant market.

The CB has analysed the case, to find out if the above mentioned conditions exit or not: First of all, CB stated that under the above mentioned explanations, it is certain that Anadolu Cam is in a dominant position.

Secondly, SM was supplying 32 million items from Anadolu Cam and this amount has reduced to 2 million items in 2001. Within the documents in the file, CB determined that the mentioned reduction has occurred as a consequence of Anadolu Cam's aim of limiting the supply of goods. Thus, CB decided that the above mentioned second condition, namely "an attitude of refusal to supply" exist in this case.

Anadolu Cam defended itself by stating that the limitation in the amount supply is arising out of reduction in its production capacities. However, CB underlined that the reduction of capacity shall be considered as a justified reason only as an exception and only in specific periods. In this case, it is not sufficient to justify the reduction in supply by Anadolu Cam. Thus, the CB did not accept the defense of Anadolu Cam (3).

Lastly, the CB examined the restrictive effects of the said practice on competition from two points: (i) the effects on the Complainant and the effects on the competition in the relevant market.

Although, the CB approved that the limitation of supply of goods has negative effects on the business of the Complainant.

Notwithstanding the above, CB pointed out that in order to qualify the attitude of refusal to supply, as a violation of Art 6 of the Act no 4054, this attitude should cause a considerable negative effect on issues like sale price and product quality, which is directly reflected on the consumers in the glass household goods market. However, there are not any concrete effects on the sale prices in the market. The sale prices of Pasabahce did not increase. On the contrary, CB stated that SM had made another complaint [2] against Pasabahce alleging that it applies unfairly low sale prices. As a matter of fact, CB decided that, the competition conditions are preserved in the market as regards to the sale prices.

As to quality, the other supplier of the Complainant, which is Marmara Cam, has a drawback mechanism, so that Complainant may return the goods which are not in good quality back to the Supplier. Thus, the quality issues are not reflected to the consumers.

In the light of the above explanations, The CB stated that the refusal of to supply does not restrict the competition in the "glass package" and "glass household goods" markets.

In conclusion, the CB decided that Anadolu Cam's refusal of supplying goods to SM, shall not be considered as an anticompetitive practice under article 6 of the Act no 4054 and did not incur any punishment against Anadolu Cam. However, CB underlined that these kinds of actions by an undertaking in a dominant position may lead to violation of competition law, therefore, it is very important for such actions to be notified to CB. Finally, CB decided to send a Presidency Opinion to Anadolu Cam stating that since it is in a dominant position, it should refrain from decisions and applications which may restrict competition.

This decision displays the expertise and knowledge CB gained over the last decade. Earlier decisions of CB were very...
short and mostly lacked of sufficient research and merits. However, celebrating its 10th anniversary, CB started to carefully determines and widely analyses the components of competition, as in this case; the structure of the relevant market, different competitors, and effects on consumers. It is very promising to see that CB's vision has enlarged and interpretation has evolved.
