

The Turkish competition board investigates price fixing and non-compete provisions in franchising agreements (DiaSA/Complaining Franchisees)

Turkey, Anticompetitive practices, Price fixing, Exclusive purchasing agreement, Franchising, Exemption (block), Non-competition clause, Distribution/Retail

Two complaints were lodged against DiaSA by its franchisees alleging that the provisions and application of DiaSA's franchise agreements are in violation of the Act on Protection of Competition Numbered 4054 [1] ("Competition Act").

The Competition Board ("CB") examined the price and non-compete provisions of the franchise agreements and their application after receiving the complaints mentioned above.

The parties under investigation are DiaSA which is a partnership formed by Sabanc#305; Holding, a Turkish holding company, and Dia, which is a subsidiary of the Carrefour Group.

Relevant Market

The CB stated that the main actors in the fast-moving consumer goods retail sector are hypermarkets, supermarkets, medium-sized markets, small markets, grocery stores, kiosks, and specialty stores. The discount markets are defined as markets which sell a limited group of goods with simple presentations at low prices. They are categorized as "hard discounters" or "soft discounters". The CB classified DiaSA as a soft discount market.

In determining the relevant product market, the CB did not consider the discount supermarkets as a different market and identified the relevant market as "the organized retail market, consisting of stores with an area of 300 m² or less".

As for the geographic market, the CB noted that the undertaking's fields of activity within the consumer goods market significantly range between different regions depending on the scale of towns. Therefore, the geographic markets have been separately determined as each town where DiaSA is active.

Contents of the Complaints

The first complaining franchisee ("Complainant 1") alleged that DiaSA fixes the resale prices of goods by using an online cash register system and does not let the franchisees enter any alternative prices. Complainant 1 noted that DiaSA had sold the cash register devices to its franchisees but did not give the "key 4" and the relevant manual required for changing the prices. Complainant 1 also stated that DiaSA decided to give this key and manual to all of their franchisees when this dispute arose. However, even with the manual, Complainant 1 could not effectively change the prices because the cash register system resets all the prices entered by the franchisee each morning. This resetting requires excessive time and effort for the franchisees since they have to change the prices of many goods every day. Thereby, Complainant 1 alleges that the system makes price-changing almost impossible.

In addition, Complainant 1 claimed that DiaSA is selling the same goods at a lower price at its own stores and does not supply goods being promoted to its franchisees alleging that their stock is insufficient.

The second franchisee ("Complainant 2") alleged that Articles 5.5 and 8 of the "Supermarket Operation Agreement" between DiaSA and themselves violates the Competition Act. Moreover, they complain that DiaSA is forcing its franchisees to sell the same goods at higher prices than its own retail markets by using the cash register system.

DiaSA's Replies

DiaSA's General Manager stated that DiaSA has its own operational stores and has two types of franchise stores. In the first type, the real estate and the equipment are supplied by franchisees. In this case, a Supermarket Operation Agreement is concluded between the parties. In the second type, the franchisee provides the real estate and the equipment is supplied by DiaSA. In the second case, a Sub-Franchise Agreement is concluded.

Regarding the allegations on price fixing through using the cash register system, DiaSA stated that prices of goods can be changed by the franchisees either by using (i) the key or (ii) "the other code" system. Additionally, DiaSA noted that cash register system does not reset all the prices every day, but only refreshes the prices which are renewed that specific day by the DiaSA cash register center.

DiaSA also mentioned that they apply regional prices to goods and that they make discounts at the opening of each store. Therefore, the price of the same goods may differ from store to store.

Exemption

Pursuant to article 2 of the Block Exemption Communiqué [2] on Vertical Agreements ("Communiqué"), an exemption can be applied if the market share of the supplier does not exceed 40% of the relevant market where the goods and services that are the subject of the vertical agreement are provided.

The CB determined that DiaSA's market share in the relevant markets does not exceed the threshold of 40%. Therefore, the franchise agreements in question are within the scope of the Communiqué.

Franchise Agreements (Non-compete obligations and recommendation of maximum sale price)

The Supermarket Operation Agreement grants the privilege of operating Dia supermarkets under the Dia trademark and of applying DiaSA's procedures and business policies. Thereby, the franchisee also accesses the know-how and obtains personnel training and support services of Dia.

Article 5.3.2 of the Agreement stipulates a non-compete obligation regarding the supply of goods to be sold at the relevant store. Moreover, Article 5.5 stipulates a non-compete obligation for the franchisee to refrain from competing in the same field of activity as DiaSA during the term of the agreement. Pursuant to the same article, the franchisee warrants not to compete with DiaSA after the cessation of the Agreement in the territory designated in the Agreement for a period of one year. However, DiaSA had amended the Supermarket Operation Agreements with its franchisees on 3.9.2009 and limited the non-compete obligation which would be applied after the cessation of the Agreement to the facility where the franchisee operates during the agreement rather than all the territory.

As for the duration of the Agreement, it was stipulated that it would be in force for five years and would be automatically renewed for one year if none of the parties sends a termination notice one month before the end of the duration. Communiqué Article 5 (a) deems such an agreement to be concluded for an indefinite term.

The article of the Communiqué mentioned above regulates that an agreement with an indefinite term cannot benefit from

the exemption for non-compete clauses. However, the same article also stipulates that if the real estate to be used belongs to the supplier or is provided by the supplier through a lease or other rights in rem, then non-compete clauses can be included in vertical agreements for the duration of the agreement. Therefore, the CB noted that Supermarket Operation Agreement can benefit from the block exemption in relation to the non-compete obligation for its duration.

Article 5(b) of the Block Exemption Communiqué regulates that a non-compete obligation may be imposed on the purchaser provided that it does not exceed one year as of the cessation of the agreement if (i) the prohibition relates to goods and services in competition with the goods or services which are the subject of the agreement, (ii) it is limited to the facility or land where the purchaser operates during the agreement, and (iii) it is needed to protect the know-how transferred by the supplier to the purchaser. In light of this provision, it must be stated that the former version of the Agreement could not benefit from the exemption since the non-compete obligation was stipulated for the whole territory designated in the Agreement. However, in the amended version, the non-compete obligation is limited to the facility only. Thus, the CB is of the opinion that the Agreement can benefit from the exemption as noted above.

As for the provisions in the Agreement regarding the resale prices of goods, all of DiaSA's price lists are maximum resale price recommendations. Thus, they are in compliance with the Communiqué.

The Sub-Franchise Agreement also includes the same non-compete clauses and maximum resale price recommendation. The CB stated that the non-compete obligation to be imposed during the Sub-Franchise Agreement is in violation of the Communiqué since the Agreement was concluded for an indefinite term and the real estate is not provided by the supplier. However, with the later amendments, the duration of the Agreement was limited to 3 years and the automatic renewal clause was deleted. Therefore, the CB decided that the new version of the Agreement is in compliance with the Communiqué.

Cash Register System

In the investigation of the system, no proof was found that cash register system prohibits price changes or makes them impossible. Therefore, the allegations of the complainants in this respect were found ungrounded.

Conclusion

This decision is significant because it displays (i) the potential infringements of competition through the provisions of franchise agreements and (ii) under which circumstances they can benefit from the block exemption for vertical agreements.

[1] To consult the complete text of the Competition Act, please see the following link :

<http://www.rekabet.gov.tr/index.php...>

[2] To consult the complete text of the Block Exemption Communiqué, please see the following link :

<http://www.rekabet.gov.tr/dosyalar/...>

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