

# e-Competitions

## Antitrust Case Laws e-Bulletin

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### The Turkish Competition Board withdraws the individual exemption granted to an agreement containing exclusivity clauses in the on-trade beer market sector (*Tuborg*)

**ANTICOMPETITIVE PRACTICES, EXCLUSIVE DISTRIBUTION, VERTICAL RESTRICTIONS, EXCLUSIVITY CLAUSE, NON-COMPETITION CLAUSE, TURKEY, EXEMPTION (INDIVIDUAL), EXCLUSIVE PURCHASING AGREEMENT, TOBACCO AND ALCOHOL**

Turkish Competition Board, *Tuborg*, No 19-22/335-152, 20 June 2019 (Turkish)

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This case summary includes an analysis of the Turkish Competition Board's (the "**Board**") *Tuborg* decision (20.06.2019; 19-22/335-152) in which the Board withdrew *Tuborg Pazarlama A.Ş.*'s ("**Tuborg**") individual exemption granted to its agreements containing exclusivity clauses with sellers such as restaurants, bars, hotels and cafes, to supply on-trade beer. The individual exemption which was granted to *Tuborg* with the Board's decision of March 18th, 2010 (decision no. 10-24/331-119), has been re-evaluated upon the request of *Efes Pazarlama ve Dağıtım A.Ş.* ("**Efes**"). In its analysis, based on the altered market circumstances and the increasing market power of *Tuborg*, the Board decided to withdraw *Tuborg*'s individual exemption as per Article 13(1)(a) of the Law No. 4054 on the Protection of Competition ("**Law No. 4054**").

#### Background

As for background information on the Turkish beer market, the Board initially acknowledged that beer distribution has been conducted through two channels: (i) on-trade (i.e. beer sold by pubs, bars, restaurants, hotels etc., as part of the offered services) and (ii) off-trade (i.e. beer sold by retail outlets). As a general remark, the Board noted that prices for on-trade and off-trade beer significantly differed from each other. Based on the numeric data of beer-sellers which have the alcoholic beverages license, it has evaluated that on-trade market has expanded 10% as of 2012, whereas the retailers selling off-trade beer have remarkably decreased within this period.

The Board based its analysis regarding the Turkish beer market on the sales and market share data of *Efes* and *Tuborg* in both channels, as it found that the market shares of other manufacturers and importers active in the Turkish beer market were too low. Accordingly, it has found that majority of the beer sales constitutes off-trade beer, which also refers 75-80% of all sales in the overall beer market.

The Board observed that there is a significant difference between Tuborg's availability rates in on-trade and off-trade beer markets. The Board also indicated that in overall beer market in Turkey, the market share of Tuborg has gradually increased, while the market share of Efes has proportionally decreased.

With regards to the market definition, noting that the individual exemption for off-trade beer market of Tuborg had already been withdrawn with the previous decision of the Board (09.11.2017, 17-36/583-256) and therefore it was not an issue for the case any longer, the Board defined the relevant product market solely on-trade beer market in line with its previous precedents as well as defining the relevant geographic market as Turkey.

In the assessment of its previous precedents concerning the exemptions granted and/or withdrawn in the beer market involving Efes or Tuborg (i.e., the Board's various decisions rendered in 2005, 2008, 2010, 2012 and 2017), the Board concluded that both Efes and Tuborg could not enter into exclusive agreements in the off-trade beer market. As for on-trade beer market, while Efes was not allowed to enter into exclusivity arrangements (as its application for individual exemption was rejected in 2017), Tuborg had the privilege for such clauses in line with the individual exemption previously granted by the Board.

In its complaint, Efes mainly argued that it was not in the dominant position in the on-trade beer market any longer and that Tuborg had become an equivalent competitor within the years due to its increasing market share and financial power in the relevant market and, therefore grounds for the individual exemption granted for Tuborg were not currently existent.

Efes and Tuborg are two main players in the on-trade beer market mainly due to low imports to the market and high entry barriers. In its assessment, the Board reiterated its grounds which led the individual exemption for Tuborg in 2010 and focused on any changes in the market ever since. Upon examination of Efes and Tuborg's sales and market shares in the recent years, the Board observed that Tuborg has increased its ability to effectively compete with Efes in terms of its market share, sales amount, availability and financial strength. Indeed, it concluded that market conditions have been significantly changed in favor of Tuborg since 2010, thus evaluations made in 2010 were not valid any more.

Additionally, in its decision of individual exemption in 2010, the Board had considered that market foreclosure would not be a concern as a result of the exclusivity practices of an undertaking like Tuborg which had no market power, given the dominance of Efes in the very same market. Currently, however, the Board determined that market share loss of Efes had become stable and Tuborg had gained certain market power. Additionally, it has evaluated the percentage of the sales by Tuborg made to its exclusive customers in the overall market has indicated a non-negligible market foreclosure effect.

In line with these observations, the Board evaluated that Tuborg's exclusive agreements would restrict competition in a significant part of the market. In conclusion, pursuant to Article 13(1)(a) of the Law No. 4054, the Board withdrawn the individual exemption provided to Tuborg's exclusivity clauses/practices in the on-trade beer market.

On that note, as Tuborg's market share remained below 40%, the Board also analyzed block exemption conditions and concluded that the condition set forth in Article 5(c) of the Law No. 4054 has not been satisfied, given the market foreclosure effect of exclusive agreements would significantly restrict competition in the relevant market.

On a final note, with respect to Tuborg's request in the current case, for withdrawal of the individual exemption granted to Efes' exclusive agreements with chain hotels, chain restaurants and armed forces clubs conducting centralized tenders for beer supply, the Board noted that both Efes and Tuborg were able to agree on exclusivity for

up to two years and accordingly have concluded sponsorship agreements with a term not exceeding 60 days. In this regard, given the consumer benefits arising from these agreements, such as decrease in prices due to the centralized tenders, the Board held that the individual exemption for the exclusive agreements with chain hotels, chain restaurants and armed forces clubs conducting centralized tenders for beer supply would remain in force.

## Comments

Tuborg decision is of crucial importance as it initially demonstrates the close competition between the two main players in the beer market. It also explicitly shows the alteration of the market circumstances by time, given the reasoned decision includes an in-depth compilation of highlighted individual exemption cases in the beer market thus far. In addition, although there are many individual exemption cases concerning the beer market particularly involving Efes and Tuborg, which also demonstrates the recent trend in the beer market, it is fair enough to say that cases concerning the withdrawal of individual exemptions are relatively rare.