

e-Competitions

Antitrust Case Laws e-Bulletin

Preview

The Turkish Competition Authority finds the allegations of an abuse of dominance against an automobile services company groundless and does not initiate a full-fledged investigation (*Samuklar / Brisa*)

UNILATERAL PRACTICES, DOMINANCE (ABUSE), DISCRIMINATORY PRACTICES, BLOCK EXEMPTION (REGULATION), RESALE PRICE MAINTENANCE, VERTICAL RESTRICTIONS, SERVICES, AUTOMOBILE, TURKEY

Turkish Competition Authority, *Samuklar / Brisa*, Case 0-35/455-202, 24 July 2020 (Turkish)

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e-Competitions News Issue Preview

On February 13, 2020, the Turkish Competition Board (“Board”) initiated a preliminary investigation upon the complaints received from Samuklar Motorlu Araçlar Madencilik İnş. San. ve Tic. Ltd. Şti.’s (“Samuklar”), which previously worked as the dealer of Brisa Bridgestone Sabancı Lastik San. ve Tic. A.Ş. (“Brisa”) in Bursa, Turkey, until 2017. Samuklar’s complaints included several issues that might have raised competition law concerns, however, the Board concluded as a result of a preliminary investigation that Brisa did not violate the Law No. 4054 on the Protection of Competition (“Law No. 4054”). [7]

Background

Samuklar’s complaint included many allegations which were not all related to competition law (such as disputes over debts). The Board reviewed the complaint and additional information submitted to the Authority and determined four allegations that could be assessed under Law No. 4054;

- (i) Brisa engaged in discriminatory behavior against Samuklar by way of applying different discount rates, terms, support on investments, expenses, advertisement and marketing etc.,
- (ii) Brisa granted its dealers the right to make certain amount of discounts on product sales,
- (iii) in terms of the sales made to fleet customers, Brisa only allowed the sales made by certain dealers which are designated by Brisa, thus, prevented others from selling products to fleet customers, and lastly,
- (iv) Tire Coating Companies [2] sell their tire coating products solely to Brisa and Brisa provides the relevant

products to the market and its dealers, as the sole supplier in the market.

Each foregoing allegation is assessed by the Board separately, as described below.

The Assessment on Brisa's Discriminatory Behavior:

In its complaint, Samuklar indicated that Brisa abused its dominant position and prevented Samuklar from continuing its commercial activities by engaging in discriminatory behavior in favor of its other dealer in Bursa, Turkey, i.e. Alkam Lojistik Otomotiv San. ve Tic. A.Ş. ("**Alkam**") by providing different discounts, terms, investment supports, contributions to expenses, advertisement and marketing supports, etc.

On this basis, the Board conducted its analysis on the discrimination allegation from the aspect of both (i) Article 4 as a vertical agreement between Alkam and Brisa and (ii) Article 6 as a case of abuse of dominant position.

Accordingly, the Board first indicated that a vertical agreement between Alkam and Brisa containing better terms compared to the agreement between Samuklar and Brisa, would not suffice for discriminatory behavior under Article 4 of Law No. 4054 as there should be also mutual intention between Alkam and Brisa for discrimination against the complainant. The Board indicated that there are no findings referring to such mutual intention against Samuklar.

Further, the Board indicated that in order to be qualified as an infringement of Article 6 (as well as Article 4) of Law No. 4054, "different conditions to customers who have equal status for equal rights" should be applied. In this context, to assess whether Samuklar and Alkam are buyers that are in equal positions, the Board reviewed amounts of tire purchases of Samuklar and Alkam from Brisa, along with other dealers operating in the same region and determined that Alkam purchased and paid significantly more than Samuklar for the tires it purchased from Brisa. In addition, the Board also determined that Brisa provided discount rates, premiums and investment support to dealers based on the quantity of tires and the purchase amount from Brisa.

The Board also determined that, while Alkam operated as a wholesale dealer, Samuklar has been operating as a retail dealer since 2012. The status of dealerships lead to the main difference between Samuklar and Alkam; since the wholesale dealers purchase larger amounts of products, and need larger capitals to cover the depot and logistics expenses. Besides, they carry also more risks related to collection of revenues compared to retailer dealers. Thus, Alkam received more discount rates, premiums and support since it purchased more products and bare more costs. This is considered as a reasonable practice by the Board. Furthermore, the Board also determined that Samuklar purchased less products during the timeframe it acted as a wholesale dealer as well as other differences related to deposit amounts and overdue receivables. Thus, the Board concluded that Samuklar and Alkam were not equally situated customers.

The Board also set forth that, even if Samuklar and Alkam were considered as equal customers, the Board did not find any evidence demonstrating that Brisa engaged in discriminatory behavior against its dealers and the Sales Promotion System announced by Brisa annually was based on objective criteria and standard terms and did not allow any discriminatory conducts. Thus, the Board decided that Brisa did not discriminate against Samuklar.

The Assessment on Dealers' Rights to Make Discounts:

In its assessment concerning the allegation that Brisa granted its dealers the right to make certain amounts of discounts on product sales, the Board firstly indicated that tires fall within the scope of the “spare parts” definition provided in Communiqué No. 2017/3 on Block Exemption on Vertical Agreements in the Motor Vehicles Sector (“**Communiqué**”), thus the agreements concerning tire distribution should comply with the Communiqué.

Moreover, pursuant to Article 6(a) of the Communiqué, dealers should be free to determine their resale prices. In this context, determining the maximum discount a dealer can apply to recommended prices would indirectly lead to resale price maintenance (RPM).

However, after considering Brisa’s statements that the dealers are free to determine their resale prices, discounts, payment conditions and terms, findings during the on-site inspections and the review of Brisa’s dealership agreement and price circulars (with recommended prices), the Board confirmed that it did not come across any circumstantial evidence for direct or indirect resale price maintenance or intervention to resale prices.

The Assessment on the Restriction to Make Sales to Fleet Customers:

Article 6(b) of the Communiqué prohibits suppliers from applying regional or customer based restrictions to dealers while selling the contract goods or services (subject to certain exceptions listed under the same provision). Therefore, the Board analyzed the allegation that Brisa prevent dealers from selling to fleet customers unless they are selected by Brisa, and whether Brisa restricts passive sales to fleet customers.

Brisa indicated that there are no regional or customer based sales restrictions and the dealers are free to sell to fleet customers. Fleet customers are also free to purchase from Brisa and/or (one or multiple) dealers. The Board confirmed these after reviewing the dealership agreement and the data of dealers’ sales to fleet customers, and could also not find any correspondence indicating otherwise.

The Assessment on the Claims Concerning the Sales of the Tire Coating Companies to Brisa:

With regard to the allegation that the Tire Coating Companies would sell their retreaded tire products solely to Brisa, Brisa would be the sole supplier to the market and its dealers, and its dealers would be obliged to purchase the relevant products from Brisa, the Board indicated that this should be analyzed based on Article 5(3) of the Communiqué which stipulates that in vertical agreements with exclusive supply obligations, exemption shall be applied on the condition that the market share of the buyer in the relevant market where it purchases the contract goods and services do not exceed 30%.

However, upon further assessment, it is understood that the undertakings subject to the allegation are dealers which purchase coating products, coating machines and auxiliary materials etc. from Brisa and produce retreaded tires. In fact, contrary to the allegations, the abovementioned dealers do not sell any retreaded tires to Brisa.

In any case, the Board also reviewed whether Brisa is the only supplier with respect to coating materials and determined that the dealers active in coating in the franchise system must purchase products only from authorized sources, however this is deemed reasonable to meet certain standards. Besides, they are also free to sell the coated tires to any regions and customers. Either way, the Board also considered Brisa’s share in coating materials and the turnover ratio from coating materials in its total turnover and concluded that Brisa is not in a dominant position and there were no competition law infringement as argued by the complainant.

Conclusion:

Ultimately, the Board decided not to initiate a full-fledged investigation. However, the comprehensive analysis in terms of vertical restraints and Communiqué implemented in the Brisa decision reinforces the Board's recent case law with regard to discrimination and block exemption in motor vehicles sector.

[1] The Board's Brisa decision, dated 24.07.2020 and numbered 20-35/455-202.

[2] Pro-Kap Lastik Kaplama Lojistik Otomotiv San. ve Tic. A.Ş., Pro-Kap Kayseri Lastik Kaplama Lojistik Otomotiv San. ve Tic. Ltd. Şti., Pro-Kap Ege Lastik Kaplama Lojistik Otomotiv San. ve Tic. Ltd. Şti., Pro-Kap Asya Lastik Kaplama Lojistik Otomotiv San. ve Tic. Ltd. Şti., İSB Lastik Kaplama Lojistik Otomotiv San. ve Tic. Ltd. Şti