

Competition Board concludes preliminary investigation into excessive pricing

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Introduction

On April 20 2016 the Turkish Competition Board published reasoned Decision 16-14/205-89, following its preliminary investigation into allegations that Soda Sanayii AŞ had violated:

- Article 6 of Law 4054 on the Protection of Competition by abusing its dominant position in the basic chromium sulphate market by way of excessive pricing; and
- Article 4 of the law by engaging in horizontal and vertical restrictive agreements.

Soda, incorporated under the Şişecam Association, manufactures sodium bichromate and basic chromium sulphate. In determining the relevant product market, the board held that basic chromium sulphate differs from other chemical substances, as:

- it is used as an ingredient in leather production; and
- the quality of the chemical affects the quality and value of the leather procured as a result of the manufacturing process.

In this respect, the board defined a separate product market for basic chromium sulphate.

Assessment of abuse of dominance by way of excessive pricing

In its assessment of Soda's abuse of dominance by way of excessive pricing, the board first evaluated whether Soda had held a dominant position in the relevant market. After assessing its market shares for the previous years, the board found Soda to be a global and European leader within the chrome chemicals group, which includes basic chromium sulphate. Within this framework, the board stated that it would not make a precise determination as to whether Soda had held a dominant position in the relevant market. Rather, the board – working under the assumption that Soda had done so – analysed whether there had been an abuse of this position by way of excessive pricing.

Next, the board defined an 'excessive price' as one which is "consistently and significantly determined above the competitive level" as a result of the undertaking's market power. The board also discussed the concept of excessive pricing through conceptual and practical aspects, indicating that – from a conceptual perspective – prohibiting excessive pricing may restrict undertakings' (with a certain level of market power) ability to determine prices for profit maximisation. Further, from a practical perspective, competition authorities may be unable to analyse efficiently whether the concerned undertakings' prices are constantly and significantly determined above the competitive level.

The board also examined the US and EU competition law excessive pricing regimes, finding that the consensus within both jurisdictions is that the competition authorities should not interfere with

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excessive prices in cases where the market is expected to recover in the short or medium term. However, the need for interference arises in markets where there are major barriers for entry and competition is not established in the long term. In this regard, the board concluded that the following market conditions should also be assessed in order to determine an abuse of dominance by way of excessive pricing:

- market shares and concentration levels within the relevant markets;
- barriers to entry and expansion; and
- purchasing power.

Next, the board assessed its previous decisions and concluded that it interferes with excessive prices only under limited circumstances, as such interference may have a negative effect on the market's natural operation and there is a risk of error with regard to competition authorities' determination and interference methods.

In a similar regime to that of the European Union, the board evaluates the relationship between the economic value and price of a product and applies a two-step test comprising price comparison and price-cost analysis. In light of this, the board conducted a price comparison of Soda's:

- basic chromium sulphate products and those of its competitors;
- domestic sales prices and export prices;
- domestic sales prices and the consequent profit margin ratios; and
- export sales prices and the consequent profit margin ratios.

The board found that Soda's products generally cost more than those of its competitors, and that it has generally had a high profit margin with respect to its domestic and export sales. Further, the board found that Soda's domestic prices and the consequent profits were higher than its export prices and profits, although this was due to the fact that it focused its sales and marketing strategy mainly on exports. The board also found that, even though Soda had maintained its market power throughout the years, there were no entry barriers to the basic chromium sulphate market.

Ultimately, the board concluded that there was no need to initiate a fully-fledged investigation into the allegation that Soda had abused its dominance by way of excessive pricing, as the prices under review mainly concerned the quality and uniqueness of its products.

Assessment of resale price maintenance

The board subsequently evaluated the allegation that Soda had violated Article 4 of the Law on the Protection of Competition by determining its distributors' resale prices. The board found no evidence that Soda had engaged in resale price maintenance; on the contrary, several authorised Soda distributors advised that they remain completely independent in determining their own sales conditions.

In light of the above, the board refrained from initiating a fully-fledged investigation into Soda.

Comment

The board's decision sets a prominent precedent. It demonstrates how the competition authorities will evaluate the theory and application of excessive pricing and the factors that they will consider when determining whether there has been an abuse of dominance by way of such practice.

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