

Turkey: The Turkish Competition Board grants individual and group exemptions to Coca Cola regarding its wholesale distribution contracts in Turkey

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Introduction

On 7 March 2013, the Turkish Competition Board (the “**Board**”) concluded a preliminary investigation concerning Coca Cola Satış ve Dağıtım A.Ş. (“**Coca Cola**”) as a result of the application filed by the Özbağ Meşrubat Gıda Pazarlama Dağıtım Taşımacılık San. ve Tic. Ltd. Şti. (“**Complainant**”). Complainant claimed that Coca Cola has been violating Article 4 (*Agreements, Concerted Practices and Decisions Restricting Competition*) and Article 6 (*Abuse of Dominant Position*) of the Act on the Protection of Competition (the “**Competition Law**”) through its wholesale distribution contracts and sales software provided to its wholesale distributors.

The steps of the case

On 25 September 2008, the Board has issued a decision on the alleged anti-trust violations of Coca Cola through its wholesale distribution contracts and sales software that is provided to its wholesale distributors. In this decision, the Board concluded that: (i) Coca Cola has not violated Competition Law through the sales software since such software does not determine the re-sale price or prohibit passive sales as claimed by the Complainant, and (ii) although wholesale distribution contracts of the Coca Cola may be in violation of the Article 4 of the Competition Law, they may be subject to individual and group exemptions in case they are properly amended (i.e. amendments on territorial allocation and non-compete clauses). The Board has provided Coca Cola with 90 days to amend its wholesale distribution contracts.

On 13 April 2009, the Board has decided that Coca Cola has completed requested amendments. Nevertheless, the decision of the Board dated 25 September 2008 has been brought before the Council of State (*Danıştay*) and Council of State has reversed the decision on procedural grounds on 6 April 2012 (i.e. the lack of a preliminary investigation). Upon this reversal, the Board has issued another decision after completing its preliminary investigation on 7 March 2013 (“**Final Board Decision**”).

The Board’s assessment

In the Final Board Decision, the Board focused on the same two points with its previous decision: (i) effect of sales software provided by Coca Cola to the wholesale distributors and (ii) contracts with the wholesale distributors. The relevant product markets in this decision (based on sale channels and beverage type) are defined as the “*fruit juice*”, “*packed water*”, “*iced tea*”, “*energy drinks*”, “*carbonated beverages*” and “*sports drinks*” in Turkey.

The Board first assessed whether the sales software restricts passive sales to purchasers outside any wholesale distributor’s territory. For this purpose, the Board has interviewed wholesale distributors and carried out site visits and finally concluded that the use of sales software (either previously or currently used software, i.e. Basis or Voyage) does not result in any violation of the Competition Law since such use does not result in determination of re-sale price to retail sellers or prohibition of passive sales.

Second assessment of the Board was on the provisions of the wholesale distribution contracts and particularly on whether such contracts may be subject to exemption. The Board concluded that, for “*fruit juice*”, “*packed water*”, “*iced tea*” and “*energy drinks*”, markets, such contracts may be subject to group exemption under

Communiqué No: 2002/2 on Group Exemption for Vertical Agreements since (among other reasons) Coca Cola's market share is below 40% in these markets. For "*carbonated beverages*" and "*sports drinks*" markets, where Coca Cola has a market share above 40%, the Board carried out a further analysis and took into account (among others) (i) whether there are possible negative effects of such contracts including closing markets to other competitors and elimination of competition for end users and (ii) whether such distribution contracts benefit end users through economics of scale and scope. The Board finally concluded that wholesale distribution contracts regarding "*carbonated beverages*" and "*sports drinks*" may be subject to individual exemption.

Conclusion

In sum, as a result of the re-evaluation of the case upon the Council of State's reversal, the Board has granted exemptions for Coca Cola's wholesale distribution contracts since: (i) Coca Cola's amended wholesale distribution contracts fall under the scope of individual and group exemptions, and (ii) use of Coca Cola's sales software by the wholesale distributors does not result in any anti-trust violations.

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