

Competition Law Practice in Times of Covid-19 Pandemic

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The Covid-19 pandemic, which has been affecting our country as well as the whole world, has increased the demand for products used for direct protection from the virus such as cologne, disinfectant, and mask and also for many basic consumer products. As some providers turned this situation into an opportunity to increase their profitability and/or failed to offer enough supply to the market to meet the demand due to the problems in the production and distribution chain, the prices of these products show a radical increase, or it became difficult to access to these products.

The role of competition law to prevent the aforementioned price increases and ensure an effective supply chain to meet the increasing demand during the prevailing Covid-19 circumstances, has become a topic of heated debates in Turkey and throughout the world. Within this context, in many regimes, especially in the EU and the USA, competition authorities introduced warnings and interventions regarding price increases, as well as guiding statements to encourage the agreements between competitors that are necessary for the establishment of an effective distribution chain during this period and at this point, set up task-forces to respond the questions of undertakings. In Turkey, the President of the Competition Board warned in his statement dated March 25, 2021 that administrative fines imposed from the upper limit may be on the agenda for the undertakings that opportunistically increases the prices during the pandemic. The Competition Board [**“the Board”**], on the other hand, has not yet published a guideline on the agreements between undertakings to ensure coordination of the supply to meet the increasing demand.

As can be seen, in terms of competition law practice during the Covid-19 period the discussion mainly focuses on two points: (i) whether the Board can implement preventive measures and sanctions under the competition regulations to preclude price increases, and (ii) the sort of the practice of competition law that should be adopted against the agreements between competitors in order to establish an effective production and distribution chain to meet the increasing demand.

Our brief evaluations regarding these questions will be presented below.

1. Prohibited Behaviors Under the Competition Law and Powers of the Competition Board

Competition Law is an area of law that aims to protect consumer and increase social welfare by enforcing competition in the markets. The Law on the Protection of Competition No. 4054 [**“the Law”**], which is the main regulation of the Turkish competition law, prohibits three types of behavior distorting competition, as in other advanced competition law regimes. In this regard, Article 4 of the Law prohibits the agreements, concerted actions, and decisions of association of undertakings that have the effect or purpose of limiting the competition between undertakings, especially the cartels, while the Article 6 prohibits companies from abusing their dominant position. Finally, mergers that create a dominant position or strengthen an existing dominant position are prohibited as per Article 7 of the Law.

Discussions on the undertaking actions that emerged after the Covid-19 outbreak and addressed in this study is mainly conducted within the framework of Article 4 and Article 6 of the Law. In case of violation of Article 4 or 6, the most significant sanction is to impose an administrative fine up to 10% of the relevant undertaking’s turnover in the last fiscal year as per Article 16/2 of the Law. Furthermore, pursuant to Article 9/1 of the Law, the Board may request the implementation of measures for terminating the violation from the undertakings that are found to have violated the law. In cases where serious and irreparable damages are likely to occur, the Board may further take interim measures to protect the situation before the violation until the final decision is given, as long as these measures do not exceed the scope of the final decision. In this case, the decision on the application of an interim measure will be exclusive to the undertakings that are being investigated. In addition to the foregoing powers, the Board also has the authority to determine the prices and other sales conditions to be applied in a specific sector.

2. The Role of the Competition Law in Preventing Price Increases Caused by Covid-19 Outbreak

With the Covid-19 outbreak, extraordinary price increases in many products became one of the biggest complaints. However, competition law may play a role in preventing these price increases only if said behaviors fall within the scope of Article 4 or Article 6 of the Law. For an act to constitute a violation of Article 4, in all cases, there should be an agreement between the undertakings. In this regard, increasing the prices unilaterally without making a direct or indirect agreement with other undertakings does not fall within the scope of Article 4. It is understood that during the Covid-19 outbreak, price increases are mostly caused by individual behaviors of the producers or retailers who took advantage of the concentration of demand or are a natural result of the gap between supply and demand. Therefore, only a very small part of the said price increases is estimated to fall within the scope of Article 4.

On the other hand, Article 6 is triggered, when the undertaking in question is in a dominant position. Since the price increase comes to the fore in terms of products that have numerous suppliers in general such as cologne, disinfectant, mask, and basic food products, it would be difficult to argue existence of a dominant position. A broadened application of Article 6 in a way to consider even small or medium-sized undertakings in a dominant position would not be compatible with the principle of legal certainty. For this reason, Article 6 does not appear to be an effective tool for the Board to intervene in the complained price increases.

Nevertheless, in case of price increases and practices that violate Article 4 and Article 6 of the Law, the Board will be able to impose the administrative fine regulated under the Article 16 cl.2, after completing the investigation procedure specified in Article 40 ff of the Law. Although these administrative fines are deterrent, the fact that these can only be applied as a result of a long investigation process and that the Board does not have the authority to impose extensive price restrictions on the market, in general, reduces the effectiveness of competition law instruments in combating the price increases suffered in these difficult days. Therefore, we believe that it is mainly the relevant ministries who can control prices and rapidly intervene in price increases during the Covid-19 pandemic. As a matter of fact, the Ministry of Commerce and many other ministries are already adopting an active attitude in this regard.

3. Competition Law Practice Regarding Competitor Agreements Made to Establish an Effective Production and Distribution Chain

It would not be accurate to explain the reason of the price increases and lack of supply caused by the Covid-19 pandemic only with the opportunistic behavior of undertakings. One of the main problems is that the undertakings cannot establish a production and distribution organization necessary to meet the exponentially increasing demands on products. At this point, establishment of coordination and information sharing between rival undertakings to meet the demand might be needed. However, the risk of violating Article 4 due to such agreements made between rivals might be deterrent for undertakings that would not be willing to face administrative fines up to 10% of their turnover.

It should be noted that, even though an agreement limits the competition under Article 4 of the Law, it might be exempted from the prohibition stipulated in this article, if it meets the conditions specified in Article 5 of the Law. In order for an agreement to be exempted under Article 5, all of the following conditions must be met: (i) The agreement should provide efficiency (benefit) in the production or distribution of goods and the provision of services, (ii) the agreement should not deteriorate the situation of consumers, (iii) the agreement should not unduly restrict competition; and (iv) competition should not be eliminated as result of the agreements.

In this respect, it can be said that coordination operations and information sharing between competitors during the Covid-19 pandemic in order to provide products to consumers in an adequate way, may benefit from the exemption regulated under the Article 5 as they will generate activities for the benefit of the consumer in general and will not unduly limit or eliminate the competition. However, if this coordination or information sharing has aspects such as determination of prices or region sharing other than ensuring the supply of the necessary products, which may increase prices or have consequences to the detriment of consumers, undertakings may be faced with administrative fines because of the violation of Article 4 of the Law, given that the conditions stipulated under Article 5 will not be met.

It is not obligatory to file an application with the Board in order for an agreement to be entitled to exemption within the framework of Article 5 of the Law. Undertakings may apply to the Board for this purpose, or they may evaluate themselves whether the exemption conditions are met in terms of an agreement. However, in these extraordinary days of Covid-19 pandemic, it is not very easy for undertakings to determine the extent to which they can coordinate with their competitors or exchange information under Article 5 of the Law. Therefore, it is of great importance that the Board takes the lead, just like the competition authorities in many other countries, in order to encourage the rapid conclusion of these beneficial

agreements during the Covid-19 outbreak. It would be beneficial for the Board to form an in-house task-force that will answer the questions of undertakings on this issue expeditiously, again, as many competition authorities have already done.

As a result, we believe that in these difficult days caused by the Covid-19 outbreak, the primary task of the Board is probably to provide the necessary convenience and certainty for competitors to make agreements in order to ensure an effective supply organization. In any case, the Board will for sure be able to investigate the acts that constitute abuse of dominant position with cartel agreements that do not meet the individual exemption conditions and impose the necessary sanctions, within the 8-year statute of limitations.

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