

## The Turkish Competition Board revokes the block exemption granted to distribution contracts in the non-alcoholic beverages sector (Coca-Cola)

**Turkey, Anticompetitive practices, Exemption (block), Exemption (individual), Purchase obligation, Distribution/Retail**

By its decision dated 10 September 2007, the Turkish Competition Board (hereinafter referred as "CB") revoked the block exemption granted to distribution contracts of Coca-Cola Turkey (hereinafter referred as "CCI") in take-home and on-premise channels in relation to the carbonated soft drinks (hereinafter referred as "CSD") market.

### Market definition

The CB stated that commercial beverages cover non-alcoholic beverages commercialized in the market. The non-alcoholic beverages market is divided into two sub-markets: (a) Non carbonated soft drinks market and (b) CSD market. Non carbonated soft drinks are divided into five sub-markets: (a1) bottled water, (a2) fruit juice/nectar/fruit aromatic drinks, (a3) ice tea, (a4) sports drink, (a5) energy drink. CSD [1] are divided into four sub-markets which are (b1) cola-flavored, (b2) orange flavoured, (b3) bitter flavored and (b4) other carbonated drinks. The CB focused its examinations in the CSD market. The CB underlines that, the half of the commercial beverage consumption in Turkey, is composed of CSDs.

In its examination, the CB also took the view that the take-home channel and the on-premise channel constitute distinct relevant markets [2].

Due to the large product range of CCI, the CB conducts an investigation covering the whole non-alcoholic beverages market with all of its sub-markets. Taken in consideration that both CCI and other non-alcoholic beverage products' distribution and sale channels cover the whole country, the CB determined the geographical market as "the borders of the Turkish Republic".

### Evaluation of the Concentration in the Relevant Market

The CB calculated the concentration in the relevant market and sub-markets upon Herfindahl-Hirschman Index (hereinafter referred as "HHI") and arrived to a conclusion that in the gaseous drinks market (3582): cola (4478), orange flavored drink (3143) and non flavored drinks (2410) sub-markets are highly concentrated markets. The most concentrated one is the cola sub-market in which the HHI index is the highest and the market share of CCI makes the top [3].

### Dominant Position of CCI

CB has evaluated the impacts of the exclusive agreements on the CSDs market, the CB underlined in first place, the market power of CCI and stated that the market share of CCI has never fell under 60 % and always 3 times more than its biggest competitor. The CB, secondly examined the following criteria in order to point out the importance CCI's market power :

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Coca-Cola brand is the most valuable brand in the world

CCI has the biggest and well known portfolio in non-alcoholic beverages market

CCI's advertisement expenses constitute the most important advertisement expenses in the market

Difference between the market share of CCI and its biggest competitor Pepsi is getting bigger

CCI has more active clients than its competitors.

In its above referred examination, the CB considered that the strong position of CCI (due to high market shares, unique brand recognition and stock nature of CCI's strongest brands and exceptional breadth on CCI portfolio) is protected from competition by barriers to entry, in form of sunk advertising costs preventing any significant market entry. The CB also considered that there was no countervailing buying power that would likely pave the way for effective new entry, since, according to the evidence; most customers hold a weak position in the negotiations for the supply of CCI-branded CSD.

Furthermore, the CB also took into consideration the barriers to entry in the relevant market such as brand awareness-advertising expenses, portfolio power-product differentiation, and entrance to sale channels. In addition to these factors relating to the market structure, the CB also examine the dominant position criteria of CCI such as: independency from its clients.

Evaluation of CCI's Distribution Agreements

The CB examined CCI's distribution agreements from different angles :

## 1. Product Exclusivity in the Agreements

The CB, in first place, investigated some of the practices of CCI that would ensure de iure or de facto exclusive supply of CSD to customers, mainly through exclusivity arrangements, financing arrangements and technical sales equipment arrangements (beverage coolers). With regard to exclusivity agreements, the investigation yielded of both particularities of both explicit clauses and tacit agreements aiming to secure exclusivity for CCI with regard to the sale of CSD in outlets.

The CB considered that these exclusivity agreements, regardless of their form, would lead to foreclosure of rival suppliers of CSD, particularly in the on-premise channel.

## 2. Exclusivity Related Practices

The CB underlined that CCI provide beverage coolers to customers on a rent-free basis. In return, the customer commits to stock the cooler exclusively with CCI branded CSD. With regard to the beverage cooler exclusivity, the CB stated that the combination of the CCI's strong product portfolio and the rent-free character would remove any incentive for the

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customer to place a second cooler and added that the beverage cooler exclusivity might, in certain situations, lead to, de facto outlet exclusivity, thus reducing the diversity of the cold product offering to the detriment of the final consumer.

The CB underlined that this practice would also amount to de facto outlet exclusivity and also reduces the competitive pressure in the market if their duration is excessive.

### 3. Growth and Target Provision in the Agreements

CCI has frequently offered considerable financial incentives for the customers reaching individually specified purchase thresholds [4]. These provisions took form of target and growth rebates, most of which were calculated on a quarterly basis separately in respect to the total turnover.

The CB also underlined that growth and target provisions increase customer's switching costs and bind them to CCI and its bottlers to the detriment of competitors and final consumers by reducing the variety of choice and downward pressure on prices.

#### Block Exemption Examination

After examining the agreements in detail, the CB started its examination on the revocation of the block exemption granted to such agreements [5]. As stated in Art. 13 of the Act, the exemption decisions may be revoked or particular behaviour of the parties may be prohibited in the following cases :

Change in any event constituting the basis of the decision,

Failure to fulfil the terms or obligations resolved,

Having taken the decision on the basis of incorrect or incomplete information concerning the agreement in question.

Last two revocation reasons not existing in this case, the CB focused on the «change in any event constituting the basis of the exemption decision.

As we mentioned in our comments in the Frito Lay Decision of CB [6], the Communiqué n° 2002/2 has been amended by the Communiqué n° 2007/2 and the application of the block exemption is limited to the suppliers having market share not exceeding %40 of the relevant market on which it purchases the contract goods or services. Parallel to this amendment [7], the new system incurs a limit of % 40 market share (for the buyer) for the vertical agreements containing exclusive supply obligations.

As CCI is in dominant position (with a market share more than %40) in the cola-flavored and generally in CSD and sports drinks market both in on-premise and take-home channel, the CB decided that CCI distribution agreements should no more benefit from block exemption. However, the CB underlined that the block exemption continue for the non CSD market except sports drinks.

#### Individual Exemption Examination

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The CB, as a last part of its investigation, examined whether the distribution agreements of CCI, may benefit from individual exemption, or not. Art. 5 of the Act reads as follows :

"The Board, in case all the terms listed below exist, may decide to exempt agreements, concerted practices between undertakings, and decisions of associations of undertakings from the application of the provisions of article 4 [8]:

- a) Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services,
- b) Benefiting the consumer from the above-mentioned,
- c) Not eliminating competition in a significant part of the relevant market,
- d) Not limiting competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b)."

The CB decided that the agreements do not comply with the individual exemption conditions stated in Art. 5 of the Act by two reasons :

1. Due to the dominant position of CCI in the relevant market, the exclusivity provisions (de iure) in the agreements should be considered as eliminating competition in a significant part of the relevant market, and
2. Due to the dominant position of CCI in the relevant market, the exclusivity related practices such as target/growth rebates and cooler exclusivity should be considered as limiting competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b) of art.5 of the Act.

#### Additional Arrangements

The CB added that CCI's distribution agreements may benefit from individual exemption provided that the exclusivity and exclusivity related provisions entering into the scope of Art.4 of the Act are removed from the agreements in the following manner [9] :

1. No more exclusivity arrangements: At all times, CCI customers will remain free to buy and sell CSDs from any supplier of their choice.
2. No target and growth rebates: CCI will no longer offer any rebates that reward its customers purely for purchasing the same amount or more CCI products than in the past [10].
3. 20% free space in CCI coolers: In the outlets in take-home channel area less than 100m<sup>2</sup>, where CCI provides a free cooler and there is no other chilled capacity in the outlet to which the consumer has a direct access, the outlet operator will be free to use at least 20% of the cooler provided by CCI for any product of its choosing. In parallel, in the sale points in on-premise channel, where CCI provides a free cooler and there is no other cooler suitable for stocking CSDs other than those of CCI's, the operator will be free to use at least 20% of the cooler provided by CCI for any product of its choosing.
4. The arrangements in point (3) above shall not be applied for the products that the competitors have more than 50% and more than twice the share of CCI in the relevant market.
5. The arrangements in point (3) above shall not be applied for the new products of the competitors during 2 years

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commencing from the introduction of the same product to the market by CCI.

## Conclusion

This decision of the CB shall be considered as commencement of a new period in Turkish Competition Practice according to which the CB started to apply "de facto exclusivity" criteria in order to decide on target and growth rebate applications, cooler exclusivity applications, provisions of free of cost products [11].

However, we consider that the conclusions of CB relating to the prohibition of target and growth rebates, cooler exclusivity and free of cost products are neither grounded nor satisfactory.

Moreover, the concept of "de facto exclusivity" needs more elaborated criteria and should not be understood too large in a manner to prohibit any marketing practices and thus penalizing the dominant position of the undertaking.

[1] The CB's relevant product market definition is parallel to the definition made by the Commission in its recent Coca-Cola decision (Commission Decision 2005/670/EC, of 22 June 2005, relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/A.39.116/B2 - Coca-Cola) (OJEU L 253, 29 September 2005, p. 21)).

[2] This view was reached on the basis that, contrary to the take-home channel, the sale of CSD in the on-premise channel is linked to the provision of additional services.

[3] The CB also makes an evaluation of the market upon the actors and their activities in the relevant market and the sub-markets. The CB concludes that CCI is in dominant position with its market share in excess of 60-65% in the cola-flavored drinks sub-market. The biggest concurrent of CCI in the said sub-market is Pepsi (15-19%) and Ülker (Turkish group producing cola from July 2003 - 15-19%) and other national or regional cola producers (0-8%). In the orange-flavored drinks sub-market CCI (Fanta) is also in dominant position with its market share 50-55%. However in the bitter drinks sub-market, the master is Pepsi with a market share of 40-45% (Fruko, Seven-Up) compared to 15-19% market share of CCI. The other gaseous drink sub-market constitutes a very limited part of the CSD market (2%) and the CB does not make a market share evaluation of the competitors. Regarding the bottled water and fruit juices sub-markets, CCI has no significant market share. In the ice tea sub market Pepsi is in dominant position (Lipton Ice Tea, 70-74%) and CCI is in the second rang (Nestea, 20-24%). At last, in the energy drink sub-market CCI is in second position (Burn-25-29%) against Red Bull (40-44%).

[4] The CB underlined that these thresholds are determined, often, by reference to the customers' purchases during a previous period.

[5] According to the [Block Exemption Communiqué n° 2002/2 on Vertical Agreements (hereinafter referred as "Communiqué n° 2002/2"), , Art.2 modified by Communiqué n° 2007/2, the vertical agreements that do not contain any prohibited provisions should benefit automatically from the block exemption.

[6] Please see Prof. Dr. Ercüment Erdem, The Turkish Competition Board holds that a distribution agreement contains prohibited resale price maintenance (Frito Lay , e-Competitions, n° 13737.

[7] By the above referred amendment, the Turkey takes a big step within the harmonization of the Turkish Block Exemption System to the European system. Another innovation introduced by the Communiqué 2007/2 is regarding the parallel networks created by vertical limitations of a similar nature covering more then %50 of the relevant market. If such a case occurs, the CB may issue a separate communiqué excluding the above referred vertical agreements from the

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exemption granted by the Communiqué 2007/2.

[8] Art. 4 of the Act regulates the prohibition of the agreements, concerted practices and decisions limiting, restricting and distorting competition.

[9] The CB granted to CCI a period until 1 July 2007 for the execution of the additional arrangements.

[10] An exception is recognized for (1) sponsorship agreements while the events not exceeding sixty days per year and (2) public and private tender agreements containing exclusive CSD supply rights.

[11] This new period commence with this Coca-Cola decision and Mey decision dated 10 September 2007 numbered 07-70/863-326 and continue with Algida decision dated 15 May 2008 numbered 08-33/421-147 (grounded decision is not published yet.)

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