
Resale Price Maintenance – Following The Effect

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By publishing its reasoned decision¹ on the preliminary inquiry against Duru Bulgur Gıda San. ve Tic. A.Ş. ("**DURU**"), the Turkish Competition Authority ("**TCA**") has added a new one to its decisions which include effect analysis of resale price maintenance ("**RPM**") practices. Although, Article 4(1)(a) of Block Exemption Communiqué No. 2002/2 on Vertical Agreements provides that RPM practices would not benefit from block exemption and the TCA used to evaluate RPM as a *per se* violation, in its recent decisions, the TCA subjects RPM practices to a *rule of reason* analysis and assesses the effects of such practices. In these decisions², the TCA has analysed the effects of RPM by considering several factors such as market structure, competition level and effect on consumers.

The TCA has initiated ex-officio preliminary inquiry against DURU which is active in the production and wholesale of dry food including bulgur, legumes and rice in order to determine whether Article 4 of the Competition Law is violated by DURU via RPM practices. It is interesting to note that the preliminary inquiry was initiated based upon a document which was obtained by the TCA during the on-spot inspection within the scope of another preliminary inquiry against a retailer association.

The majority of documents obtained during the preliminary inquiry stage was related to the price negotiations between DURU and retailers on shelf prices (12 documents) and the communication between the parties regarding activities and inserts (15 documents), while the remaining documents include DURU's warnings to retailers for fixing their shelf prices. In this context, the TCA expressed that retailers and DURU communicated with each other in order to determine the shelf prices, especially during campaigns and discounts periods.

In its assessment on RPM, the TCA has focused on the following:

- whether the market has a competitive structure,
- the degree of the competition between brands,
- the concentration level of the market,
- the market power of the concerned undertaking and its competitors,
- whether buyer power is present or not,
- buyers' compliance with recommended sales price and
- whether an inspection and/or sanction mechanism has been established by the supplier

First, the TCA addressed the sector's general character and competitive structure. Accordingly, the TCA has established that there are more than hundred large and small players in the grains and legumes market in Turkey. Further, it was seen that the HHI was below 1000 (it is assumed that markets with HHI below 1000 are competitive). From the retailer perspective, the TCA has stated that especially discount stores and retail chains were able to exert competitive pressure on the suppliers as they have significant buyer power and that the suppliers were not able to dictate their terms on such retailers. The TCA expressed that the anti-competitive effects of RPM would have been more visible in concentrated markets. The TCA noted that although DURU may be considered a strong player in some geographical areas, it was seen that retailers in such areas followed the prices of their competitors and did not allow DURU to force them to charge higher prices. Given the significant buyer power and high competitive pressure of discount stores and retail chains, the overall effects of DURU's RPM practices were effectively neutralized.

Second, the TCA has made a comparison between the prices of DURU products and other brands' products. The TCA determined that although DURU products were generally more expensive than the other brands, there were certain brands that had the same price levels with DURU.

The TCA further examined whether the possible negative effects of RPM were actually realized. Within this scope, price increases that can be regarded as the most significant negative impact were evaluated. In this context, it was seen that DURU closely monitored shelf prices of retailers and had a tendency to intervene. However, the documents obtained during the on-spot inspections showed that retailers negotiated with DURU based on other retailers' prices and that the retailers were more likely to follow each other's prices and sell DURU products for cheaper prices than foreseen by DURU.

Finally, the TCA examined the sales agreements between DURU and retailers and determined that there is no provision that justified RPM in the agreements.

In light of the foregoing, the TCA decided not to initiate a full-fledged investigation against DURU. On the other hand, since there was concrete evidence of DURU's intervention with the prices of the retailers, the TCA decided to issue an opinion pursuant to the Article 9(3) of the Competition Law (which is parallel to the European Union Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty), stating that RPM practices of DURU must be terminated.

By issuing this decision, the TCA clearly showed that the TCA consolidated its position on conducting an effect-based analysis in RPM cases. Consequently, in near future, it is highly probable that the TCA may be dealing with large-scale RPM cases by using the same effect-based approach.

Footnotes

1 TCA's Duru Decision dated 08.03.2018 and numbered 18-07/112-59.

2 TCA's Çilek Decision dated 20.08.2014 and numbered 14-29/597-263; Dogati Decision dated 22.11. 2014 and

numbered 14-42/764-340; Yataş Decision dated 27.09.2017 and numbered 17-30/487-211.