
Resale Price Maintenance in Turkey in Light of the Most Recent Case Law

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Introduction

By the end of the first quarter of 2019, the Turkish Competition Authority ("**TCA**") consecutively published two reasoned decisions on resale price maintenance ("**RPM**") focusing on the practices carried out by Türk Henkel Kimya Sanayi ve Ticaret A.Ş. ("**Henkel**")¹ and Sony Eurasia Pazarlama A.Ş.'s ("**Sony**")².

Both decisions are quite extraordinary from the perspective of the established customs and precedents of the TCA. This is because; the case-handlers in both cases concluded in their respective investigation reports (which resembles the statement of objections of the EU Commission and is prepared as a result of a lengthy investigation process) that the relevant undertakings did not violate the law and that there was no room for imposition of administrative fines. It should be mentioned that the examples whereby the Board, which is the decision-making body of the TCA, imposed fines on the undertakings despite the presence of an investigation report that finds no violation is extremely rare in the TCA's enforcement history.

Yet, in both Sony and Henkel cases, TCA has concluded that imposing administrative fines was necessary vis-à-vis the practices performed by Henkel and Sony and penalized the respective undertakings with 6.944.931,02 and 2.346.618,62 Turkish Liras.

With its recent decisions, the TCA provides important insights regarding its approach towards RPM and sets a framework for the undertakings that would enable them to assess the compliance of their current practices with the competition law.

Is it Illegal to Monitor the Prices of the Resellers?

The TCA indicated that Henkel had been utilizing a computer program called "Field Control Services (FCS)" to monitor its buyers' behaviours, such as resale prices and shelf positioning of Henkel's products. It is noteworthy to mention that FCS enabled Henkel to compare the insert prices ("insert prices" refer to the prices implemented for marketing campaigns incentivized and supported by Henkel) with recommended resale prices and to check the visibility of Henkel products in the markets, in comparison with competing products, for any given period.

The TCA further determined that Henkel had been utilizing another monitoring system called "Star Store" specifically for personal care and beauty products, which enabled the company to monitor the parity between resale prices and recommended campaign prices.

Although the TCA clearly set forth that Henkel did have certain tools would enable it to monitor the resale prices closely and to detect any deviation from the recommended resale prices, it made it crystal clear that having such tools is not a violation in and of itself. The TCA stipulated that a violation would occur in case it can be shown that Henkel does interfere with the resale prices by using such tools.

The TCA then delved into Henkel's market practices and found various communications revealing that Henkel had been monitoring resale prices as well as their compatibility with the recommended campaign prices and warning its purchasers to revise their prices, if the resale prices are incompatible with the recommended prices.

Is RPM a Violation by Object or Should the Effects be Assessed?

After establishing that Henkel had engaged in RPM, the TCA expressed that RPM could not be justified by an individual exemption analysis, as it is a violation "by object". The TCA's opinion on a potential exemption analysis for RPM further pointed out that RPM practices hinder intra-brand competition and inflate consumer prices.

In the Sony investigation, the TCA determined that Sony had monitored its buyers' resale prices on online platforms and took action by threatening to cease the financial support provided to the resellers that do not comply with the recommended prices. In parallel with the remarks made in the Henkel Decision, the TCA once again indicated that RPM practices could not be subjected to an individual exemption assessment and that they constitute a violation "by object". Yet, despite this approach, the TCA assessed whether Sony's practices did have actual effects in the market.

Within the scope of this effects-based analysis, the TCA first determined that there was no substantial mechanism to deter non-compliance with Sony's recommended price. Moreover, although the TCA found evidence showing that Sony threatened to cut the financial support provided to the resellers that do not abide by the recommended priced, it was seen that no concrete action was taken in that respect and the said threats did not materialize. The TCA established that Sony have continued to work with the dealers, which had not complied with the recommended prices and have not ceased to provide financial support to such dealers.

Additionally, the TCA compared the *de-facto* prices charged by the resellers and the recommended prices shared by Sony and identified deviations from Sony's recommendations.

Following these, the TCA inquired whether Sony's online sales occupy a considerable part in its total sales and determined that the volume of online sales was negligible. However, the TCA attributed a great importance to the restrictions that are targeting online sales, as it indicated that customers tend to monitor product prices online and use them as a means for bargaining against brick and mortar stores and such a mechanism puts a competitive pressure on conventional distribution channel. In light of the foregoing, the TCA indicated that although the volume of Sony's online sales was negligible, a resale price restriction imposed on resellers' online sales could have

crucial effects on competition.

The TCA further considered that Sony's low market share in the markets for cell phone and smart TV was a factor that reduces the effects of RPM in the market. Furthermore, it was indicated that Sony faces competitive pressure from Microsoft and parallel imports in the markets for video games and game consoles, which could also be considered as an element minimizing the effect caused by RPM.

However, despite this detailed effects-based analysis, the TCA concluded that RPM implemented by Sony had violated the article 4 of the the Act on the Protection of Competition ("**Competition Act**") as it constituted a violation by object. Yet, it should be noted that the limited effect of the conduct in question led TCA to reduce the base fine to be imposed on Sony.

Conclusion

Considering both investigations, it is seen that although RPM is deemed as a violation by object, the effect of the conduct on the market constitutes a parameter to be considered in determining the degree of the penalty.

It is important to mention that, Competition Board's decision establishing the violation was taken by a majority vote and the President of the Board submitted a dissenting opinion, stipulating that RPM should not be deemed as a violation by object and that it should only be deemed as a violation if the anti-competitive effects are shown. It is important to remind that until the Henkel and Sony decisions, the TCA did indeed favour an effects-based approach and refrained from penalizing RPM practices that do not have any negative impact on the market. For now, it seems that the TCA has abandoned its prior precedents when it comes to RPM and opted for a considerably more stringent approach.

Footnotes

1 TCA's Decision dated 19.09.2018 and numbered 18-33/556-274 (published on 26.03.2019)

2 TCA's Decision dated 22.11.2018 and numbered 18-44/703-345 (published on 08.04.2019)