

Competition Board concludes preliminary investigation highlighting its approach to online sales

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Introduction

On 4 June 2020 the Competition Board published its reasoned decision of 6 February 2020 (20-08/83-50) following a preliminary investigation based on allegations that Yataş Yatak ve Yorgan Sanayi Ticaret AŞ and Doğtaş Kelebek Mobilya Sanayi ve Ticaret AŞ had violated Article 4 of Law 4054 on the Protection of Competition by:

- determining dealers' resale prices;
- fixing discount rates; and
- limiting their dealers' payment methods.

As a result of the preliminary investigation, the Competition Board found no evidence demonstrating the alleged behaviours. However, the preliminary investigation revealed that Doğtaş and Yataş had been restricting their dealers' online sales, which was not part of the allegations in the beginning.

Sector and relevant product market

In relation to the product market, the Competition Board stated that Turkish furniture market players are diverse in size. The board also classified undertakings operating in the furniture sector into three groups:

- 'no-name', small-scale firms with fewer concept stores and limited product types;
- the underground economy (the board stated that these two groups consist of between 65% and 70% of the market); and
- branded undertakings which operate countrywide.

The Competition Board stated that with its Istikbal, Bellona and Mondi brands, Erciyes Anadolu Holding was the leading market player. The board defined the relevant product market based on the product groups taking into account, among other things, the supply-side substitution between them. Accordingly, the board defined the following markets:

- beds;
- sofa beds;
- home textiles;
- modular furniture; and
- sitting room sets.

Examination of documents collected during on-site inspections

In its assessment, the Competition Board first examined various agreements which Yataş and Doğtaş had executed with their dealers. The board concluded that the price lists sent by Yataş and Doğtaş to their dealers were recommended retail prices and that there was no provision in the agreements and documents seized during the on-site inspections to indicate that Yataş and Doğtaş had determined the resale prices of their

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dealers, fix discount rates or limit payment methods.

In relation to two emails collected as evidence from Yataş, the board stated that these documents implied that Yataş monitored and interfered with the resale prices of its dealers. The relevant document shows that:

- Yataş was informed about one of its dealers applying lower prices than Yataş's own stores; and
- one of Yataş's managers responded that they would discipline the relevant dealer offering low prices and terminate the agreement with them, if deemed necessary.

The Competition Board assessed that the relevant document related only to an isolated, non-recurring situation specific to the Izmir region, noting that there was no other evidence indicating that resale price maintenance had occurred in the same region or other regions. The board also analysed the dealers' resale prices to see whether Yataş had engaged in resale price maintenance.

In this regard, the board examined Yataş's recommended prices and the dealers' actual sales prices realised in the market. The assessment highlighted that the dealers had been free to set their prices differently from the recommended prices and that they had been able to set prices even below the lowest prices in Yataş's recommended prices in certain situations. It was further noted that the dealers had determined their pricing policies internally and sold their products as they wished. Accordingly, the board rejected the allegations, noting that there was no evidence indicating that Yataş and Doğtaş had engaged in resale price maintenance, fixing discount rates or limiting payment methods.

With regard to Doğtaş, the Competition Board noted that no evidence had been found to signal that Doğtaş was involved in price maintenance, fixing discount rates or limiting payment methods, in the scope of both on-site inspections of Doğtaş's and the concerned dealer's premises. Nevertheless, the board examined the dealer's actual sale prices and Doğtaş's recommended prices and concluded that the dealer's prices differentiated from the recommended price and that various discounts and payment methods had also been offered to customers.

Assessment of agreements

The Competition Board evaluated whether Yataş and Doğtaş had restricted online sales as the board found that some of the provisions in the agreements found were restrictive in terms of online sales.

The board first referred to the EU Vertical Block Exemption Regulation (330/2010), accompanied by its Guidelines on Vertical Restraints in terms of online sales. It stated that the following restrictions exclude the relevant agreement from block exemption:

- agreeing that the (exclusive) distributor will prevent customers located in another (exclusive) territory from viewing its website or will redirect customers to the manufacturer's or other (exclusive) distributors' websites;
- cancelling a customer's order if the customer's credit card information reveals that they are not located in the exclusive territory;
- a restriction on the proportion of total sales conducted over the Internet; and
- agreeing that the distributor will pay a higher price for products planned to be resold by the distributor online than for products planned to be resold offline.

The Competition Board indicated that if the restriction on sales has no objective justification, it would be regarded as anti-competitive behaviour. Subsequently, referring to the Block Exemption Communiqué on Vertical Agreements (Communiqué 2002/2), the board noted that a provision restricting the online sales of authorised distributors would cause a vertical agreement to fall outside the communiqué's scope and within the scope of Article 4 of Law 4054 because online sales are primarily categorised as passive sales and their restriction would be deemed a restriction of passive sales.

The board referred to its *BSH* decision,⁽¹⁾ in which it confirmed that although the wording of an agreement may not always result in a passive sales restriction an agreement's implementation in practice may lead to a *de facto* restriction of passive sales.

The board also referred to its *Jotun* decision,⁽²⁾ in which it indicated that although Jotun established a selective distribution system, since it restricts the online sale of authorised distributors, it should alter and renew its dealer agreement to exclude the prohibition of passive sales via the Internet.

Assessment with regard to exemption

The Competition Board assessed the provisions of Yataş's and Doğtaş's agreements by noting that provisions which could lead to the restriction of online sales and their effect in practice should be evaluated to determine whether said agreements benefit from Communiqué 2002/2's safe harbour. As a result of its assessment, the

board found that both Yataş's and Dođtaş's aforementioned agreements did not benefit from the protective cloak of the block exemption since they both restricted online sales, which are regarded as passive sales. Thus, the agreements fell within the scope of Article 4 of Law 4054. After determining that the agreements did not enjoy the block exemption, the board conducted an individual exemption analysis within the scope of Article 5 of Law 4054. As such, the board decided that restricting passive sales are viewed as a hardcore restriction, which does away with the expected economic or technical improvement and thus such agreements will not be granted individual exemption.

As a result, considering both Yataş's and Dođtaş's market position, the board decided that there was no need to initiate a fully fledged investigation and ordered that Yataş and Dođtaş avoid practices that restrict passive sales and alter and renew their dealership agreements accordingly, otherwise written opinions should be delivered to Yataş and Dođtaş in accordance with Article 9(3) of Law 4054.

Comment

The Competition Board emphasised its established position that restricting passive sales, unless justified with objective reasons depending on the nature of the concerned product, is regarded as a hardcore restriction, which does not benefit from the block exemption and, as the case may be, from individual exemption.

The decision also demonstrates the Competition Board's tendency to follow EU practice closely and implement such practice in Turkey as necessary.

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Endnotes

(1) The Competition Board's decision of 22 August 2017 (17-27/454-195).

(2) The Competition Board's decision of 15 February 2018 (18-05/74-40).

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