

e-Competitions

Antitrust Case Laws e-Bulletin

Preview

The Turkish Competition Authority imposes administrative monetary fines on a manufacturer and distributor of heating systems for engaging in vertical restraints (*Baymak*)

ANTICOMPETITIVE PRACTICES, DISTRIBUTION/RETAIL, BLOCK EXEMPTION (REGULATION), DISTRIBUTION AGREEMENT, RESALE PRICE MAINTENANCE, VERTICAL RESTRICTIONS, MANUFACTURING, SERVICES, SANCTIONS / FINES / PENALTIES, ABUSE OF ECONOMIC DEPENDENCE, NON-COMPETITION CLAUSE, TURKEY

Turkish Competition Authority, *Baymak*, 20-16/232-113, 26 March 2020 (Turkish)

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This case summary concerns an analysis of the Board's *Baymak* decision [1], which concerned an administrative monetary fine of TL 26,813,704.10 against *Baymak Makina San. ve Tic. A.Ş.* ("*Baymak*") for the violation of Article 4 of the Law No. 4054 on the Protection of Competition ("*Law No. 4054*") through resale price maintenance practices, restrictions on online sales and non-compete obligations with a duration exceeding five years. Upon its evaluation of the merits of the case at hand, the Board resolved that none of the three types of vertical restraints that *Baymak* imposed on its dealers could benefit from the block exemption granted under Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("*Communiqué No. 2002/2*") or an individual exemption under Article 5 of Law No. 4054, and thus, *Baymak* violated Article 4 of Law No. 4054.

Background

The Board initiated a full-fledged investigation against *Baymak* in 2018 to determine whether *Baymak* violated Article 4 of Law No. 4054, based on the allegations that (i) a number of agreements entered into between *Baymak* and its authorized dealers included non-compete obligations for an indefinite time period, (ii) such agreements included provisions aimed at resale price maintenance and that *Baymak* interfered with its dealers' resale prices based on these provisions, and (iii) *Baymak* prevented its dealers from making online sales.

Eventually, the Board resolved that *Baymak* violated Article 4 of the Law No. 4054 through resale price maintenance practices, restrictions on online sales and non-compete obligations with a duration exceeding five years; and imposed an administrative monetary fine against *Baymak*. Furthermore, the Board ordered

Baymak to amend the provisions which enabled resale price maintenance, the duration of the non-compete obligations and the provisions concerning restrictions on the dealers' sales to certain customers; as well as to cease its practices which were in violation of Article 4 of Law No. 4054.

The Board's Assessment on Non-Compete Obligations:

In terms of the allegations regarding the non-compete obligations imposed by Baymak on its dealers, the Board stated that the agreements which contained non-compete obligations for an indefinite period, but had not been in force for a duration exceeding five years at the time of the investigation should be amended to be in compliance with the Communiqué No. 2002/2. The Board also referred to its case law and indicated that otherwise, such agreements would not benefit from block exemption under Communiqué No. 2002/2 at the end of the fifth year from the signing dates of the agreements. [2] With respect to the agreements between Baymak and its dealers which contained non-compete obligations for an indefinite time period and had been in effect for more than five years, the Board indicated that these agreements could not benefit from the protective cloak of the block exemption under Communiqué No. 2002/2. The Board subsequently proceeded by evaluating whether these agreements resulted in market foreclosure for Baymak's competitors; and confirmed that (i) Baymak did not have high market shares in any of the plausible relevant product markets, (ii) some of Baymak's competitors had higher market shares than Baymak in several of these product markets and the markets were competitive, (iii) there were not any entry barriers in the relevant product market and the market participants did not have any difficulties in finding dealers to work with. To that end, the Board resolved that these agreements did not result in any market foreclosure and therefore the adverse effects of the non-compete obligations in these agreements were rather limited.

That being said, within the scope of its individual exemption analysis with respect to the agreements between Baymak and its dealers, Board concluded that the agreements restricted competition more than what was compulsory for achieving such efficiencies by way of the non-compete obligations.

The Board's Assessment on Resale Price Maintenance:

In consequence of its review of the agreements between Baymak and its dealers, the Board determined that there were provisions which stipulated that the dealers could sell their products based on the price lists circulated by Baymak and they could not set their prices lower than the prices provided on such price lists. Moreover, the Board detected that the provisions included within the agreements were also applied in practice, Baymak interfered/tried to interfere with its dealers' prices by actively monitoring and warning the dealers whose sales prices were lower than the prices that it circulated.

The Board referred to its settled case law in recent years and indicated that resale price maintenance practices has been considered as a "by object" restriction of competition [3], and it was not expected for resale price maintenance to satisfy the conditions for individual exemption. In this context, the Board concluded that (i) there were provisions in the agreements between Baymak and its dealers aimed at resale price maintenance, (ii) Baymak also interfered with its dealers' prices through its practices via actively monitoring their sales prices, and (iii) therefore Baymak restricted competition in the market by reducing intra-brand competition.

Within the scope of its individual exemption analysis on this front, the Board stated that Baymak's practices aimed at restricting certain dealers' below cost prices could protect its brand image before consumers and therefore result in efficiency gains as well as increased consumer welfare. Having said that, the Board indicated that resale price maintenance was not necessary to obtain such efficiencies. Furthermore, taking into account the scope of the documents which concerned resale price maintenance practices of Baymak, the Board resolved that such practice is also targeting other dealers as well and Baymak's defense stating that it only restricted below cost prices by wholesaler dealers was not accurate. It is also important that the Board dismissed Baymak's arguments that the dealers did not comply with Baymak's employees' attempts or it did not result in resale price maintenance in the market.

The Board's Assessment on Restrictions on Online Sales:

Although the Board indicated that the agreements did not include any provisions that were aimed at restricting the dealers' online sales, the Board found several documents that demonstrated Baymak's practices towards restricting online sales as a result.

Within this framework, the Board referred to its case law which indicated that restrictions on online sales were considered as restrictions of passive sales. [4] To that end, the Board pointed out that such restrictions would not benefit from a block exemption and in order for them to benefit from an individual exemption, there must be a valid ground for restricting online sales. The Board concluded that Baymak imposed an absolute restriction on online sales made by its wholesaler dealers on their own web sites or third party platforms, irrespective of whether the customers were end-customers or sub-dealers/retailer dealers. Given that Baymak restricted its wholesaler dealers' online sales made to sub-dealers/retailer dealers, which are not end-customers, the Board resolved that those restrictions would not benefit from block exemption. Moreover, the Board indicated that the restrictions would not benefit from individual exemption as well, given that the products Baymak sold and marketed via its dealers were not among the products which could have constituted a valid ground for such restrictions. Although the Board did not indicate for which products the undertakings could argue that restrictions on online sales were based on valid grounds, its case law sheds light on this issue. Accordingly, restrictions on online sales of products such as luxury goods where sales on third party platforms could damage brand image, prescription medicinal products and products whose online sales are publicly banned could benefit from individual exemption. [5]

Conclusion:

Baymak decision reinforces the Board's recent case law setting forth that the Board considers resale price maintenance practices as a by object restriction and could find a violation irrespective of whether it had any effects on the market. Furthermore, the Board made it clear that it takes restrictions on online sales very seriously and demonstrated its unwillingness to yield to such practices. Within this framework, undertakings are expected to become even more careful when dealing with their resellers and think twice when imposing such vertical restrictions in order to ensure they are not crossing the line in the face of the Board's consistence stance on this front.

[1] The Board's Baymak decision, dated 26.03.2020 and numbered 20-16/232-113.

[2] The Board's Moneygram/Denizbank/Kuveyt Türk decision dated 08.08.2018 and numbered 18-27/442-212; İpragaz/Yüksel decision dated 09.09.2009 and numbered 09-41/1045-262.

[3] The Board's Henkel decision dated 19.09.2018 and numbered 18-33/556-274; Sony decision dated 22.11.2018 and numbered 18-44/703-345; Consumer Electronics decision dated 07.11.2016 and numbered 16-37/628-279.

[4] The Board's BSH decision dated 22.08.2017 and numbered 17-27/454-195; Jotun decision dated 15.02.2018 and numbered 18-05/74-40.

[5] The Board's Yataş decision dated 06.02.2020 and numbered 20-08/83-50.