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Antitrust Case Laws e-Bulletin

Preview

The Ankara Administrative Court annuls the Turkish Competition Board's decision to close its preliminary investigation conducted against a company regarding its alleged resale price maintenance practices in the food retailing sector (*Duru Bulgur*)

ANTICOMPETITIVE PRACTICES, REALE PRICE MAINTENANCE, AGRICULTURE / FOOD PRODUCTS , JUDICIAL REVIEW, TURKEY, ANNULMENT, RULE OF REASON

Ankara Administrative Court, *Duru Bulgur*, Case 2020/315 E, 2020/1569 K., 17 September 2020 (Turkish)

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This case summary includes an analysis of the Ankara 13th Administrative Court's (the "**Court**") judgment, [7] where the Court reviewed and annulled the Turkish Competition Board's (the "**Board**") decision to close its preliminary investigation conducted against Duru Bulgur Gıda San. Tic. A.Ş. ("**Duru Bulgur**") regarding its alleged resale price maintenance ("**RPM**") practices. The Court found that as Duru Bulgur's practices do indicate a violation within the scope of the **Law No. 4054** on Protection of Competition ("**Law No. 4054**"), the Board should have expanded the initial preliminary investigation to a full-fledged one, and duly obtained and scrutinized all the available evidence, in order to avoid any doubt as to the existence of a competition law violation in the matter at hand.

Background

The stages of the case and the process of judicial review are summarized below in chronological order to establish a cohesive background:

(1) In 2017, the Board launched a preliminary investigation to evaluate whether Duru Bulgur had violated Article 4 of Law No. 4054 by way of intervening in the resale prices of its retailers. While the Board found that Duru Bulgur had closely interacted with its retailers in deciding the shelf prices of its products, particularly during the discount and promotion periods, the Board delved into analyzing the effects of these practices on the relevant market. More specifically, the Board examined the following factors: (i) the competitive structure of the market, (ii) inter-brand competition and the competitive pressure applied by the chain stores, (iii) pricing mechanisms in discount chain

stores and the fact that they priced some of the relevant products at half of the other market prices, (iv) Duru Bulgur's low market shares and the low concentration level in the market, (v) the fact that retailers often priced the products below the prices recommended by Duru Bulgur, and (vi) the lack of evidence indicating any monitoring mechanism for the implementation of the recommended prices set by Duru Bulgur. In accordance with its findings, the Board then concluded there was no need to initiate a full-fledged investigation and sent an opinion letter pursuant to Article 9(3) of Law No. 4054 that ordered Duru Bulgur to terminate its practices that could constitute RPM, in accordance with Article 9(3) of Law No. 4054. [2]

(2) In 2018, an individual consumer (Mr. Aydın Çelen) appealed the Board's decision, claiming that Duru Bulgur had acted against his interests through price increases of its products in various cities in Turkey, including Ankara, where he resided. The Court handling the case highlighted that in order for a consumer to be able to apply for the annulment of an administrative decision, there must be a personal, legitimate and actual interest on part of the plaintiff regarding the matter; in other words, the administrative act subject to the annulment application should have breached the plaintiff's personal interests, and there should be a substantial and reasonable connection between the administrative act and the plaintiff. Subsequently, the Court dismissed the lawsuit, as it found that the interest of the plaintiff as a consumer was not established in the case at hand. [3]

(3) Following the dismissal, Mr. Aydın Çelen appealed the Court's decision before the Ankara Regional Administrative Courts in 2019. Upon its assessment of the case, The Regional Court annulled the first instance judgment and concluded that the Board's decision could be subject to a lawsuit brought by the consumers whose interests had been affected, and thus remanded the case back to the Court to be re-examined on merits. [4]

Current Case

In its re-examination of the case, the Court initially recognized that the Board may decide not to initiate an investigation when, as a result of a preliminary investigation, there is no doubt in terms of the non-existence of violation; however, where the findings were not sufficient or conducive in reaching such a conclusion, then undoubtedly a full-fledged investigation would be required.

In this respect, the Court referred to the Board's evaluation in which it specified that while those Duru Bulgur practices that lead to RPM could fall within the scope of Article 4 of Law No. 4054, there was no need to initiate a full-fledged investigation, primarily based on (i) the non-concentrated structure of the market, (ii) intra-brand competition, (iii) competitive pressure in the organized retail market; and therefore decided to just send an opinion letter to Duru Bulgur to cease the practices that could be considered as RPM.

In conclusion, the Court found that based on the evidence collected during the preliminary investigation, the practices of Duru Bulgur appear to constitute a violation within the meaning of the Law No. 4054. Accordingly, since proving the lack of violation on part of Duru Bulgur beyond any doubt would require collecting and assessing all the information, documents and evidence that would have been obtained in case of an expanded investigation, the Court deemed the Board's decision not to initiate a full investigation was unlawful and annulled it in the re-examination phase.

Conclusion

The Court's annulment of the Board's Duru Bulgur decision is of significance because it is based on an exceptional RPM case. The Board's case law has so far been consistent in that RPM practices would be evaluated as "per se" violations. [5] However, similar to a few other relatively recent decisions, [6] in the Duru Bulgur decision,

the Board adopted the rule of reason approach and analyzed the effects of Duru Bulgur's RPM practices by considering the market structure, competition level and effect on consumers. The judgment sheds light on the Court's approach regarding the Board's interpretation of the findings in cases involving RPM practices, which also re-asserts the necessity of initiating a full-fledged investigation where the Board's assessments under the pre-investigation phase were not found sufficient by the Court.

[1] Ankara 13th Administrative Court judgment dated September 17, 2020, and numbered E:2020/315 K:2020/1569.

[2] The Board's *Duru Bulgur* decision dated March 8, 2018, numbered 18-07/112-59.

[3] Ankara 13th Administrative Court judgment dated December 20, 2018, and numbered E:2018/1875 K:2018/2595.

[4] Ankara Regional Administrative Court, 8th Administrative Chamber judgment dated November 20, 2019, and numbered E: 2019/1829, K: 2019/2624.

[5] See, for example, the Board's *Sony* decision dated 22 November 2018 and numbered 18-44/703-345, *Henkel* decision dated August 19, 2018 and numbered 18-33/556-274, *Anadolu Elektronik* decision dated 23 June 2011 and numbered 11-39/838-262.

[6] See the Board's *Çilek* decision dated August 20, 2014, numbered 14-29/597-263; *Dogati* decision dated October 22, 2014, numbered 14-42/764-340 and *Doğtaş/Yataş* decision dated September 27, 2017 and numbered 17-30/487-211