



An Overview of the Turkish Competition Board’s Approach to Resale Price Maintenance Practices in Light of the Groupe SEB Decision

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I. Introduction

The Turkish Competition Authority has recently published its *Groupe SEB* decision¹ in which it evaluated the allegation that Groupe SEB İstanbul Ev Aletleri Ticaret A.Ş. (“*Groupe SEB*”) and İlk Adım Dayanıklı Tüketim Malları Elektronik Tekstil İnşaat ve İletişim Hiz. San. Tic. Ltd. Şti. (“*İlk Adım*”) violated Article 4 of the Law No. 4054 on the Protection of Competition (“*Law No. 4054*”) by way of determining the resale prices and restricting the online sales of their distributors and other resellers. The Turkish Competition Board (the “*Board*”) assessed the activities of Groupe SEB and İlk Adım which included interfering with distributors’ pricing strategies, imposing sanctions on distributors that disrupt the pricing strategy such as prohibiting the online sales and also notifying distributors to increase their prices. Based on the evidence collected during the on-site inspections and upon consideration, the Board decided to impose administrative monetary fines on Groupe SEB and İlk Adım.

II. The Board’s Evaluation in Groupe SEB Decision

In setting out the background to the case, the Board described Groupe SEB as an undertaking active in the small home appliances market. Its products include steam irons, vacuum cleaners, personal and laundry care products, food and drink preparation accessories and electronic cooking appliances. Groupe SEB is active in the distribution of these product segments under various brands, namely Tefal, Rowenta, Moulinex and Krups, and through various sales channels such as exclusive shops, own shops, business to business, business to consumer, internet shops, corner dealers, premium dealers, chain stores, technology

¹ Turkish Competition Board’s decision dated March 4, 2021 and numbered 21-11/154-63.

superstores, shop in shop and its distributor, İlk Adım. More specifically, İlk Adım is Groupe SEB's distributor for traditional stores and local dealers.

As for the relevant product market, the Board determined this to be the small house appliances market, for the case at hand. The Board also pointed out that the market consisted of many different undertakings which operated through six main sales channels: (i) distributors and exclusive shops, (ii) traditional shops and local dealers, (iii) local chain stores, (iv) e-commerce platforms, (v) technology superstores and (vi) hypermarkets. In light of this, the Board defined the geographic market as Turkey.

In its substantive assessment, the Board mainly focused on the allegations concerning the practices of Groupe SEB and İlk Adım, with regard to (i) resale price maintenance ("**RPM**") and (ii) online sales restrictions.

i. Assessment on the Resale Price Maintenance Allegations

Firstly, the Board evaluated the practices conducted by Groupe SEB. The Board stated that the main sales channels for products distributed by Groupe SEB are the "Tefal shops" (exclusive shops) and corner stores. On the other hand, the Board also stated that internet sales constitute another important sales channel, as online sales have increased over the past years and that e-commerce has become more popular.

After examining the documents collected during the on-site inspection, the Board stated that Groupe SEB mainly aims to keep the final sales prices of the products at the recommended level. It is also seen from the documents that in case Groupe SEB determines that a price is below the recommended level, it requests the dealers to increase their prices to the recommended sales prices. Moreover, it is also understood that Groupe SEB has been monitoring the prices constantly, especially for sales made through online channels, that employees from different sales channels have been constantly reporting the prices to each other, and based on this data Groupe SEB issues warnings to its distributors who apply lower sales prices. All in all, the Board revealed that Groupe SEB's objective and sales strategy was ensuring resale price maintenance.

The Board stated that Groupe SEB's interference in the sales prices was observed in various ways. Indeed, Groupe SEB is shown to have interfered directly with the prices applied by its dealers under its own sales channels. Moreover, Groupe SEB interfered with the prices applied by its distributor İlk Adım's dealers through issuing warnings to İlk Adım. The Board determined that the documents related to Groupe SEB's activities on resale price maintenance concerned mainly online sales, as it was easier to determine any inconsistency between the recommended sales price and the prices applied by the dealers within the scope of online sales. However, it was noted that Groupe SEB's resale price maintenance practices also included other sales channels, based on its policy to ensure price consistency throughout all of its sales channels. In addition, the Board also found that Groupe SEB implemented certain measures against those undertakings which did not comply with its recommended sales prices.

In this respect, the Board stated that Groupe SEB and İlk Adım had interfered with the sales prices and applied sanctions, including the restriction and prohibition of online sales, to those who do not comply with the price maintenance. Consequently, it has been observed that some sellers increased their prices after facing these sanctions. The Board evaluated these practices to be resale price maintenance, a vertical restraint as per Article 4 of the Law No. 4054 which lists the competitive restrictions prohibited under Turkish competition law. In this case, fixing the purchase or sale price of products or services, or those elements such as cost and profit which form the price, and any terms of purchase or sale, fall within the prohibition set out in Article 4/1(a) of the Law No. 4054.

As for the evaluation of İlk Adım's practices, the Board found that when Groupe SEB determines that the prices applied by a dealer belonging to İlk Adım's sales channel are lower than it should be, Groupe SEB first informs İlk Adım of the matter and asks them to warn the dealer to increase the prices or terminate the sales of the products. In this respect, the Board concluded that Groupe SEB's resale price maintenance practices concerning İlk Adım's dealers are executed through İlk Adım, rather than directly by Groupe SEB. This highlights Groupe SEB's interference with İlk Adım's commercial practices. The Board evaluated the relationship between these two undertakings and stated that İlk Adım is an undertaking which is capable of taking decisions independently within the meaning of the general preamble of

the Law No. 4054. Referring to the preamble, the Board emphasized that competition law applies to all undertakings which conduct economic activities. As for the resale price maintenance practices in question, the Board found that İlk Adım was responsible for these practices, as it was an economically independent undertaking and a separate legal entity that resold the products supplied from Groupe SEB. Although the lists including the resale prices of the products were determined by Groupe SEB, İlk Adım was deemed liable for forcing its dealers to comply with those price lists and for interfering with their resale prices. Consequently, the Board concluded that these practices constituted resale price maintenance within the scope of Article 4 of the Law No. 4054.

Moreover, the Board stated that these resale price maintenance practices could not benefit from the block exemption set forth under the Block Exemption Communiqué No. 2002/2 on Vertical Agreements (“*Communiqué No. 2002/2*”) since they constituted a restriction within the meaning of Article 4(a) of the Communiqué No. 2002/2. Subsequently, the Board evaluated whether the cumulative conditions for individual exemption within the scope of Article 5 of Law No. 4054 were fulfilled, *i.e.*, if the practices (i) ensured new developments or improvements or economic or technical improvement in the production or distribution of goods and the provision of services; (ii) help customers benefit from the foregoing condition; (iii) did not eliminate competition in a significant part of the relevant market; and (iv) did not restrict competition more than necessary to achieve the goals set out in the first two conditions.

The Board decided that none of these conditions were fulfilled. Firstly, the resale price maintenance practices did not ensure any new developments or improvements; on the contrary, the Board emphasized that the high dealer prices would limit the intra-brand competition among the dealers and reduce their incentives to invest and minimize costs. The Board rejected Groupe SEB’s brand image defenses on this point, as increasing the products’ prices artificially would not preserve the brand image before the consumers as they claimed, nor would this lead to any efficiency gains. As for the second condition, the Board decided that it was not fulfilled either, since resale price maintenance was a form of restriction intended to reduce intra-brand competition which led to the increase of the prices for consumers. The Board also concluded that the third and fourth conditions were not fulfilled,



due to the fact that despite the many undertakings active in the small home appliances market, Groupe SEB had significant market power in many of the product segments and resale price maintenance led to the reduction of intra-brand competition.

The decision also included the Board's by object and effects based analysis. The Board stated that resale price maintenance was a by object infringement, and in light of the evidence collected during the on-site inspection, it was sufficient to determine the existence of the object to interfere with the resale prices of the dealers, to conclude there was a violation. Because of this, evaluation of the effects of the practices in the market was not an essential factor in order to decide whether a violation took place.

ii. Assessment on the Online Sales Restrictions Allegations

The Board stated that Groupe SEB was also involved in practices leading to the restriction of online sales, alongside its resale price maintenance practices. In some cases, Groupe SEB interfered directly with the internet sales of the dealers, and in others it conducted these practices indirectly, through İlk Adım. After evaluating the evidence collected during the on-site inspection, the Board stated that Groupe SEB constantly monitors the market and shapes its strategies concerning resale price maintenance based on the developments in the market.

The Board determined that Groupe SEB's practices related to the restriction or prohibition of internet sales were price-based. Whenever Groupe SEB had determined that the prices on the internet had not been in line with the price lists or the recommended prices issued, Groupe SEB interfered with the prices and requested a revision, and in case of non-compliance, Groupe SEB restricted the internet sales, sometimes even directly preventing the online activities of the infringers, to ensure they revised their prices. The Board concluded that this demonstrated that the restriction and prevention of internet sales appeared both as a sanction to ensure resale price maintenance and as a practice to directly restrict competition.

The evidence showed that while the request mostly originated from Groupe SEB, there were also cases that demonstrated İlk Adım's interference with its dealers' internet sales. In this respect, İlk Adım's practices could be considered as the restriction of passive sales within the

scope of Article 4 of the Law No. 4054. The Board did not consider İlk Adım's distribution network as a selective distribution network and therefore, decided that the restrictions imposed on the internet sales of the dealers could be evaluated within the scope of Article 4(b) of the Communiqué No. 2002/2. Therefore, the Board stated that the vertical relationship between Groupe SEB and İlk Adım's dealers could not benefit from the group exemption within the scope of the Communiqué No. 2002/2. The Board also analyzed the conditions set forth under Article 5 of the Law No. 4054 for individual exemption for this practice, but concluded that none of the conditions were fulfilled.

In light of the above, the Board decided that Groupe SEB and İlk Adım violated Article 4 of the Law No. 4054 through resale price maintenance and restriction of internet sales. In this respect, the Board imposed administrative fines on both undertakings.

III. An overview of the Turkish Competition Board's Approach to RPM Practices

Over the past few years, the Board has focused its attention towards vertical agreements, especially on resale price maintenance and restrictions of online sales practices. The Board's recent decisional practice highlights its approach towards these practices. In this respect, the Board's most notable decisions are briefly scrutinized under this section.

In its *Maysan Mando* decision,² the Board decided that Maysan Mando Otomotiv Parçaları San. ve Tic. A.Ş. ("**Maysan Mando**") violated Article 4 of the Law No. 4054 by determining the resale prices of shock absorbers through the supply agreements with its dealers. The Board evaluated such conduct under the Block Exemption Communiqué No. 2017/3 on Vertical Agreements in the Motor Vehicles Sector ("**Communiqué No. 2017/3**") and held that further to Article 6 of the Communiqué No. 2017/3, directly or indirectly prohibiting the distributors from freely determining their selling prices is considered as a restraint which aims to restrict competition, and any agreement that contains such restrictions cannot benefit from the block exemption provided within the scope of the Communiqué No. 2017/3.

² Turkish Competition Board's *Maysan Mando* decision dated June 20, 2019 and numbered 19-22/353-159.

To highlight another example of resale price maintenance, the Board’s *BP/Opet/PO/Shell* decision³ concerned the fuel and LPG sector. The Board investigated the practices of five undertakings and decided that four out of the five (BP Petrolleri A.Ş., Petrol Ofisi A.Ş., Shell & Turcas Petrol A.Ş. and OPET Petrolcülük A.Ş. – excluding Total Oil Türkiye A.Ş.) interfered with their dealers’ pump prices. The Board analyzed the investigated undertakings’ recommended prices and their dealers’ prices and ultimately decided that dealers predominantly complied with the prices set by the investigated undertakings. Therefore, the Board imposed an administrative monetary fine on the relevant undertakings for determining the resale prices of their dealers.

In *Yataş*,⁴ the Board evaluated the allegation that Yataş Yatak ve Yorgan Sanayi Ticaret A.Ş. (“*Yataş*”) and Doğtaş Kelebek Mobilya Sanayi ve Ticaret A.Ş. (“*Doğtaş*”) violated Law No. 4054 by determining the resale prices, fixing discount rates and limiting the payment methods of their distributors. The Board examined the various contracts that Yataş and Doğtaş executed with their distributors and based on the relevant provisions of the said contracts, concluded that the price lists provided by Yataş and Doğtaş were of an advisory nature and apart from that, there was no indication that Yataş and Doğtaş had determined the resale prices, fixed discount rates or limited payment methods under the contracts executed with their distributors. In its assessment, the Board compared the recommended sales prices and the actual sales prices of the dealers, and concluded that the dealers could deviate from the recommended sales prices and determine their own. In addition, after examining the invoices, the Board determined that the dealers were able to apply different percentages of discounts and offer various payment methods to the consumers. The Board, after assessing the provisions of Yataş’s and Doğtaş’s agreements, stated that neither Yataş’s nor Doğtaş’s contract provisions restricting online sales satisfied Article 5(a) of the Law No.4054, thus such agreements did not benefit from the protective cloak of individual exemption. All in all, the Board decided that there was no need to initiate a full-fledged investigation against these undertakings and issued a written opinion recommending that both Yataş and Doğtaş to alter

³ Turkish Competition Board’s *BP/Opet/PO/Shell* decision dated March 12, 2020 and numbered 20-14/192-98. Ankara 7th Administrative Court issued a stay of execution for the monetary fine imposed against Opet Petrolcülük A.Ş. (January 14, 2021; E. 2021/60) and the administrative judicial process concerning this decision is still ongoing.

⁴ Turkish Competition Board’s *Yataş* decision dated February 6, 2020 and numbered 20-08/83-50.

and renew their dealer agreements to exclude the prohibition of passive sales via internet otherwise it would initiate further action in accordance with Law No. 4054 as indicated in the written opinion issued based on Article 9(3) of the Law No. 4054. For completeness, according to the dissenting opinion of one of the Board members, there was evidence indicating that Yataş interfered in its dealers' resale prices and thus the Board should have decided to initiate a full-fledged investigation against Yataş.

In *Sony Eurasia*,⁵ the Board evaluated the allegations against Sony Eurasia Pazarlama A.Ş. ("*Sony*") concerning the determination of online resale prices of its distributors. According to the reasoned decision, many of the e-mail messages collected as evidence by the case handlers indicated that online price levels were monitored by sales teams and managers. In addition, some of the internal e-mail correspondences suggested Sony was issuing warnings to its distributors about low price levels, especially on online sales platforms. Last but not least, the decision indicated that some of the external e-mail messages between the Sony sales team and distributors contained warnings made to distributors to correct their prices. As a result of its assessment, the Board decided that Sony (i) monitored the price levels in online platforms, (ii) expected compliance with its recommended resale prices, and (iii) had the ability to threaten the distributors with withholding incentive payments in case of non-compliance. Against this background, the Board concluded that Sony's conduct restricted its distributors' ability to autonomously determine their online prices. In light of the above, the Board, with majority vote, decided that Sony violated Article 4 of the Law No. 4054 by determining the online resale prices of its distributors, and imposed an administrative fine. On the other hand, the dissenting opinion by Prof. Dr. Ömer Torlak stated that (i) distributors autonomously determined their prices, (ii) there was no conclusive evidence that Sony implemented a resale price maintenance scheme including any sanctions imposed on any of its distributors, (iii) Sony had various distribution channels, (iv) the prices of distributors were in fact different than the recommended prices, and (v) intra-brand competition was strong in the market.

*Henkel*⁶ is another important decision that highlights the Board's approach concerning the evaluation of monitoring practices. In this decision, the Board conducted a full-fledged

⁵ Turkish Competition Board's *Sony Eurasia* decision dated November 22, 2018 and numbered 18-44/703-345.

⁶ Turkish Competition Board's *Henkel* decision dated September 19, 2018 and numbered 18-33/556-274.

investigation against Türk Henkel Kimya Sanayi ve Ticaret A.Ş. (“*Henkel*”) in order to determine whether the relevant undertaking violated Article 4 of the Law No. 4054 by way of resale price maintenance. In *Henkel*, the Board noted that the sole fact that Henkel collected data on its products’ resale prices and used this information in its planning of commercial and promotional activities could not be considered as a violation in and of itself. However, the Board further stated that intervening directly to the resale prices which should have been freely determined within the scope of the independent commercial decisions of the buyers and preventing the buyers from setting the resale prices, constitute violation. The Board concluded that Henkel’s conduct went beyond talking to the customer and monitoring the sales prices of the reseller and instead Henkel intervened in its customers’ independent decision-making capacity by applying measures in order to determine the resale prices of its products within a certain program, and thus prevented its customers from freely determining their prices. All in all, the Board unanimously decided that Henkel violated Article 4 of the Law No. 4054 via maintaining the resale prices of its products and decided to impose administrative monetary fines on the relevant undertaking. Upon Henkel’s appeal, the 13th Chamber of the Council of State recently decided to reverse the Court of Appeal’s judgment⁷ that rejected the request to quash the Board’s Henkel decision⁸. In this regard, the 13th Chamber of Council of State found the Board’s decision unjustified and decided that Henkel had not violated Article 4 of the Law No. 4054 by way of resale price maintenance. The 13th Chamber of the Council of State discussed the Board’s relatively strict approach on the standard of proof for RPM cases and stated that Henkel’s practices were not considered as an anti-competitive act of pressure or encouragement as the element of “pressure or encouragement” in question must be of a value to affect buyers’ freedom to determine resale prices as an independent economic behaviour and there was no clear and concrete data to prove the existence of “pressure or encouragement” element in the case at hand.

As for the Board’s approach concerning by object restrictions and effects based analysis, in each of the *BP/Opet/PO/Shell*, *Maysan Mando*, *Sony Eurasia*, *Henkel* and *Yataş* decisions, the

⁷ Ankara Regional Administrative Court 8th Chamber of Administrative Law’s judgment dated December 23, 2020 and numbered 2020/394 E., K.2020/2451. Following the judgement of Council of State, Ankara Regional Administrative Court 8th Chamber of Administrative Law’s judgment dated September 9, 2021 and numbered 2021/1300 E., 2021/1241 K., rescinded Ankara 4th Administrative Court’s decision dated 08.01.2020 and numbered 2019 E., 2020/50 K..

⁸ The 13th Chamber of Council of State’s judgment dated July 6, 2021 and numbered 2021/969 E., 2021/2654 K.



Board stated that resale price maintenance constituted a by object restriction.⁹ The Board confirmed this approach once again in its *Groupe SEB* decision.

IV. Conclusion

It is clear that resale price maintenance has become one of the hottest topics in the Turkish competition law regime considering the Board's significant decisions in the past few years, as well as its most recent *Groupe SEB* decision in which the Board evaluated all aspects of the resale price maintenance in detail, along with the restrictions on online sales and price strategies.

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⁹ The administrative judicial processes concerning some or all of these decisions may be still ongoing.