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Antitrust Case Laws e-Bulletin

Preview

The Turkish Supreme Court annuls the Competition Authority's decision to impose a fine on a manufacturer of personal and home care products for resale price maintenance and clarifies that RPM cases require an element of "coercion" or "incentive" (*Henkel*)

ANTICOMPETITIVE PRACTICES, DISTRIBUTION/RETAIL, BURDEN OF PROOF, RESALE PRICE MAINTENANCE, SANCTIONS / FINES / PENALTIES, JUDICIAL REVIEW, TURKEY, ANNULMENT, ANTICOMPETITIVE OBJECT / EFFECT, CHEMICAL INDUSTRY

Turkish Supreme Court, *Henkel*, case No 2021/969, 6 July 2021 (Turkish)

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This case summary includes an analysis of the 13th Chamber of the Council of State's reversal (E. 2021/969, K. 2021/2654, 06.07.2021) of Ankara Regional Administrative Court's judgment (E. 2020/394, K. 2020/2451, 23.12.2020). Ankara Regional Administrative Court upheld the Turkish Competition Board's ("Board") decision (18-33/556-274, 19.09.2018) in which the Board imposed a hefty fine on Türk Henkel Kimya San. ve Tic. A.Ş. ("**Henkel**") based on the grounds that it had determined the resale prices of its "beauty and personal care products" and "laundry and homecare products".

The Board imposed an administrative fine against Henkel in 2018 for the alleged resale price maintenance ("**RPM**") practices. Upon Henkel's appeal, both the first instance administrative court and the appellant regional administrative court upheld the Board's decision. Henkel subsequently applied to the Council of State, which is the highest court of appeal in Turkey. The 13th Chamber of the Council of State reversed the Board's decision and ruled that since the alleged RPM violation was not proved with clear and tangible evidence, the Board's decision is unlawful. The ruling of the 13th Chamber of the Council of State has remarkable points such as (i) the elements of "coercion" or "incentive" should be proven to establish an RPM type of infringement, and (ii) the Board should prove the RPM violations with clear and tangible evidence.

Background

In 2018, the Board initiated a preliminary investigation upon a complaint alleging that Henkel violated Law No. 4054 on the Protection of Competition ("**Law No. 4054**") by determining its resale prices. As a result of the preliminary investigation, the Board launched a full-fledged investigation against Henkel. The full-fledged investigation focused on the alleged practices in the markets for "beauty and personal care products" and "laundry and home care products".

The Board noted that Henkel used a computer program called "Field Control Services" ("**FCS**") to monitor the end-point sale prices for its own and other firms' products. Additionally, the field employees of Henkel conducted site visits and collected information on the details of insert prices and the display conditions of Henkel products. According to the Board's decision, Henkel also established another system called "Star Store" ("**SS**") for internal reporting of its own products in the beauty and personal care categories. The Board found that Henkel could analyze whether (i) Henkel products were placed in the shelves and (ii) the shelf prices were under or over the price recommended by Henkel via this system. The Board therefore noted that when Henkel found that the resale price was lower than the recommended price, Henkel took some actions (e.g., sending an e-mail message to the relevant Henkel employee to ask "which actions" should be taken against the price) to increase the price. Accordingly, even though the rapporteurs did not make a violation finding, the Board decided that Henkel interfered with the resale prices which was beyond monitoring and recommending resale prices and imposed an administrative fine on Henkel on the basis that Henkel indirectly determined the resale prices.

Henkel filed an annulment lawsuit against the Board's infringement decision. Henkel's request for an appeal was dismissed by the Ankara 4th Administrative Court. Henkel then appealed the case to the Ankara Regional Administrative Court 8th Administrative Chamber which rejected Henkel's appeal request since the Board's decision was found lawful. After these two phases of the judicial review process, Henkel appealed the case before the Council of State which was the highest court in the judicial review process in Turkey. The 13th Chamber of the Council of State reversed the Ankara Regional Administrative Court's judgment and held that Henkel did not violate Article 4 of Law No. 4054.

The Council of State's Assessment in the Henkel Case

The 13th Chamber of the Council of State stated that "*impeding the buyer's freedom to set its own resale price*" and "*determining a minimum or fixed price as a result of coercion or incentive*" are considered as examples of the limitations which could not benefit from the block exemptions under Communiqué No. 2002/2. The 13th Chamber of the Council of State made a distinction between direct and indirect RPM behaviors by referring to Guidelines on Vertical Agreements. Guidelines on Vertical Agreement explains that while incorporating RPM clauses in contracts by suppliers amounts to "direct RPM behaviors", determining the resale prices through various practices is considered as "indirect RPM behaviors".

The 13th Chamber of the Council of State then indicated that the elements of "coercion" and "incentive" mentioned under Communiqué No. 2002/2 are key factors to establish indirect RPM practices. Accordingly, the 13th Chamber of the Council of State found that since the agreements conducted with the distributors and the large-scale retailers do not contain explicit provisions regarding RPM, the dispute at hand revolves around whether Henkel indirectly determined the resale prices.

The 13th Chamber of the Council of State focused on the statements from Henkel's resellers to determine whether Henkel contacted the resellers whose resale prices were lower than Henkel's recommended price to increase the price. These statements, some of them were directly quoted in the ruling of the 13th Chamber of the Council of State, showed that (i) the resellers did not know Henkel's "actions", (ii) Henkel's conduct was merely a

reproach towards the resellers who did not comply with Henkel's recommended prices, and (iii) Henkel did not obstruct the reseller's freedom to determine the resale price in practice. The 13th Chamber of the Council of State highlighted that the elements of "coercion or incentive", which should be established to determine indirect RPM, must be at such a level that would affect the resellers' independent economic behavior in terms of their freedom to determine resale prices. The 13th Chamber of the Council of State did not find that Henkel (i) took actions against the resale prices which go beyond reproaching and (ii) used coercion or incentive to the resellers to determine the resale price at the level which Henkel recommended.

Although the Board found that the resale prices increased as a result of Henkel's "actions", the 13th Chamber of the Council of State held that (i) it is not clear whether coercions or incentives by Henkel's employees caused the price adjustments in question and (ii) the Board's assessment on the price increase was "not based on concrete and clear data". The 13th Chamber of the Council of State also indicated it would have been difficult for Henkel to determine and maintain the resale prices due to (i) the existence of strong competitors in the market, (ii) Henkel's low market share, (iii) strong substitution effect between the competitors in relevant market, (iv) the existence of consumers' preferences which are likely to be quickly affected by any price adjustments, (v) the strong power of the large-scale retailers and (vi) the absence of exclusivity conditions for distributors. In this context, the 13th Chamber of the Council of State concluded that since Henkel's alleged RPM practice was not proven with the clear and concrete data, the Board's decision is unlawful.

Conclusion

The Board's previous decisional practice shows that the Board predominantly considers RPM practices as restriction by object (e.g., Anadolu Elektronik, 11-39/838-262, 23.06.2011; Sony Eurasia, 18-44/703-345, 22.11.2018; Maysan Mando, 19-22/353-159, 20.06.2019). It seems, however, that the 13th Chamber of the Council of State's judgment might change the Board's approach to a more effect-based analysis by setting a high bar for the standard of proof to establish this sort of infringement. This ruling, rendered by the highest administrative judicial authority in the Turkish jurisdiction, could force the Board always to rely on clear and tangible evidence when dealing with the RPM cases. These developments would be considered as a signal that the Board would be restrained in condemning RPM practices with no negative effect on the market in the future.