e-Competitions

Antitrust Case Laws e-Bulletin

Concurrences
Antitrust Publications & Events

Preview

The Turkish Competition Authority imposes administrative monetary fine on a major paint supplier for resale price maintenance and exclusive distribution *(DYO)*

ANTICOMPETITIVE PRACTICES, BLOCK EXEMPTION (REGULATION), DE MINIMIS, DISTRIBUTION AGREEMENT, EXCLUSIVE DISTRIBUTION, RESALE PRICE MAINTENANCE, VERTICAL RESTRICTIONS, SANCTIONS / FINES / PENALTIES, HARDCORE RESTRICTION, TURKEY, EXEMPTION (INDIVIDUAL), ANTICOMPETITIVE OBJECT / EFFECT, CHEMICAL INDUSTRY

Turkish Competition Authority, *DYO*, Case 21-22/267-117, 15 April 2021 (Turkish)

Gönenç Gürkaynak | ELIG Gürkaynak Attorneys-at-Law (Istanbul)
Fırat Eğrilmez | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

e-Competitions News Issue Preview

This case summary aims to shed light on the Turkish Competition Board's ("**Board**") DYO Decision [*1*], whereby the Board imposed an administrative fine of TL 21,036,866.58 to DYO Boya Fabrikaları Sanayi ve Ticaret A.Ş. ("**DYO**"), a major paint supplier in Turkey, on the ground that DYO has violated Article 4 of the Law No. 4054 on the Protection of the Competition ("**Law No. 4054**") by way of resale price maintenance and exclusive distribution. In the DYO Decision, the Board evaluated that exclusive distribution practices of DYO could not benefit from the block exemption granted under Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("**Communiqué No. 2002/2**"). Additionally, the Board concluded that resale price maintenance and exclusive distribution practices of DYO could not benefit from an individual exemption under Article 5 of Law No. 4054, as well.

Background

Within the scope of a preliminary inquiry against the undertakings active in painting materials industry, Turkish Competition Authority ("**Authority**") found certain e-mail correspondences, which indicated that DYO might have violated the Law No. 4054. Accordingly, the Board initiated an investigation against DYO in an effort to determine whether DYO has violated Article 4 of Law No. 4054.

The Board's Assessment on Resale Price Maintenance

In terms of the assessment on resale price maintenance, the Board initially made an analysis regarding its decisional practice on resale price maintenance, focusing on whether resale price maintenance have been regarded by the Board as a violation of competition rules *by object* or *by effect*. To that end, the Board utilized a

This document is protected by copyright laws and international copyright treaties. Non-authorised use of this document constitutes a violation of the publisher's rights and may be punished by up to 3 years imprisonment and up to a € 300 000 fine (Art. L 335-2 CPI). Personal use of this document is authorised within the limits of Art. L 122-5 CPI and DRM protection.

breakdown of its past decisions from 1999 to 2019 regarding investigations on resale price maintenance and indicated that the Board considered resale price maintenance conducts subject to each of such past decisions as *by object* violations.

Additionally, in terms of the past decisions within the period of 1999 – 2019 regarding resale price maintenance, where there were no determination of violation, the Board remarked that the reason for the absence of determination of violation is that there was not enough evidence to establish violation. To that end, the Board resolved that there were not a decision rendered upon an investigation within such period that indicates that the Board conducted an effects-based analysis for resale price maintenance conduct [*2*]. That being said, the Board remarked that there have been certain decisions, where the Board utilized an effects-based analysis in terms of resale price maintenance. The Board underlined that these decisions, where the Board utilized an effects-based analysis were all rendered upon preliminary inquiries [*3*] and all the Board decisions rendered upon a full-fledged investigation regarding resale price maintenance considered resale price maintenance as a *by object* violation.

In terms of the analysis based upon the findings obtained by the Authority within the scope of the investigation, the Board concluded that DYO has interfered with its dealers' sales conditions and sales prices. Additionally, the Board remarked that DYO has imposed sanctions against the dealers that are not complying with the resale prices imposed by DYO, by way of cutting sales bonuses and/or ceasing to supply goods in order to establish and maintain the desired level of resale prices. To that end, the Board concluded that DYO has violated Article 4 of the Law No. 4054 via its resale price maintenance conducts.

The Board's Assessment on Exclusive Distribution

The Board's assessment on exclusive distribution mainly focuses on DYO's "hinterland system" that it employed in terms of its wholesale dealers. The Board determined that DYO has allocated territories and customers to its dealers within the scope of the "hinterland system" without granting exclusivity to such dealers in terms of the territories and customers allocated to them. In light of the findings obtained by the Authority within the scope of the investigation as well as a response letter submitted by DYO to the Authority, the Board determined that DYO has allocated more than one dealer to a single hinterland territory/customer group and DYO has not granted exclusive distribution rights to its dealers in terms of such hinterland territories/customer groups. Additionally the Board determined that DYO disciplined its wholesale dealers by way of depriving the dealers, which violated the hinterland system, of the discounts and bonuses that such dealers would have normally be granted.

The Board provided the legal background on DYO's exclusive distribution system by way of referring to the Guidelines of Vertical Agreements ("**Guidelines**"). To that end, in parallel with the remarks set out in the Guidelines, the Board emphasized that if the number of undertakings selling to a specific region or customer group is two or more, that region or customer group is no longer exclusive. Furthermore, the Board noted that regional restrictions or customer restrictions would not benefit from the block exemption provided in the Communiqué No. 2002/2 in case that the mentioned region or customer group is non-exclusive, even if the market share of the relevant supplier falls short of the market share threshold set out in the Communiqué No. 2002/2.

Against the foregoing the Board determined that DYO has violated Article 4 of the Law No. 4054 by means of imposing regional/customer group restrictions.

The Board's Assessment on De Minimis and Commitment Applications of DYO

Within the scope of the investigation DYO has made an application to the Authority with a request of termination of

This document is protected by copyright laws and international copyright treaties. Non-authorised use of this document constitutes a violation of the publisher's rights and may be punished by up to 3 years imprisonment and up to a € 300 000 fine (Art. L 335-2 CPI). Personal use of this document is authorised within the limits of Art. L 122-5 CPI and DRM protection.

the investigation on the ground that DYO's conducts under scrutiny fall within the scope of *de minimis* rule under Article 41(2) of the Law No. 4054. Although the secondary legislation regarding *de minimis* rule was not effective on the date when the DYO's request was submitted to the Authority, the Board remarked that in order for a conduct to be considered within the scope of *de minimis* rule, such a conduct must not be "clear and hard-core" per Article 41(2) of the Law No. 4054. Accordingly, based on the decisional practice of the Board and the secondary legislation regarding vertical restrictions, the Board concluded that resale price maintenance is a hard-core violation. Thus, the Board concluded that the conducts under scrutiny could not be considered within the scope of *de minimis* rule given that such conducts could not meet the criteria of not being "clear and hard-core" violations.

Additionally, DYO has also made a commitment application to the Authority before the final decision of the Board was rendered. In terms of the commitment application, the Board underlined that commitment applications are admissible within the preliminary inquiry or investigation phases. Accordingly, the Board noted that as per Article 43 of the Law No. 4054, only the commitment applications that are submitted within the investigation phase could be evaluated by the Board. Furthermore, the Board remarked that the investigation phase concludes on the date when the third written defences of the parties to the investigation are submitted to the Authority.

Against the foregoing, the Board rejected the commitment application of DYO, given that the commitment application was submitted to the Authority after the investigation phase concluded (i.e. the date when the third written defence of DYO is submitted to the Authority). Additionally, the Board remarked that the commitments offered by DYO could not be accepted, regardless of the date of application, given that resale price maintenance is a hard-core restriction.

Conclusion

DYO Decision of the Board is a successor of the past decisions of the Board, where resale price maintenance is considered as a *by object* restriction of the competition rules. Additionally, although later promulgated secondary legislation on the commitment mechanism and *de minimis* rule deems resale price maintenance as a clear and hard-core violation, the Board's ruling in the DYO Decision was a precursor that the Authority would consider resale price maintenance as a clear and hard-core violation and preclude such conduct from the commitment mechanism and *de minimis* rule. Furthermore, DYO Decision also marks the importance of an elaborately designed distribution system with an emphasis on the competition rules, given that if DYO had implemented an exclusive distribution system that involved proper exclusive territories and/or customer groups within the meaning of the Guidelines, the Board might have decided that DYO have not violated the Law No. 4054 by means of such an exclusive distribution system.

[*1*] Decision of the Board dated 15.04.2021 and numbered 21-22/267-117.

[*2*] Decision of the Board dated 15.04.2021 and numbered 21-22/267-117, para 94.

[*3*] These decision of the Board are as following: Dogati Decision dated 22.10.2014 and numbered 14-42/764-340; İstikbal Decision dated 16.12.2010 and numbered 10-78/1624-624; KWS Decision dated 25.11.2009 and numbered 09-57/1365-357; Dagi Decision dated 15.7.2009 and numbered 09-33/725-165; Kuruçayırlı Decision dated 27.5.2008 and numbered 08-35/462-162;

This document is protected by copyright laws and international copyright treaties. Non-authorised use of this document constitutes a violation of the publisher's rights and may be punished by up to 3 years imprisonment and up to a € 300 000 fine (Art. L 335-2 CPI). Personal use of this document is authorised within the limits of Art. L 122-5 CPI and DRM protection.

Frito Lay Decision dated 11.01.2007 and numbered 07-01/12-7; Kütaş Teekanne Decision dated 24.08.2006 and numbered 06-59/773-226; Fuel Oil Decision dated 15.11.2006 and numbered 06-84/1059-306.

This document is protected by copyright laws and international copyright treaties. Non-authorised use of this document constitutes a violation of the publisher's rights and may be punished by up to 3 years imprisonment and up to a € 300 000 fine (Art. L 335-2 CPI). Personal use of this document is authorised within the limits of Art. L 122-5 CPI and DRM protection.