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Turkish Competition Board concludes sports equipment sector investigation with settlement and fine

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Introduction

In June 2022, the Turkish Competition Board delivered its final judgment and announced that the investigation against Olka Spor Malzemeleri Ticaret AŞ (Olka) and Marlin Spor Malzemeleri Ticaret AŞ (Marlin), two undertakings active in the sports equipment sector, had ended with a settlement.

The investigation was initiated in March 2022 after a confidential complaint alleging that Olka, which had been distributing Skechers USA, Inc products, and Merlin, which had been distributing Asics Corporation and Fila Holding SpA products in Turkey, had been restricting online sales through online marketplaces for over two years. The complaint also alleged that Olka and Marlin:

- punished any non-compliance with their restrictions; and
- unilaterally terminated dealership agreements with dealers that continued to sell the products through online marketplaces despite the sales ban.

As a result of on-site inspections carried out on Olka and Marlin's premises, the board decided to initiate a full-blown investigation against Olka and Marlin, stating that these two undertakings had violated article 4 of the Law No. 4054 on the Protection of the Competition with their conduct towards the dealers.

Upon Olka and Marlin's request to initiate a settlement process, the investigation successfully resulted in a settlement between the investigated parties and the board.

This article provides information regarding the parties and the relevant markets and presents the board's evaluations as to the resale price maintenance (RPM) and internet sales restrictions, along with the assessments regarding the group and individual exemption. This article also examines the board's assessment concerning the administrative monetary fine and the settlement procedure.

Facts

Parties subject to investigation

Olka was established in 2011 and has been distributing and marketing Skechers products as the only authorised reseller of these products in Turkey. Olka has been manufacturing shoes and textile products of Skechers in a production facility established in Turkey since 2019. Since 2020, Olka also holds the exclusive production rights of the Skechers' shoes, together with holding exclusive production rights of Skechers' textiles and accessories since 2019, through licensing agreements signed between Olka and Skechers. Olka manufactures products through its two subsidiaries, Markalab Giyim San Tic AŞ (Markalab) and Prolab Ayakkabı San ve Tic AŞ (Prolab). Olka sells directly to the final customer and makes sales through dealers and authorised resellers. The board remarked that Olka distributes its products through channels such as:

- retail stores;
- dealer retail stores;
- online channels and online marketplaces; and
- distribution networks (wholesales).

Olka's dealers vary from national chain stores to the dealers who only sell their products online.

Marlin was established in 2017 and has been importing, selling and marketing Asics products as the only authorised reseller and distributor of Asics. Marlin also sells Filo branded products as one of the dealers of the brand, since Filo has no authorised reseller in Turkey. Marlin has been the only authorised reseller of Asics branded products since 2018 although it does not carry out any manufacturing activities. The board remarked that distribution channels of Marlin are:

- retail stores;
- online channels and marketplaces; and
- distribution networks (wholesales).

Relevant product market

Taking into consideration that Olka and Marlin operate in the training shoes, sportswear and sports accessories sector, the board defined three separate product markets:

- the "branded training shoes market";

- the "branded sportswear market"; and

- the "sports accessories and equipment market".

Relevant geographic market

While defining the geographical market, the board took into account that the sales in the relevant product markets could be realised in different cities and the conditions surrounding entry to the market, access to the sources of supply, production, distribution, marketing and sales did not change based on the region. Consequently, the board defined the geographic market within the scope of the investigation as Turkey.

Decision

On 18 January 2022, the Turkish Competition Authority conducted an on-site inspection on the premises of the investigated undertakings which resulted in several findings. The board's decision included 46 of these mentioned findings to support the violation claims. The board concluded that the documents obtained during the on-site inspections revealed that Olka and Marlin had actively interfered with the dealers' resale prices and that the matter should be evaluated within the scope of article 4 of the Law No. 4054.

Upon examining the findings, the board determined that Olka and Marlin had contacted their dealers and requested their dealers remove the discounts on the products and adjust or revise the prices in accordance with the resale prices determined by Olka and Marlin. The board determined that findings indicated that Olka had interfered with the resale prices of the Skechers branded products and Marlin had interfered with the resale prices of the Asics and Fila branded products. The board also stated that both undertakings had closely monitored the discounts and contacted the dealers in order to ensure that discounted prices had been revised in accordance with the determined resale prices.

Accordingly, the board based its assessments on its precedents where restrictions imposed on the online sales were categorised within the scope of the restriction of passive sales⁽¹⁾ and were accepted as restriction by object, in accordance with the approach adopted in the European Union.⁽²⁾

In various board decisions adopted after 2011, the board stated that the objective to determine the resale prices is sufficient for the existence of an infringement. In some decisions, the board refrained from examining the effect of the violation. In others, even if it was found that the conduct did not have an effect, the existence of the objective was deemed to be sufficient for a violation and as a result administrative fines were imposed on the undertakings. Additionally, with the Communiqué on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings that do not Significantly Restrict Competition (Communiqué No. 2021/3) and the Communiqué on the Commitments to Be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition and Abuse of Dominant Position (Communiqué No. 2021/2), the determination of resale prices has been classified as hard-core infringements. Accordingly, the determination of resale prices is accepted to restrict the competition "by object" within the scope of the Turkish Competition Law.

While presenting its assessments, the board highlighted that in many findings Olka and Marlin had:

- strictly monitored whether the dealers were applying discounts;
- intervened with discounted prices;
- contacted the dealers to remove applied discounts; and
- requested that the dealers revise the prices in accordance with the price lists.

Consequently, the board determined that Olka and Marlin had violated article 4 of the Law No. 4054 by explicitly interfering with the dealers' prices.

The board delivered its assessments concerning restriction of online sales, based on the findings of the on-site inspections. The board established that Olka and Marlin actively interfered with the dealers' sales conducted through online marketplaces. The board emphasised that in some of the findings, Olka and Marlin contacted the dealers, indicated that no sales should be made through online platforms and requested that the dealers remove the mentioned products from the sales. The board also highlighted that Olka and Marlin indicated that they would terminate ongoing commercial relationship with the dealers if the dealers continued to sell products through online marketplaces. The board evaluated that an absolute and general restriction of online sales constitutes a hard-core restriction within the context of restriction of intra-brand competition and prevention of passive sales, by referring to the board's precedents and the German Federal Cartel Office's Ciba Vision,⁽³⁾ Adidas,⁽⁴⁾ Asics⁽⁵⁾ decisions.

Considering that Olka and Marlin interfered with the dealers' prices by actively controlling the prices, and imposed restrictions on the dealers' online sales conducted through online marketplaces (both through agreements and unauthorised conducts), the board stated that investigated undertakings had restricted competition in the market. Such conduct constituted a violation of article 4 of the Law No. 4054.

The board consequently assessed that in some instances the restriction of online sales function as a complementary element to enhance the deterrence and effectiveness of the determination of resale prices. In other words, in order to ensure the effective implementation of resale price maintenance in the market, interference and control towards online sales may take the form of an extension of resale price maintenance. The board determined that this was the case in this investigation and concluded that resale price maintenance and online sales ban were indeed a single conduct.

Block and individual exemption

The board assessed that it was not possible for Olka and Marlin to benefit from the block exemption within the scope of Communiqué No. 2002/2, since:

- resale price maintenance is a hard-core restriction; and
- the restriction of sales through online platforms such as Trendyol, N11, Hepsiburada and Amazon was considered to be the restriction of passive sales.

Subsequently the board moved on with the assessments regarding individual exemption. Article 5 of Law No. 4054 provides that:

Agreements between undertakings, concerted practices and decisions of associations of undertakings are exempt from the application of Article 4 provisions, provided they fulfill all of the requirements below: a) They must ensure new developments or improvements or economic or technical improvement in the production or distribution of goods, and in the provision of services, b) The consumer must benefit from the above-mentioned, c) They must not eliminate competition in a significant part of the relevant market, d) They must not restrict competition more than necessary to achieve the goals set out in sub-paragraphs (a) and (b).

As per article 5 of Law No. 4054, if one of the requirements listed in the article is not fulfilled, it is not possible to exempt the undertakings from the application of article 4. Within this scope, the board assessed that none of the conditions were met and therefore individual exemption could not be granted.

Administrative monetary fine and settlement procedures

During the investigation process, Olka and Marlin requested to initiate a settlement process as per article 43 of Law No. 4054 with a letter dated 29 March 2022. Upon the parties' request, the board decided to initiate the settlement process on 4 April 2022.

Article 43(7) of Law No. 4054 provides that *"As a result of the settlement procedure, a discount of up to twenty five per cent may be applied to the administrative fine."* As per article 9(1) of the Regulation on the Settlement Procedure:

Within fifteen days following the entry of the settlement text into the Authority records, the investigation is concluded for the relevant party with a Board decision establishing the violation and setting out the administrative fines imposed.

Based on the above legislation the board held that Olka's and Marlin's restrictive conduct constituted "other" infringements and therefore assessed that determination of the base fine should be based on a rate between 0.5% and 3% of Olka and Marlin's gross income for the year 2021. The relevant legislation also provides that factors such as market power of the investigated undertakings or the significance of realised or potential damage of the conduct should be considered when determining the rate applicable to the base fine. Considering these factors, the board decided upon a lower rate and concluded that the applicable administrative monetary fine should be reduced by 25%. The investigation was concluded through this settlement procedure.

Comment

In this decision, the board concluded that the restriction of online sales is a complementary element to resale price maintenance, and therefore these are a single violation. In addition to the evaluations as to the single violation, the board finalised the investigation process with a settlement procedure.

Although this decision is not the first example in which the board evaluated online sales as a complementary conduct of resale price maintenance,⁽⁶⁾ the scope of the investigation was comprehensive as it involved resale price maintenance, an online sales ban and a settlement procedure.⁽⁷⁾

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Endnotes

(1) *Yatsan* (22 September 2010, 10-60/1251-469); *Antis 1* (08 May 2008; 08-32/401-136); *Antis 2* (24 October 2013, 13-59/831-353); *BSH* (22 August 2017, 17-27/454-195); *Jotun* (15 February 2018, 18-05/74-40), *Yataş* (06 February 2020, 20-08/83-50); *Baymak* (26 March 2020, 20-16/232-113); *BSH Individual Exception* (16 December 2021; 21-61/859-423)

(2) *Pierre Fabre*, Case C-439/09 [2011]; 2 Autorité de la concurrence, 12 December 2012, Decision No. 12-D-23, *Bang et Olufsen*, *Guess* [2019] Case AT.40428; *Adidas*, German Federal Cartel Office [2014], B3-137/12; *Asics*, German Federal Cartel Office, [2015], B2-98/11; *Coty*, Case C-230/16 [2017]; *Aloe2Go*, Regional Court of Hamburg, [2016], 315 O 396/15; *Aloe2Go*, Higher Regional Court of Hamburg, [2018], 3 U 250/16; *NIKE* [2017], C/13/615474 / HA ZA 16-959.

(3) *Ciba Vision*, German Federal Cartel Office, 2009, B-3-123/08.

(4) *Adidas*, German Federal Cartel Office 2014, B3-137/12.

(5) *Asics*, German Federal Cartel Office, 2015, B2-98/11.

(6) Board's *Singer* decision (30 September 2021, 21-46/672-336); Board's Groupe SEB decision (4 April 2023; 21-11/154-63).

(7) Board's *Arnica* decision (30 September 2021, 21-46/671-335) also involves resale price maintenance, online sales ban and settlement procedure.