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The Turkish Competition Authority fines a consumer electronics company for resale price maintenance on online sales channels (*Sony*)

UNILATERAL PRACTICES, DISTRIBUTION AGREEMENT, RESALE PRICE MAINTENANCE, VERTICAL RESTRICTIONS, SANCTIONS / FINES / PENALTIES, TURKEY, INTERNET, ONLINE PLATFORMS, BIG TECH

Turkish Competition Authority, Sony, 18-44/703-345, 22 November 2018

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This case summary includes an analysis of the Turkish Competition Board's (the "**Board**") *Sony* decision (22.11.2018; 18-44/703-345) in which the Board evaluated the allegations concerning resale price maintenance ("**RPM**") against Sony Eurasia Pazarlama A.Ş. ("**Sony**") upon complaint of a former distributor of Sony. Accordingly, the Board concluded that Sony has violated Article 4 of the Law No. 4054 on the Protection of Competition ("**Law No. 4054**") by determining the resale prices of its online retailers and imposed an administrative fine of TRY 2,346,618.62.

Background

Sony has been incorporated as a Turkish subsidiary of Sony Corporation to develop and supply Sony Corporation's services in Turkey. Sony is active in consumer electronics by way of import, sale and marketing of televisions, audio devices, video cameras, video, DVD, portable audio systems, music systems for automobiles, game consoles (Playstation) and their accessories, radio TV broadcasting, medical, security displaying, video conference and video projection devices. According to the complaint filed before the Turkish Competition Authority (the "**Authority**") by a former distributor, Sony allegedly constrained its distributors and determined their resale prices and sale-purchase conditions.

In defining the relevant product market, the Board initially identified five main distribution channels for the consumer electronics market; namely (i) fast consumed goods retailers (the mass channel), (ii) technology super stores, (iii) traditional resellers, (iv) specialised computer stores and (v) telecommunication stores of Turkcell, Vodafone and Türk Telekom.

The Board emphasized the fast-changing consumer behaviour in the industry and pointed out a trend towards technology super stores from traditional resellers, since technology super stores can offer discounted prices due to their cost advantages and buyer power. Although the Board acknowledged that its previous practice has been focused on defining narrower markets for the overall consumer electronics sector based on the consumer use, it refrained from a conclusive market definition in the case at hand, since its assessment would not change under any market definition. The Board nevertheless took into account the “consumer electronics market” for its analysis, while defining the relevant geographic market as “Turkey”, given that market entry, access to supply sources, production, distribution and sale conditions did not differ based on any region.

The Board’s assessment depended heavily on the documents obtained during onsite inspections at Sony and the premises of some of its major distributors. The case material consisted of various internal and external e-mail correspondences, the majority of which are related to the distributors’ online price levels on e-commerce platforms, such as n11.com and hepsiburada.com. As a result of its assessment, the Board decided that Sony has (i) monitored the price levels in online platforms, (ii) expected compliance with its recommended resale prices and (iii) has the ability to threaten the distributors with withholding incentive payments in case of non-compliance (*still, there were not any quantified finding that Sony did actually act on such threats and refrained from making incentive payments even in cases where price differences were detected*). Against this background, the Board concluded that the said conduct of Sony has restricted distributors’ ability to autonomously determine their online prices. Consequently, the Board noted that online prices can easily be tracked and this increases price transparency that can facilitate restriction of competition. The Board asserted that online prices strengthen price competition in offline trade as even consumers shopping from brick and mortar shops have the ability and incentive to check online prices and impose competitive constraints on offline resellers’ prices with online price lists.

The Board briefly evaluated the possibility of granting Sony an individual exemption under Article 5 of the Law No. 4054 and concluded that an individual exemption cannot be granted on the basis that Sony’s conduct would not result in improvement of Sony’s distribution channels nor would it cause better and improved products or services for the benefit of consumers. To the contrary, the Board resolved that determining the resale prices would cause restriction of inter-brand competition and thereby increase prices for end-users.

In its effect analysis, the Board held that Sony’s RPM practices had a limited impact on the market in light of its findings that (i) the RPM practices were related to third-party online marketplaces (such as n11.com, hepsiburada.com etc.), (ii) Sony had no market power in the products concerned, (iii) distributor prices which were monitored and intervened by Sony could differ from Sony’s determined prices, and (iv) there was no evidence indicating any sanctions imposed by Sony for non-compliance with the determined prices.

With respect to the *rule of reason* arguments, while the Board acknowledged that RPM might be justified under very exceptional circumstances, it also added that such practices cause elimination of intra-brand competition even though in cases where undertakings’ purposes are to prevent any damage on the brand reputation. In this regard, the Board evaluated that the case at hand did not contain such exceptional circumstances to urge the Board leaving its *per-se* (by-object) approach on RPM practices and conduct a *rule of reason* (effects-based) analysis. In light of the above, the Board, with majority, decided that Sony has violated Article 4 of the Law No. 4054 by determining the online resale prices of its distributors and imposed an administrative fine of TRY 2,346,618.62.

Dissenting Opinion

Prof. Dr. Ömer Torlak (President of the Board) dissented from the Board's decision due to his opinion that (i) Sony had various distribution channels, (ii) the prices of distributors were in fact lower than Sony's recommended prices, (iii) there was no conclusive evidence that Sony implemented an RPM scheme with any sanctions imposed on its distributors, (iv) there was no parallel prices concerning the sales made through both traditional and online channel, (v) intra-brand competition was strong in the market and (iv) Sony did not *de facto* intervene in the price levels or online sales of its distributors. Therefore, the President of the Board argued that the Board should have decided to send a written opinion under Article 9(3) of the Law No. 4054, which was also the view of the case handlers of the Authority handling the case.

Comments

Sony decision is a cornerstone decision of the Board as it is an example where RPM was considered as a *per-se* violation. This somewhat contradicts the ever-increasing trend of treating RPM cases under a *rule of reason* analysis.