November 11 2021

Council of State clarifies standard of proof in RPM cases

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Introduction

On 6 July 2021, the 13th Chamber of the Council of State rendered a cornerstone judgment[(1)] concerning the Competition Board's decision on resale price maintenance (RPM) allegations against Turk Henkel Kimya Sanayi Ve Ticaret AŞ, active in the business of laundry and home care products, cosmetics and adhesives.[(2)]

The judgment set the standard of proof for the Board to identify an RPM violation by requiring the establishment of "clear and concrete findings and assessments". It also determined elements of RPM as "a coercive or incentivising conduct" that has reached a sufficient level to restrict buyers, as well as due consideration of the market structure and conditions.

Competition Board

On 19 August 2018, the Board decided that Henkel had violated article 4 of the Law on the Protection of Competition (Law 4054) by determining resale prices of its buyers in the markets for "beauty and personal care products" and "laundry and home care products". The Board imposed an administrative monetary fine of 6,944,931.02 lire on the undertaking, despite the fact that the assigned case team had not recommended the finding of a violation or the imposition of an administrative monetary fine. This is in line with the Board's recent tendency to adopt a rigid approach to RPM cases. Since its *Henkel* decision, the Board has imposed administrative fines in 12 investigations out of a total of 14.[(3)]

The Board's finding of infringement was based on two related elements:

- Henkel's internal systems, which enabled the prices of the products it sold to be monitored; and
- internal emails between Henkel's employees.

According to the Board's decision, Henkel had used a computer system called Field Control Services to monitor the prices set by the sales points for both its own products and the products of its competitors. The Board's decision also referred to Star Store, an internal reporting system that analysed, among other things, whether "prices are set below or above the action price" by each sales point. The Board subsequently referred to email messages obtained during the onsite inspection conducted by the Competition Authority at the Henkel premises. These findings revealed internal correspondences which showed that a Henkel employee had compared prices via Star Report with the sales points' final prices through the Field Control Services system. According to these correspondences, if the final prices were lower than the recommended prices, a Henkel employee would reach out to the field responsible and ask the reason for this difference and what kind of "actions will be taken" to fix the issue.

The Board considered this as proof that Henkel had contacted its buyers to intervene in the resale prices, resulting in buyers changing their prices. The Board concluded that this practice exceeded a mere price recommendation and constituted RPM, which is prohibited under article 4 of Law 4054.

On 9 September 2018, Henkel filed an annulment lawsuit against the Board's decision. The first-instance court decided that the Board's decision was lawful and dismissed the case.[(4)] Henkel challenged this decision before the appellate court. The Eighth Chamber of the Ankara Regional Administrative Court upheld the decision of the first-instance court.[(5)]

Council of State

Henkel brought its case before the Council of State, the highest degree court in the administrative limb of the judicial review. Following the Council of State's reversal decision, the case was returned to the Ankara Regional Administrative Court. The Eighth Chamber of the Ankara Regional Administrative Court rescinded the first-instance court's decision and quashed the Board's decision on 9 September 2021.[(6)]

The Council of State adopted a systematic approach when reviewing the Henkel case. The assessments started with a review of the applicable legislation. The judgment referred to the prohibition of RPM as per article 4 of Law 4054, through direct or indirect means. The Council of State ruled that, as per the "coercion or incentive" concepts laid down in Communiqué No. 2002/2 on vertical agreements, converting recommended prices to fixed prices, forcing conduct related to RPM and establishing price monitoring systems constitute important criteria in assessing RPM cases.

The Council of State then proceeded with the examination of the facts in the case file. The Council of State reviewed the agreements concluded between Henkel and large retailers to establish that they did not provide for the determination of resale prices. The highest court concluded that there was no finding of direct RPM and sought to determine whether Henkel had resorted to indirect RPM. As part of its review, the Council of State respectively reviewed, by way of concrete evidence, the evidence in the case file and the market conditions and structure.

The Council of State found that the findings in the case file reflected Henkel's intent to set prices higher in case they fell below the recommended price, including through face-to-face meetings with the sales points, which was articulated as "taking action" in their

correspondences. The Council of State then compared this finding with the statements of the sales points as presented in the Competition Authority's case file. It determined that all sales points had unanimously stated that they had set their own resale prices based on their own economic assessments and Henkel employees could "only voice their reproaches" on the issue.

Based on these findings, the Council of State clarified the concept of "coercion or incentive", explaining that the investigated conduct must be strong enough to affect the freedom of resellers to independently set their prices. The Council of State noted that, absent a "coercion or incentive" impacting the resellers' freedom to independently set their prices, there can be no anticompetitive conduct or RPM. The Council of State concluded that the Board had failed to establish that Henkel had resorted to a "coercive or incentivising" conduct beyond any "mere reproaches".

The Council of State also assessed the market conditions and structure, which consisted of:

- Henkel's moderate market share;
- the presence of strong inter-brand substitutability in the market;
- the end user's preference being rapidly affected by prices;
- resellers' strong bargaining power; and
- the distribution of Henkel's products on a non-exclusive basis by distributors.

The Council of State concluded that the facts of the case also did not prove that the market conditions would allow Henkel to set and maintain resale prices.

Lastly, the Council of State highlighted the necessity for the Board to establish its assessments based on "clear and concrete" findings. The Council of State criticised the Board for easily reaching the conclusion that prices had been raised as a result of Henkel's intervention, despite the statements from resellers that this was not the case. The Council of State found that it was not clear whether price change in the market had indeed resulted from Henkel's alleged intervention and that the Board had not assessed whether the isolated example in its decision was, in fact, a widespread phenomenon.

As a result, the Council of State ruled that the Board's decision that Henkel had violated article 4 of Law 4054 was unlawful, as the Board had not based this on clear and concrete findings and assessments.

Comment

There are two main takeaways from the Council of State's *Henkel* judgment:

- First, the judgment showed that RPM cases require a "by effect" approach which clarifies the elements that need to be taken into consideration – namely:
  - whether the supplier's "coercion or incentive" was sufficient to restrict the buyers' independence to set their own resale prices; and
  - the importance of market conditions and structure.
- Second, the judgment reflected the administrative courts' requirement for a high standard of proof in infringement cases. In the recent *Sahibinden* judgment, the Ankara Sixth Administrative Court highlighted the necessity of "clear and precise assessments beyond any doubt" instead of "mere observations and assumptions" in the Board's infringement decisions. In this case of excessive pricing, the Court underlined that "reaching a conclusion based on doubt is legally insufficient" and "the requisite legal standard requires the allegation to be proven with concrete evidence and justifications establishing that the doubt is valid". The Council of State, which is the highest administrative court, subsequently dictated the requirement for the Board to establish its case based on "clear and concrete findings" within the scope of an RPM case.

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Endnotes

(1) 2021/969 E, 2021/2654 K.

(2) 19 August 2018, 18-33/556-274.

(3) The Board's decision in:

- *Henkel* (19 August 2018, 18-33/556-274);
- *Sony Eurasia* (28 November 2018, 18-44/703-345);
- *Turkcell* (10 January 2019, 19-03/23-10);
- *3M* (18 April 2019, 19-22/232-13);
- *Maysan Mando* (20 June 2019, 19-22/353-159);
- *Tefal* (4 March 2021, 21-11/154-63);
- *Akaryakıt* (3 March 2020, 20-14/192-98);
- *Bellona* (26 March 2020, 20-16/231-112);
- *Baymak (26* March 2020, 20-16/232-113);
- *DYO* (15 April 2021, 21-22/267-117);
- *Anka Mobil* (15 April 2021, 21-22/266-116); and
- *Philips* (5 August 2021, 21-37/524-258).

(4) Ankara Fourth Administrative Court, 8 January 2020, 2019/931 E, 2020/50 K.

(5) 23 December 2020, 2020/394 E, 2020/2451 K.

(6) 2021/1300 E, 2021/1241 K.