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The Turkish Competition Authority concludes that resale price maintenance and customer/territory exclusivity allegations against a household appliances company are unfounded in a decision that poses importance for meeting the requisite standard of proof especially in resale price maintenance type of violations (*BSH*)

ANTICOMPETITIVE PRACTICES, DISTRIBUTION/RETAIL, EXCLUSIVE DISTRIBUTION, INVESTIGATIONS / INQUIRIES, RESALE PRICE MAINTENANCE, SELECTIVE DISTRIBUTION, VERTICAL RESTRICTIONS, MANUFACTURING, TURKEY, ANTICOMPETITIVE OBJECT / EFFECT

Turkish Competition Authority, *BSH*, Case No: 22-55/864-358, Decision, 15 December 2022 (Turkish)

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This case summary aims to offer insight into the Turkish Competition Board's ("**Board**") BSH Decision [7] ("**Decision**"), where the Board assessed whether BSH Ev Aletleri Sanayi ve Ticaret A.Ş. ("**BSH**") violated Article 4 of Law No. 4054 on the Protection of Competition ("**Law No. 4054**") by way of territory/customer restrictions and/or resale price maintenance upon its authorized dealers. As a result of an investigation [2] the Board concluded that BSH did not violate Article 4 of Law No. 4054 on the grounds that (i) no information and documents indicating that BSH has engaged in resale price maintenance could be found and (ii) BSH did not impose customer and territorial restrictions to its authorized dealers.

Background

During the Investigation phase, the Turkish Competition Authority ("**Authority**") identified certain conducts that BSH had employed within the scope of its selective distribution system, which had caused competition law problems. The Board noted that these conducts included the following: (i) an online sales ban for BSH's authorized dealers on e-commerce platforms, (ii) restriction of selective distribution network members' active sales targeting end-users in the brick and mortar sales channels, (iii) exclusive supply clauses in the brick and mortar sales channels, restricting selective distribution network members' ability to purchase goods from other selective distribution network members and (iv) clauses that restrict authorized dealers' active and passive sales to certain customers groups in the brick

and mortar sales channels [3] (“**Competition Law Issues**”).

In that context, BSH proposed to submit commitments to eliminate the Competition Law Issues identified by the Authority and the Board accepted BSH’s commitment proposal and initiated commitment negotiations with BSH. As a result of the commitment negotiations, BSH submitted its first commitment package to the Authority, which was rejected by the Board [4]. The Board also decided a revised version of the commitment package could be submitted for the Board’s review only once. Upon the Board’s decision, a second commitment package was submitted to the Authority [5]. The second commitment package of BSH was accepted by the Board [6] and the Board concluded the part of the Investigation against BSH that relates to the Competition Law Issues identified above (“**Commitment Decision**”).

That said, the Authority continued to assess the allegations regarding resale price maintenance and exclusive distribution within the scope of the Investigation. In that context, the Decision, which was rendered upon the Investigation that continued after the Commitment Decision, pertains to the allegations that BSH has engaged in resale price maintenance and territory/customer restrictions.

The Board’s Assessment on Resale Price Maintenance

In terms of the resale price maintenance allegation, the Board’s assessment concentrated on a total of three findings. All in all, the Board concluded that none of the findings satisfied the standard of proof that must be met to speak of a violation.

With regards to Finding 1, which is an e-mail correspondence between a BSH employee and an employee of a dealer of BSH, Asya Halı San. ve Tic. A.Ş. (“**ASYA**”), the Board remarked that the relevant correspondence raises the suspicion that ASYA was prevented from selling at discounted prices in its brick-and-mortar stores, hence ASYA’s resale prices were interfered. The Board remarked that Finding 1 could be interpreted as BSH has indirectly interfered with its dealers’ prices at their brick-and-mortar stores by way of conveying to the dealer that discounted prices determined for online channel could not be implemented at physical channel. That being said, the Board concluded that this finding, in and of itself, is not sufficient to prove that BSH has engaged in resale price maintenance and no other evidence could be obtained within the scope of the Investigation which proves such a violation.

Finding 2 is a draft WhatsApp correspondence between BSH’s regional distributor, Seren Day. Tük. Mam. Tic. ve Paz. Ltd. Şti. (“**SEREN**”) and a retailer Teknofish Elekt. Hizm. San. ve Tic. A.Ş. (“**TEKNOFISH**”). This correspondence includes two draft texts prepared by a TEKNOFISH employee, which were intended to be communicated with BSH. The TEKNOFISH employee has sent these texts to a SEREN employee and requested confirmation on the contents thereof from the SEREN employee. However, these messages were not sent to BSH.

The first draft text notes that TEKNOFISH has complied with BSH’s request in relation to the increase in retail prices of Bosch branded products sold on TEKNOFISH’s website, however TEKNOFISH notices that other retailers’ online prices remained as they were. Additionally, this draft text notes that despite the fact that TEKNOFISH has notified the matter to BSH, BSH did not take any action regarding these retailers but kept interfering with TEKNOFISH’s retail prices. Additionally, the second draft text includes the following remarks: “ (...) *due to the following reasons, we would like to convey that we will not be able to meet the total value (...) TL that we committed to purchase at the beginning of this year: the stores were open within certain time periods in 2021, the ban brought upon online sales and interferences to prices.*”

Against the foregoing, the Board noted that the remarks within these draft texts showed that TEKNOFISH's online prices were sought to be increased to the level of its retail prices several times. Additionally, the Board remarked that the draft texts also showed TEKNOFISH's discomfort with the lack of interference to prices of major authorized dealers, despite the interference to TEKNOFISH's retail prices. The Board then noted that the text within Finding 2 was not sent to BSH and remained as a draft. Considering that no other evidence could be obtained in support of the allegation and the draft text comprised of unilateral remarks, the Board concluded that Finding 2 is not capable of proving BSH's interference with TEKNOFISH's resale prices beyond any doubt and does not meet the requisite standard of proof.

As for Finding 3, which is a correspondence between a BSH employee and an employee of a distributor of BSH, ALC Dayanıklı Tük. Mall. San. Tic. Ltd. Şti ("**ALC**"), the ALC employee expresses his/her discomfort in relation to an online price of a Siemens branded iron that he/she encountered on the internet to the BSH employee. In response to ALC, the BSH employee notes the following: "*these prices will be corrected*". The Board noted that although BSH's response could be construed as BSH would interfere with the online resale prices, there is not any clarity on whether BSH actually interfered with such prices. Considering that the relevant correspondence as well as other documents and information obtained during the Investigation do not show that the alleged violation has actually taken place, the Board noted that no violation allegation could be brought against BSH based on this document.

The Board's Assessment on Territory/Customer Restrictions

In terms of the allegation that BSH has implemented territory/customer restrictions on its authorized dealers, there is only one document, namely, Finding 4, which is a WhatsApp correspondence between BSH employees. In Finding 4, it is indicated that a BSH dealer has been selling goods to stores and sellers in Yozgat and Kırıkkale provinces with prices below the list prices and created sub-dealerships within these provinces, this was reported to BSH by BSH's dealers in these provinces and the relevant BSH employee said that he/she would take care of the matter.

After its evaluation, the Board noted that BSH has been implementing a selective distribution system and under Article 3 of the Block Exemption Communiqué on Vertical Agreements No. 2002/2 ("**Communiqué No. 2002/2**"), a supplier employing a selective distribution system could prevent the members of the selective distribution system (i.e., authorized dealers) from selling undertakings that are not members of the selective distribution system. To that end, the Board noted that BSH's restriction of its authorized dealers' sales to non-authorized customers in Yozgat and Kırıkkale provinces would not be considered as a violation.

Conclusion

The Decision of the Board provides invaluable insight as to the evidence that would satisfy the standard of proof, especially in terms of establishing resale price maintenance type of violations. As per the Decision, the Board seeks further evidence for establishing a violation in cases where the documents at hand raises a suspicion that resale prices have been interfered with but do not prove the existence of a violation beyond doubt.

[1] Decision of the Board dated 15.12.2022 and numbered 22-55/864-358.

[2] Investigation launched with the Board's decision dated September 9, 2021 and numbered 21-42/617-M ("**Investigation**").

[3] Decision of the Board dated 08.09.2022 and numbered 22-41/579-239, para. 20.

[4] The Board rejected the first commitment package of BSH with its decision dated July 25, 2022 and numbered 22-33/524-M.

[5] In terms of the commitments to eliminate Competition Law Issues regarding brick and mortar sales channels, the Board remarked that with the Second Commitment package the clauses in the agreements respectively between (i) BSH and Teknosa İç ve Dış Ticaret Anonim Şirketi (“**Teknosa**”) and (ii) BSH and Media Markt Turkey Ticaret Limited Şirketi (“**MediaMarkt**”) would be removed: (i) the clause in the agreement entered into with Teknosa restricting active sales of authorized dealers to end-users, (ii) the clause in the agreement entered into with MediaMarkt preventing authorized dealers from purchasing goods from other authorized dealers, by way of an exclusive purchase obligation.

[6] The second commitment package was accepted by the Board with its decision dated 08.09.2022 and numbered 22-41/579-239.